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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA  
FIRST APPELLATE DISTRICT  
DIVISION FOUR

THE PEOPLE,  
Plaintiff and Respondent,  
v.  
TIMOTHY JOHN DONOGHUE,  
Defendant and Appellant.

A103765  
(Alameda County  
Super. Ct. No. 142392)

A jury convicted appellant Timothy John Donoghue of second degree robbery and found true that he was armed with a handgun. The court sentenced appellant to the five-year upper term with an additional consecutive one-year term for the enhancement. The court also recommended that appellant be evaluated for mental health treatment pursuant to Penal Code<sup>1</sup> section 2960.

On appeal, among other points appellant claims the court erred to his prejudice in failing to undertake a competency inquiry; refusing to authorize funds for experts to assist him; and refusing to allow certain cross-examination. Per a reply brief, appellant raises a sentencing issue under *Blakely v. Washington* (2004) 542 U.S. \_\_\_\_ [124 S.Ct. 2531]. We affirm the judgment of conviction but vacate the upper term sentence on the second degree robbery and remand for further proceedings consistent with this opinion.

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<sup>1</sup> All subsequent statutory references are to the Penal Code unless otherwise indicated.

## I. FACTUAL BACKGROUND

### A. *The Robbery*

The evidence of appellant's guilt was overwhelming. On the morning of November 21, 2001, Renny Artha, a teller at the Telegraph Avenue branch of Bank of America, noticed a suspicious looking man standing in line. He had on a lot of makeup and wore a fake mustache and wig. The man was wearing a navy blue jacket, black pants, red T-shirt and gloves, and carried a brown briefcase.

Appellant approached Ms. Artha's teller window, opened his briefcase and positioned a note inside for Ms. Artha to read. It said: "I have guns. Give me all one hundred, fifty, twenty." When Ms. Artha tried to take the note, appellant crumpled it and put it in his briefcase. Ms. Artha gave appellant all the bills in her first drawer, which included bait money and a tracking device. He put it in his briefcase and left, carrying a black umbrella with a wooden handle. Ms. Artha activated an alarm when appellant reached the foyer.

Rogilo Valdez, the teller coordinator, was working behind Ms. Artha's window when he noticed that Ms. Artha looked afraid. He realized a robbery was occurring. Valdez had noticed appellant at the teller window. Appellant wore a dark blue blazer, black pants, a tie and thick glasses. He had a mustache or beard and salt and pepper hair.

Valdez told Kevin Smith, the customer service manager at the bank, "We've been robbed and that's the guy." Smith had a pretty good view of the robber, describing him as wearing a navy blue sports coat; tinted sunglasses; and a very large, ill-fitting, shaggy-dog type salt and pepper wig. The robber also had a beard and mustache, was carrying a briefcase and wore gloves. He weighed about 200 pounds and was between five feet eight inches and six feet tall.

Valdez followed appellant as he walked up Telegraph Avenue toward the campus. At the intersection of Bancroft and Telegraph, appellant went into a bookstore. Valdez lost track of him in the bookstore. He went downstairs to the bathroom where he noticed what appeared to be someone changing clothes in a

closed stall. There was a green-gray duffel bag on the floor. Valdez left and returned to the bank.

### *B. The Arrest*

Meanwhile, Berkeley Police Officer Lester Soo received a dispatch report of a robbery involving a tracking device. As Officer Soo traveled south from North Berkeley, he began receiving signals on his own electronic tracking device. The signals led him to Arch Street and appellant. The suspect was around five feet 10 inches, 200 pounds, wearing green pants, sandals, white socks, and a maroon-red long-sleeved shirt. He was carrying an umbrella and a bluish-gray duffel bag. Appellant's hair was very short-trimmed high above the ear.

Officer Soo got out of his car and ordered appellant to stop. Appellant had no identification on his person. Officer Soo asked him what was in the bag. Appellant responded that there was some clothing, a briefcase and money.

Other officers arrived. Using a handheld tracking device, one of them recovered the Bank of America tracking device from a briefcase inside the duffel bag. The bag contained the stolen money with bills whose serial numbers had been recorded by the bank; a dark blue jacket; black pants; a tie; gloves; sunglasses; the wig; fake mustache and beard; and Enterprise Rent-a-Car keys. A .25-caliber pistol with a magazine was inside the right front pants pocket. There was a bullet in the magazine and in the chamber.

Items included inside the briefcase were the robber's demand note, adhesive gum and gum remover, and a bag containing appellant's identification and cash not related to the robbery. Appellant's mother recognized the handwriting on the note as that of her son.

### *C. The Field Showup*

The three bank witnesses participated in a field showup. Ms. Artha noticed what appellant did not have on, but stated he had the same "sharp" shaped nose, same shaped face, height and weight. When appellant donned the wig, she

immediately knew he was the robber. At trial Ms. Artha identified the clothes, fake hair and mustache, briefcase and demand note.

Mr. Valdez did not immediately recognize appellant. His clothes and hair were different, but his facial features, weight and size were the same. When shown the wig, Valdez was certain. He also identified items from the duffel bag at trial.

