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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FOURTH APPELLATE DISTRICT

DIVISION THREE

THE PEOPLE,

Plaintiff and Respondent,

v.

SOON YOUNG KIM,

Defendant and Appellant.

G053028

(Super. Ct. No. 07HF1249)

O P I N I O N

Appeal from a judgment of the Superior Court of Orange County, Thomas M. Goethals, Judge. Affirmed.

Marta I. Stanton, under appointment by the Court of Appeal; Law Offices of E. Thomas Dunn, Jr., E. Thomas Dunn, Jr., for Defendant and Appellant.

Xavier Becerra, Attorney General, Gerald A. Engler, Chief Assistant Attorney General, Julie L. Garland, Senior Assistant Attorney General, Arlene A. Sevidal and Alan L. Amann, Deputy Attorneys General, for Plaintiff and Respondent.

Soon Young Kim represented herself at trial. The jury found her guilty of grand theft (Pen. Code,¹ § 487, subd. (a); count one) and money laundering (§ 186.10, subd. (a); count two), and found the money involved was more than \$1,000,000, and less than \$2,500,000 (§ 186.10, subd. (c)(1)(C)). The trial court sentenced Kim to four years in prison, consisting of a one-year term on count two, a consecutive three-year term on the enhancement, and a concurrent two-year term on count one. The court credited Kim with four years for time she served in Korea on a related conviction and the time she spent in custody awaiting trial in California. The court also ordered Kim to make restitution.

On appeal, Kim contends she was not competent to stand trial and the trial court erred in permitting her to represent herself. She further appears to argue that even if she was competent to stand trial, the due process right to a fair trial prevails over the right to self-representation.² None of her contentions have merit, and we affirm the judgment.

FACTS

A full recitation of the facts is unnecessary given the issues presented. The following facts suffice.

A. Prosecution Evidence

Seung Choi is a manager for a Korean company, Komex, and works in Korea. Komex obtains semiconductors and solar materials from the United States, Germany, or Japan, and exports them to China. MEMC Electronics Materials, Inc. (MEMC) is a semiconductor company located in the United States. MEMC makes

¹ All further statutory references are to the Penal Code.

² Appointed counsel filed an opening brief stating the case and facts, but did not raise any issues on appeal. (See *Anders v. California* (1967) 386 U.S. 738; *People v. Wende* (1979) 25 Cal.3d 436.) Kim thereafter retained counsel who filed a supplemental opening brief.

wafers for semiconductors and has the polysilicone necessary to make the wafers.

Polysilicone is expensive and difficult to obtain.

Kim was the owner of a company named Baada, which she ran from her house. In 2006, Choi used Baada to purchase polysilicone from MEMC. After receiving an invoice from Baada, Komex transferred \$3.45 million to MEMC and \$95,000 to Baada as Kim's commission.

At some point, Kim told Choi the process would be faster if Komex wired funds to Baada's bank account and she then forwarded the funds to MEMC. Komex's next purchase amount was for \$1.94 million in polysilicone and contained a provision for a minor price adjustment, depending on whether MEMC supplied the exact amount of polysilicone ordered. Pursuant to that provision, Komex paid \$1.92 million up front to Baada and withheld \$20,000 for possible adjustments based on the amount of polysilicone actually shipped. If the exact amount requested shipped, the remaining \$20,000 would be immediately paid. Komex confirmed MEMC had the product available and wired the money to Baada's account on February 16, 2007. Baada was to ship the product as soon as the money was received. Choi said Baada's commission was \$20,000.

Choi was in California, and Kim invited him to her house. Kim told Choi that she received the funds wired into Baada's account, but would not forward the funds to MEMC until Komex paid her the \$20,000 commission. Choi refused. Three or four days later, Choi e-mailed Kim instructing her to either fulfill the contract or refund Komex's money. Later that day, Kim telephoned Choi and asked him to come back to her house. He did, and they spoke inside his car. Kim said she needed an additional \$25,000 commission. Kim also wanted Choi to tell her the name of Komex's buyer. Choi refused both requests.

Choi contacted his boss, C.J. Suk,³ the president of Komex. Suk directed Choi to meet with Kim again. This time Kim said she wanted a total commission of \$70,000. Choi reported back and suggested the amount be paid so Komex could complete the deal with its buyer. Suk agreed. Choi telephoned Kim and told her \$70,000 was agreeable. The next day, Choi received a telephone call from Kim. She said \$70,000 was not enough and inquired as to the maximum amount Komex would offer her.

That night, Choi e-mailed Kim a contract. As Choi recalls, it contained a provision for a commission of \$50,000 or \$70,000. He asked for a reply by midnight. When he did not receive an answer, he telephoned Kim to see if she agreed. She told him she would take care of it and to not contact her anymore. Twice during their conversations, Kim told Choi that if she was not paid, she could disappear with the money.

Komex never received the product it sought to purchase from MEMC, and Kim did not return the \$1.92 million.

B. Defense Evidence

Kim testified in a narrative form. The gist of her defense was she could not be charged with embezzlement because she did not have a special relationship with Komex and she had no intent to keep the money wired to her by Komex.

Kim said Komex used the same contract when dealing directly with MEMC and in Komex's dealing with her. From this, she concluded that like MEMC, she was a seller of polysilicone, not a supplier, and because she was a seller, she did not have a special relationship with Komex and was not guilty of embezzlement. She asserted this is a civil dispute, not a crime. According to Kim, if she had been acting as Komex's "go-between" or "servant," Komex would have wired her \$1.85 million, not \$1.92 million.

³

The record did not contain Suk's first name.

Kim denied any intent to take Komex's money. She said the \$20,000 mentioned in the contract was an allowance on the shipping quantity, not a commission. Kim said she demanded \$20,000 to complete the purchase because she could not be sure Komex would send her the previously withheld \$20,000 upon receipt of the product. Kim said Choi had offered her \$50,000, but she told him she did not need it. She told him, "'Just give me \$20,000 as soon as possible.'"

Believing Komex would freeze her bank account, Kim transferred all the funds in her account to a bank in Korea. Kim said she went to Korea to personally settle the "civil matter" with Suk. Once in Korea, employees of Komex detained her. Fearing Komex would "levy [her] money," she withdrew all her funds from the Korean bank and put the money in her car. While she was in jail in Korea, her siblings had the key to her car and spent all the money it contained. Kim said she returned to the United States (after having served prison time in Korea