Mr. Smith saw defendant standing on the curb. He was the same size, and had the same facial features, as the robber. Smith said, "That's him. That's the guy who robbed me." He was 95 percent certain. The facial features were "dead on." When appellant put on the wig, he had "no doubt whatsoever."

#### *D. Search of Car*

Police Officer Skyler Ramey located appellant's rental car in the 1100 block of Oxford Street. She ran a check on the rear license plate, which was attached to the car with Velcro. The rear plate had been previously reported as stolen. As well, a vehicle identification number check on the car "came up with a different license plate." Searching the trunk of the car, Officer Ramey found screwdrivers and other tools and a license plate that matched the car's vehicle identification number, with Velcro adhesive on the back. She also retrieved a bag containing a cardboard box of CCI Blazer .25 bullets. Loose in the trunk were spirit gum and spirit gum remover, Q-tips and some screws. Another bag from the trunk contained a file folder with plans for a bank robbery. Appellant's wallet and identification, plus a rental car agreement, were found inside the glove compartment.

Technician Robert Teeby processed documents found in the trunk for fingerprints. He identified several latent fingerprints matching appellant's.

#### *E. Search of Appellant's Home*

Appellant gave the police a residence address in Sacramento that turned out to be a mail drop box. From his parents the police learned that appellant lived in an apartment in Sacramento. Sergeant Cary Kent searched the apartment. There were rags dangling from cans attached to the walls. Throughout he noted hundreds of pieces of white, lined binder paper, with handwritten notes. The handwriting was the

same as the handwriting on documents found in the rental car. The content was also similar. One of the papers was a demand note that was the same size, and written on the same type of writing tablet, as the actual demand note. Sergeant Kent also recovered a blond wig and mustache, loose wig hair, a roll of Velcro with a strip cut off, and the packaging for the briefcase.

Appellant's mother testified that the handwriting on the duplicate demand note and other documents from the apartment was appellant's.

#### F. *The Defense*

Appellant called three character witnesses. His father testified that appellant attended U.C. Berkeley from 1993-1997, majoring in biochemical engineering. He left in good standing and had never been involved in criminal activity. Appellant worked part-time for Mr. Donoghue. From 1999-2001 appellant was involved in "activism" and had his own Web site. He organized rallies in Sacramento that attracted TV news coverage.

Thomas McKay worked with appellant in connection with appellant's human rights organization, Citizens Against Human Experimentation. McKay believed appellant had been set up by the government.

Linda Bekkedahl testified that appellant was a man of "high ideals, a human rights activist who is absolutely opposed to all violence and inhumanity to human beings." She found it "totally absurd" that appellant "would have had an escape plan to go across the street from the Bank of America to U.C. Berkeley."

Appellant also called Sergeant Kent in an effort to show how his fingerprints got on the robbery plan documents in the rental car. He attempted to show that Kent gave him the originals during an interrogation. However, Kent insisted he brought copies.

Appellant testified on his own behalf. He denied committing the robbery. He maintained that the state's evidence was "irregularly obtained and mistakes were made." Some of the evidence was "outrageous in nature," "suspicious and should not be believed."

The day before the robbery someone by the name of John called appellant. John indicated he was an activist who was interested in working with appellant. They were going to meet at the ACSU bookstore the next day. When appellant arrived at the bookstore a friend of John's met him. Because it was too crowded, the friend suggested they meet John elsewhere. It was suggested that they meet in the Safeway parking lot. The man had a duffel bag and asked appellant to carry it to the parking lot while he met briefly with a friend at a café. The man said he would give \$50 to appellant's organization; appellant agreed. Appellant started toward Safeway but became suspicious and fearful. He stopped on campus and looked through the duffel bag, getting his fingerprints on some of the items. Scared and panicked, appellant started walking toward his car.

Appellant testified that one of the "screw holes" for the license plate was stripped and the plate had fallen off. Using Velcro, he attached a license plate that he found to the rear of the car. Appellant did not want to attach the rental car plate because he was afraid it would fall off while traveling.

Appellant denied that the papers found in his apartment—which he characterized as "outrageous," "ridiculous" and "all garbage"—were his papers; nor was the handwriting his. Appellant denied writing any demand note and denied that the handwriting on the note was his. Nor had he seen the briefcase box until it was produced at trial. Appellant stated he did not wear wigs and had never seen the wig or hair that police said had been found in his apartment. With regard to the box of bullets, appellant said, "[t]hey probably mixed those up like they did the papers and the keys." There were no bullets in his car; he did not own any handguns or pistols.

## **II. DISCUSSION**

### *A. The Trial Court Did Not Err in Failing to Conduct a Competency Hearing.*

Appellant faults the trial court for not conducting a competency hearing prior to granting his request to represent himself. The court did not err.

## 1. *Legal Principles*

The Sixth Amendment of the United States Constitution affords a criminal the right to represent him or herself at trial. (*Faretta v. California* (1975) 422 U.S. 806, 807, 834-835.) Nevertheless, the “defendant must be mentally competent, and must make his request knowingly and intelligently, having been apprised of the dangers of self-representation.” (*People v. Welch* (1999) 20 Cal.4th 701, 729.)

The standard of competency, which is the same as the standard of competency to stand trial, is modest: to ensure the capacity of the defendant to understand the proceedings and assist counsel. (*People v. Hightower* (1996) 41 Cal.App.4th 1108, 1113.) This standard is captured in section 1367, subdivision (a), providing that a defendant is mentally incompetent to stand trial if, as a result of a mental disorder or developmental disability, he or she is “unable to understand the nature of the criminal proceedings or to assist counsel in the conduct of a defense in a rational manner.”

Due process requires that the trial court conduct a full competency hearing when the accused presents substantial evidence of incompetence. (*People v. Koontz* (2002) 27 Cal.4th 1041, 1063.) Evidence is substantial if it raises a reasonable doubt about the accused’s competence to stand trial. (*Id.* at p. 1064.) Where substantial evidence of incompetency exists, the trial court must, on its own motion, “state that doubt” and hold a hearing pursuant to section 1368. (*Ibid.*; § 1368, subd. (a).) This rule applies even when the trial judge’s personal observations lead him or her to believe the defendant is competent. (*People v. Castro* (2000) 78 Cal.App.4th 1402, 1415.)

Recently, our Supreme Court reiterated that in *People v. Pennington* (1967) 66 Cal.2d 508, 519, the court “enunciated the following standards regarding what would constitute substantial evidence of incompetence to stand trial: ‘If a psychiatrist or qualified psychologist [citation], who has had sufficient opportunity to examine the accused, states under oath with particularity that in his professional opinion the accused is, because of mental illness, incapable of understanding the purpose or nature of the criminal proceedings being taken against him or is incapable of

assisting in his defense or cooperating with counsel, the substantial-evidence test is satisfied.’ ” (*People v. Welch, supra*, 20 Cal.4th at p. 738.)

Case law gives us some guidance as to what is sufficient. “Evidence regarding past events that does no more than form the basis for speculation regarding possible current incompetence is not sufficient.” (*People v. Hayes* (1999) 21 Cal.4th 1211, 1281.) In *Hayes*, the trial court denied the defendant’s motion that competency proceedings be undertaken. In support of his motion, the defendant read a statement which, among other things, referred to his prior acquittal of murder on grounds of insanity; past psychiatric treatment; a prior finding of incompetence to stand trial; commitment to a mental institution in another state; and treatment with psychotropic medication. Said the court: “None of this established present incompetence to stand trial.” (*Id.* at p. 1281, fn. 30.) “[N]othing in the record suggests that at any time during these proceedings appellant was unable to understand the nature of the proceedings or to assist counsel in conducting the defense in a rational manner. Defense counsel never expressed a doubt as to appellant’s competence.” (*Id.* at p. 1282.) Moreover, the defendant’s effort and work as co-counsel demonstrated he was able to assist defense counsel, was completely aware of the nature of the proceedings and made rational legal decisions. (*Ibid.*)

Similarly, in *People v. Davis* (1995) 10 Cal.4th 463, 525-526 the defendant asserted that the trial court had a sua sponte duty to conduct a section 1368 hearing based on reports of defense counsel concerning defendant’s anger, fear of mistreatment in jail, lack of cooperation and insistence on standing in the doorway of the courtroom during the penalty phase of trial. Rejecting this claim, our Supreme Court noted: “Under the applicable substantial evidence test, ‘more is required to raise a doubt than mere bizarre actions [citation] or bizarre statements [citation] or statements of defense counsel that defendant is incapable of cooperating in his defense [citation] or psychiatric testimony that defendant is immature, dangerous, psychopathic, or homicidal or such diagnosis with little reference to defendant’s



ability to assist in his own defense.’ ” (*Id.* at p. 527, quoting *People v. Lauder milk* (1967) 67 Cal.2d 272, 285.)

Likewise, the defendant in *People v. Rodrigues* (1994) 8 Cal.4th 1060, 1110-1111 argued the trial court was confronted with, but ignored, substantial evidence of incompetence, citing his childhood seizure and lifelong episodes of migraine headaches, plus statements of two defense psychiatrists and his own counsel’s repeated expressions of concern regarding his competence. The state’s high court dispatched the physician’s conclusions as not meeting the test set forth in *People v. Pennington, supra*, 66 Cal.2d at page 519, quoted above. First, one of the doctors, who had not examined the defendant, merely stated that, based on reports, he suspected the defendant suffered from drug dementia and that his record of substance abuse suggested a very high risk of neurological impairment that would make it very difficult for him to cooperate with the defense. This was not enough. (*Id.* at p. 1111.) Second, the other doctor did meet with the defendant but gave an inconclusive opinion. He felt that the defendant had brain damage but had not done a competency evaluation and was not sure of his opinion. (*Ibid.*)

## 2. *Pertinent Facts*

We review the validity of the trial court’s ruling at the time it was made. (*People v. Welch, supra*, 20 Cal.4th at p. 739.) The following facts were of record at the time of appellant’s request to represent himself.

### a. *November 26, 2001 Section 4011.6 Report*

On November 26, 2001, the court referred appellant to Alameda County Behavioral Health Care Services for an evaluation pursuant to section 4011.6. That statute permits a court to refer an inmate for 72-hour treatment and evaluation pursuant to Welfare and Institutions Code section 5150 when it appears that he or she “may be mentally disordered.” (§ 4011.6.) The referral order stated: “Family reports history of mental illness and use of psychiatric meds. Client reports use of psychiatric meds for a short period of time because mother wanted him to be on meds. Denies hearing voices or depression.”

P. Russell, M.A., RCII<sup>2</sup> examined appellant. She reported a conversation with appellant's mother who stated appellant had been "5150'd three times in Sacramento since 1998 for 'acting out and being threatening.'" He was given various antipsychotic medications. One seemed to be most effective, but he refused to continue taking it. According to the mother, appellant adamantly denies having a mental illness and refuses to seek treatment. Russell described appellant as "oriented, alert, coherent, and cooperative. He appears to be bright. He denies hallucinations. He denies any history of depression or suicidal ideation/attempts. He downplayed others' concerns, but there is evidence of delusional and paranoid thinking." She gave the following assessment: "By the history given by his mother, it does appear that he does suffer from schizophrenia. Like many his age, he is in denial of his illness."

b. *June 28, 2002 Section 4011.6 Report*

Appellant was referred again for a section 4011.6 evaluation in June 2002. The referral order stated: "(1) Past history schizophrenia, paranoid type (2) Defendant is highly functioning but given to delusion[al] thought, including feelings of a conspiracy against him."

Attached to the referral order were prior diagnoses and letters written by defendant. The prior diagnosis was from a November 1999 commitment in Sacramento. Appellant was discharged with a diagnosis of schizophrenia, paranoid type. Discharge medications included Haldol and Paxil. There were no referrals because appellant had "private [symbol] & will be in Clozaril Program."

The four attached letters were written by defendant to the FBI in early 2000. In the earliest he complained of being the subject of "torture, terrorism and harrassment [*sic*]." He had been "tortured by electromagnetic weapons and forced to scream out in pain." Appellant wrote: "No one is above the law with regards to

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<sup>2</sup> Counsel for appellant states his understanding that "RCII" means "Rehabilitation Counselor, Grade II."

torturing and terrorizing American citizens. The black ops experimenters should be on trial for their criminal actions.” He had witnessed three suspects who were street theater actors.

The next two letters, dated the same day, again advised of torture by electromagnetic weapons. In one appellant said he was being accused of “horrendous crimes” and was willing to take a lie detector test. He had been “programmed with strange information by the perpetrators” who were manipulating him. In the other letter appellant indicated he was being tortured on the freeway by the “black ops” experiment group. Appellant asked the FBI to stop them from endangering his life and “from torturing and murdering American citizens and making a fool out of this government.”

In the last letter appellant said he had been “systematically terrorized by an organized group” that conducted “an MK-ULTRA type experiment.” He gave the names of two “operatives” who “set me up and instigated trouble” and described several others. Appellant pleaded that the FBI “bring these black operations mavericks to justice. They have tortured, maimed and murdered hundreds of American citizens.”

Roberta Weiner, a licensed social worker, conducted the evaluation. Her report stated: “He admitted that he is an ‘eccentric character and a free spirit,’ but does not believe that he has a mental illness. He feels that his past psychiatric history (three involuntary psychiatric hospitalizations in Sacramento in 1996) were his mother’s doing.” Weiner gave the following evaluation and assessment: “Mr. Donoghue . . . made little eye contact, exhibited a flat affect . . . and appeared very careful not to say anything that would indicate any mental illness. He spoke in a clear manner with no indication of psychotic thinking. The record indicates delusional thinking, but this was not evident during this interview. . . . His insight and judgment were impaired. . . . [¶] . . . Because of his past psychiatric history, Mr. Donoghue has been seen monthly in the CJMH clinic . . . . He does not feel he has a mental illness and therefore, refuses medications. He has a schizoid quality about

him which could cause him to be viewed by others as being different, but, at least in this interview, did not exhibit bizarre behavior or thinking.”

*c. Appellant’s Motion to Represent Himself*

On August 20, 2002, appellant appeared in court seeking to discharge his attorney. He immediately asked if he could represent himself. Appellant stated he had attended college for three years at “UC Berkeley,” studying molecular and cell biology. The court noted, “Obviously, you are an educated man and also well spoken.” The court advised appellant of the risks of self-representation. The court indicated it was “satisfied of course that you are well spoken, and that you are articulate and that you have an education level which I believe that you are able to certainly present your case . . . .” The court proceeded to ensure that appellant understood the charges.

The following dialog took place concerning appellant’s mental health issues:

“THE COURT: Okay. I am satisfied that—let me address one other issue, however. I notice from the court file that you have been examined by a psychiatrist pursuant to 4011.6 of the Penal code. And that psychiatrist found that you were competent, and you did not present any problems. [¶] Let me just review this a second. But I do note that you have a history of involuntary hospitalization based on psychiatric issues; is that not correct.

“[APPELLANT]: I believe that’s correct at my mother’s behest.

“THE COURT: Yes. You indicated that your mother had committed you under two or on two or three occasions; is that correct?

“[APPELLANT]: Yes.

“THE COURT: And those were all in 1996 or were they at other times?

“[APPELLANT]: I believe they were all 1999.

“THE COURT: Okay. The report here says 1996.

“[APPELLANT]: No, that’s incorrect.

“THE COURT: Since that time, have you had any problems?

“[APPELLANT]: No.

“THE COURT: Have you been seeing a therapist?

“[APPELLANT]: No. [¶] . . . [¶] . . .

“THE COURT: The doctor here indicates that you have been seeing—

“[APPELLANT]: Oh, at the jail?

“THE COURT: Yeah, at the jail.

“[APPELLANT]: Yes, I’ve talked to the doctor there.

“THE COURT: Are you on any medications at all?

“[APPELLANT]: No.

“THE COURT: Based then upon the analysis of the doctor as well as my personal observation of you, I do feel that you are able to represent yourself competently and adequately, and I will permit you under *Faretta* versus California to represent yourself in these proceedings.”

### 3. *Analysis*

Appellant correctly pointed out that the trial court misread the file as concerned his mental health history. First, there was no analysis from a doctor—the two evaluations were conducted by, respectively, an LCSW and an M.A./RC-II. Nor did either examiner find him “competent.”

Notwithstanding this misunderstanding, the court did not err in failing to institute a competency inquiry. First, the prior involuntary psychiatric hospitalizations and diagnoses occurred nearly three years prior to the *Faretta* hearing, and the letters were written more than two years earlier. Second, the section 4011.6 reports were not the result of referrals to determine competency to stand trial. “[S]ection 4011.6 does not require a defendant to be examined at a mental health facility in order to determine whether the defendant is competent to stand trial, but merely to determine whether the defendant is a danger to himself or others, or is gravely disabled. [A] conclusion that a defendant is dangerous or gravely disabled does not necessarily mean the defendant is incompetent to stand trial.” (*People v. Ford* (1997) 59 Cal.App.4th Supp. 1, 4-5.)

Third, the section 4011.6 reports indicated appellant presented himself well, was alert and cooperative. While taken together the evaluations noted a downplaying of concerns, denial of illness, his past history and a “schizoid” quality, they did not report current bizarre behavior or thinking.

Fourth, the court’s assessment of appellant as being educated, articulate and capable of self-representation was not skewed by any medication.

Fifth and most significant, nothing in the record suggested appellant was currently unable to understand the nature of the proceedings or assist in his defense. (*People v. Hayes, supra*, 21 Cal.4th at pp. 1280-1281 & fn. 30.) Under the substantial evidence test, more is needed to raise a doubt that “ ‘psychiatric testimony that defendant is . . . psychopathic . . . or such diagnosis with little reference to defendant’s ability to assist in his own defense.’ ” (*People v. Davis, supra*, 10 Cal.4th at p. 527.) In short, there was no evidence before the court of appellant’s *current*, legal incompetence. All the observations were to the effect that appellant was able to participate in the necessary processes.

*B. The Court Did Not Abuse its Discretion in Denying Appellant’s Motion to Retain Experts.*

1. *Background*

On February 19, 2003, appellant sought a continuance. He wanted funds to hire someone to test items in the duffel bag for hair and DNA samples. The purpose was to establish that someone else may have had control of the bag before he was arrested. The court expressed its understanding that the bag was not new and thus questioned the relevancy of the proposed test. If DNA testing showed hair or fingernails, etc. from somebody else, that would just indicate that someone else handled the bag in the past. How would that person be identified? As well, the prosecutor pointed out that appellant was arraigned in March 2002, had made more than 20 court appearances and thus there had been ample opportunity to accomplish the proposed investigation. Ultimately, the court denied the request on grounds the matter was not relevant and did not justify the cost and time involved.

Several days later the prosecutor indicated that there were “volumes” of documents and physical evidence in the property room of the Berkeley Police Department that had been received from the scene of the crime and the arrest, the rental car and appellant’s apartment. Appellant had not been able to personally review the evidence because of his in-custody status. There was also a large supplemental report that appellant had not seen. The court scheduled a time for appellant to review the evidence.

After reviewing the evidence, appellant asked to postpone jury selection for a few days. He needed to “look into a handwriting expert” and revise his approach. Appellant stated he was not aware of the bullets found in the rental car or the items taken from his apartment, including plans for bank robberies and the disguise materials.

The trial court declined to postpone voir dire, but indicated it was open to considering a continuance if there were “some problem either on the prosecutor’s side or your side.” Once trial began, appellant’s mother testified that the practice demand note found in appellant’s apartment, and documents seized from the rental car and apartment, were all written in his handwriting. Several days later appellant moved for appointment of a handwriting expert.

The prosecutor reiterated that appellant had been represented by counsel as of January 2001 and that counsel was in possession of the supplemental report that included the documents seized from his apartment. Further, the prosecution had provided these same documents to appellant again during the first week of trial.

The trial court denied the motion for a handwriting expert as untimely.

## 2. *Analysis*

An indigent defendant’s right to effective assistance of counsel includes access to public funds for expert services. (*Ake v. Oklahoma* (1985) 470 U.S. 68, 76-77; *Corenevsky v. Superior Court* (1984) 36 Cal.3d 307, 319-320.) However, the defendant is only entitled to *necessary* services, and it is his or her burden to show that expert services are necessary to the defense. (*People v. Gaglione* (1994) 26

Cal.App.4th 1291, 1304.) We review the trial court's decision on the need for appointment of an expert under the abuse of discretion standard. (*Ibid.*)

Appellant contends his requests for experts to examine the contents of the duffel bag and to determine if he were the author of documents found in his apartment and rental car were necessary to his defense. We disagree.

First, the trial court's denial of funds for DNA testing of the duffel bag contents was sound. Its relevancy assessment was accurate—whether someone else had handled the bag would not undermine the fact that he was found with it minutes after the bank robbery occurred. Moreover, even if funds were forthcoming and DNA evidence not linked to appellant were uncovered, it was unlikely that the testing would identify *who* previously handled the bag. The value of DNA evidence would be minimal and the cost potentially substantial. This is exactly the type of decision that we uphold under the abuse of discretion standard.

Second, the trial court was within its discretion to deny appellant's request for a handwriting expert to examine documents seized from his apartment and rental car. Appellant lived alone and was in control of his apartment as well as the rental car. There was no evidence introduced that anyone else had access to either location. More to the point, appellant's mother identified the handwriting. She testified she was familiar with his handwriting because she had seen it throughout the course of his life. Appellant conducted extensive cross-examination on the issue. Finally, the trial court properly instructed the jury that it was not required to accept Mrs. Donoghue's opinion but should determine what weight, if any, to afford it.

In any event, any error in denying appellant's request was harmless in light of the overwhelming evidence against him, recited above.

*C. The Trial Court Did Not Improperly Limit Cross-examination.*

Appellant maintains the court erred in not allowing him to ask his mother whether she had any mental health problems and whether she was taking



antidepressant medication.<sup>3</sup> The purpose of this inquiry was to discredit her handwriting-identification testimony. The court did not err.

The confrontation clause of the Sixth Amendment guarantees a criminal defendant the right to cross-examine witnesses called by the prosecution. (*Delaware v. Van Arsdall* (1986) 475 U.S. 673, 678-679.) However, within the ambit of the confrontation clause, trial judges retain wide latitude to reasonably restrict cross-examination that is prejudicial, confusing, repetitive, marginally relevant and the like. (*Id.* at p. 679.) Thus the clause guarantees “ ‘an *opportunity* for effective cross-examination, not cross-examination that is effective in whatever way, and to whatever extent, the defense might wish.’ ” (*Ibid.*) “[U]nless the defendant can show that the prohibited cross-examination would have produced ‘a significantly different impression of [the witnesses’] credibility’ [citation], the trial court’s exercise of its discretion in this regard does not violate the Sixth Amendment.” (*People v. Frye* (1998) 18 Cal.4th 894, 946, quoting *Delaware v. Van Arsdall, supra*, at p. 680.)

A witness may be questioned as to whether he or she recently has used, or is under the influence of, drugs. (*People v. Viniestra* (1982) 130 Cal.App.3d 577, 581.) Additionally, the mental illness of a witness may be relevant to his or her credibility, and thus the witness may be cross-examined on that point if such illness affects the ability of the witness to perceive, recall or describe the pertinent events. (*People v. Gurule* (2002) 28 Cal.4th 557, 591-592.)

In the present case, appellant unsuccessfully tried to make his mother vacillate on her identification of his handwriting. Attempting to impeach her credibility, the following exchange took place:

“[APPELLANT]: Mother, are you on any type of medication relating to your mental health?”

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<sup>3</sup> Mrs. Donoghue stated that she did not believe “any of the medication I’m on would affect my testimony.”

“[PROSECUTOR]: Objection. Scope, relevancy, and argumentative.

“[THE COURT]: Sustained. Sustained as the question was phrased.

“[APPELLANT]: Mother, do you have any mental health problems?

“[PROSECUTOR]: Same objection.

“THE COURT: That is sustained.

“[APPELLANT]: Mother, are you currently taking any type of medication?

“[MRS. DONOGHUE]: Yes, I am.

“[APPELLANT]: What types of medication?

“[PROSECUTOR]: Before the answer is given, I would ask for the relevancy.

I don't see the relevancy.

“THE COURT: All right. Now Mr. Donoghue, you can ask a witness if they're on any medication that may affect their testimony.

“[APPELLANT]: Right. That's what I'm asking.

“THE COURT: Is that clear?

“[MRS. DONOGHUE]: Okay. I don't believe any of the medication I'm on would affect my testimony.

“[APPELLANT]: Are you currently taking antidepressant medication?

“[PROSECUTOR]: Same objection.

“THE COURT: Sustained.”

The court properly limited cross-examination to any use of medication that would affect the witness's testimony concerning appellant's handwriting. Appellant was allowed to ask that question; the witness responded in the negative. Any other inquiry was irrelevant. Appellant has made no showing that had he been able to elicit that his mother was taking antidepressant medication, he could have shown that her mental health or medication might have affected the accuracy of her handwriting identification. For example, there was no offer of proof that an expert would testify as to the effects of antidepressant medication, etc. On this record there is no demonstration that the prohibited cross-examination would have produced “ ‘a

significantly different impression of ” appellant’s mother’s credibility. (*People v. Frye, supra*, 18 Cal.4th at p. 946.)

D. *The Trial Court Did Not Improperly Preclude Appellant from Referring to his Notes.*

Appellant testified on his own behalf. On direct examination, he read written testimony. During cross-examination, the prosecutor asked appellant to turn over his summary sheets. A colloquy ensued about appellant’s right to have notes that was taken up again later in the trial. The court told him he was supposed to testify from memory unless “you made a report or filed a paper or made a statement that you can have notes to refresh your memory.” The court indicated he was not to refer to his notes but could have them with him if they gave him “a certain amount of comfort.” If he had a need to write something down to help him remember and organize his thoughts, “let’s try it.”

Appellant correctly points out that he was entitled to use any document to refresh his recollection, including notes he prepared himself. (*People v. Hess* (1970) 10 Cal.App.3d 1071, 1080-1081.) He contends this error requires reversal under the state and federal Constitutions because it adversely affected the composition of the record and its prejudice is not likely to be evident from the record.

We disagree. The record shows that during cross-examination, the instances appellant could not remember or recall were insignificant. For example, appellant stated he did not remember if he used a calendar, but he denied that the calendar recovered by the police was his or that the writing on it was his handwriting. He did not think the wig was in his apartment, but he denied ownership of it. Moreover, appellant made it clear he wanted his notes because writing things down helped him to be organized and remember details. The court allowed appellant to have paper to write things down if necessary. Finally, any error in misapplying the law was harmless because appellant performed effectively on cross-examination. In any event, appellant can show no prejudice because appellant already read his scripted

notes to the jury on direct. What he would have said if permitted to refresh his memory or reread his notes would have been a repeat of the direct examination.

#### E. *Sentencing Errors*

Appellant asserts the case must be remanded for resentencing because selection of the upper term was improper under state law and federal constitutional law.

##### 1. *State Law Issues*

The court selected the upper five-year term for the robbery conviction and added a one-year consecutive term for the arming enhancement. Citing California Rules of Court, rule 4.421, the court identified six aggravating factors: (1) the robbery involved a threat of great bodily harm; (2) appellant was armed with a weapon; (3) the victim was particularly vulnerable; (4) the crime was accomplished with planning, sophistication and professionalism; (5) the crime involved the taking of great monetary value; and (6) appellant engaged in violent conduct indicating a serious danger to society. The court found one factor in mitigation: Appellant had no prior record.

Appellant correctly points out that the court was precluded from relying on the aggravating factor that appellant was armed at the time of the robbery. This is because the court also imposed a one-year arming enhancement.<sup>4</sup> (§ 1170, subd. (b); *People v. Scott* (1994) 9 Cal.4th 331, 350.) Appellant also contends there was nothing to justify the vulnerable victim factor. The court stated: “[A]ny time anyone faces another individual with a loaded handgun and the other person is not armed, that person is definitely vulnerable.” We note that appellant did not display any weapon, but a pistol was found in his front pants pocket and the note indicated he had weapons. This is sufficient under state law to cite this aggravating factor.

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<sup>4</sup> The People argue that appellant’s claims on appeal are waived for failure to make specific objections below. We disagree. Appellant filed papers objecting to all the factors identified in the probation officer’s report. As well, he objected twice in open court.

Appellant also complains that the court did not take into account all the mitigating factors, namely no one was injured and although there was planning, the robbery was otherwise run-of-the-mill, and appellant behaved well in jail. The court acknowledged only one mitigating factor—no record. The others are not mentioned in the Rules of Court, and apparently the trial court was not impressed with them. Nor are we. That no one was injured, the weapon was not displayed and the robbery was run of the mill are not mitigating factors. If anything, they would support the middle term. Appellant’s performance in jail might have some slight mitigating significance, but certainly not enough to alter the balance the trial court struck. A single aggravating factor can justify imposition of the upper term. (*People v. Cruz* (1995) 38 Cal.App.4th 427, 433.) The trial court’s broad discretion in determining the appropriate sentence includes the authority to minimize or disregard mitigating factors. (*People v. Salazar* (1983) 144 Cal.App.3d 799, 813.)

## 2. *Blakely v. Washington*

Appellant also urges that the United States Supreme Court decision in *Blakely v. Washington* applies to the trial court’s selection of the upper term in his case and mandates vacation of that sentence. We agree.

According to *Blakely*, any fact that increases the penalty for a crime beyond the prescribed statutory maximum, other than the fact of a prior conviction, must be submitted to a jury and proved beyond a reasonable doubt, or admitted by the defendant. (*Blakely v. Washington, supra*, 542 U.S. at p. \_\_\_\_ [124 S.Ct. at p. 2536].) We note that a number of *Blakely* issues are currently under review by our Supreme Court, including whether *Blakely* precludes a trial court from making findings on aggravating factors for an upper term sentence, and if so, the standard of review that applies; and the effect of *Blakely* on the validity of a defendant’s upper term sentence. (See *People v. Towne* (S125677), review granted July 14, 2004; and *People v. Black* (S126182), review granted July 28, 2004.) The emerging majority view is that under *Blakely*, the midterm is the statutory maximum absent the fact of a prior conviction, the jury’s finding of an aggravating factor, or the defendant’s

admission of one. Under this view, the maximum penalty the court can impose under California law without making additional factual finding is the middle term.<sup>5</sup>

The People contend nonetheless that appellant has forfeited his *Blakely* claim by failing to make a constitutional objection to his sentence at trial. We disagree. Because *Blakely* error has constitutional dimensions, we question whether the forfeiture doctrine applies at all. (See *People v. Vera* (1997) 15 Cal.4th 269, 276-277 [claims asserting deprivation of certain fundamental, constitutional rights are not forfeited by failure to object].) Moreover, such an objection would have been futile. (See § 1170, subd. (b); Cal. Rules of Court, rules 4.409, 4.420-4.421.)

Turning to the merits, there are five aggravating factors remaining after disregarding the arming factor. All the remaining factors require additional factual findings which should have been submitted to a jury under the reasonable doubt standard. Therefore, the *court's* selection of the upper term violated appellant's Sixth Amendment right to a jury trial on factual determinations which increase the sentence beyond the statutory maximum penalty as defined in *Blakely*.

### III. DISPOSITION

We cannot, from this vantage point, determine whether failure to obtain jury determinations on aggravating factors was harmless beyond a reasonable doubt. We therefore vacate the upper term sentence on the second degree robbery conviction and remand to allow the prosecution the opportunity to decide whether to seek jury findings necessary to support the upper term. If the prosecution elects not to pursue jury findings, the court shall impose sentence. In all other respects, the judgment is affirmed.

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<sup>5</sup> A petition for review was granted March 23, 2005, in *People v. Harless* (2004) 125 Cal.App.4th 70 (S131011).

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Reardon, J.

I concur:

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Kay, P.J.

Sepulveda, J., Dissenting

I respectfully disagree with that portion of the majority opinion which finds that *Blakely* (*Blakely v. Washington* (2004) 542 U.S. [124 S.Ct. 2531]) applies to California's determinate sentencing scheme. Under our determinate sentencing law, a defendant may be sentenced to the mitigated, middle or aggravated term provided by statute for a specified offense. That sentencing triad is the statutory range for any crime with a determinate sentence. The sentencing court must exercise its discretion in determining which of those three sentences is appropriate, although the middle term is presumptively correct. (Cal. Rules of Court, rule 4.420(a).) The rules of court provide factors in mitigation and aggravation which the court should consider in exercising that discretion, and only if the sentencing court finds that the circumstances in aggravation outweigh the circumstances in mitigation may it impose the upper term. (Cal. Rules of Court, rules 4.420, 4.421, 4.423.) This range of possible sentences is similar to the standard range for second degree kidnapping in the *Blakely* case (49-53 months), and imposition of the aggravated term is not the same as imposing additional time beyond that range, which was found akin to imposing an enhancement and prohibited by *Blakely*. The maximum term provided by statute for the charged offense is the aggravated term. Even if aggravating circumstances are found, however, the sentencing court is not required to impose the higher term.

The Supreme Court's recent *Booker* decision (*United States v. Booker* (2005) 543 U.S. \_\_\_\_ [125 S.Ct. 738] (*Booker*)) supports this conclusion. As Justice Stevens indicated, "We have never doubted the authority of a judge to exercise broad discretion in imposing a sentence within a statutory range . . . when a trial judge exercises his discretion to select a specific sentence within a defined range, the defendant has no right to a jury determination of the facts that the judge deems relevant." (*Booker, supra*, 543 U.S. \_\_\_\_ [125 S.Ct. 738 at p.751].) Thus the Court, in an opinion authored by Justice Breyer, invalidated the provision of the federal



sentencing statutes that makes the Federal Sentencing Guidelines mandatory. Justice Breyer noted, in explaining the difficulty with grafting a Sixth Amendment right to trial by jury onto the federal sentencing scheme, that such a requirement would create a system far more complex than contemplated by Congress. The identified complexity would be equally as burdensome if California's sentencing scheme were held to require trial by jury of aggravating factors: "How would courts and counsel work with an indictment and a jury trial that involved not just whether a defendant robbed a bank but also how? Would the indictment have to allege, in addition to the elements of robbery, whether the defendant possessed a firearm, whether he brandished or discharged it, whether he threatened death, whether he caused bodily injury, whether any such injury was ordinary, serious, permanent or life threatening, whether he abducted or physically restrained anyone, whether any victim was unusually vulnerable, how much money was taken, and whether he was an organizer, leader, manager or supervisor in a robbery gang? [Citation.] If so, how could a defendant mount a defense against some or all such specific claims should he also try simultaneously to maintain that the Government's evidence failed to place him at the scene of the crime?" (*Booker, supra*, 543 U.S. \_\_\_ [125 S.Ct. 738 at pp. 761-762].) Justice Breyer went on to note the additional difficulties in instructing and having the jury work with the Guidelines definitions of terms such as "relevant conduct" and "loss" in a securities fraud case. Similar difficulties would attach if a jury trial requirement were read into California's determinate sentencing scheme, but *Blakely* does not require such a modification. Imposition of a term other than the midterm is already discretionary with the sentencing court, not mandatory, and therefore under *Booker*, *Blakely* does not apply to our determinate sentencing scheme.

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Sepulveda, J.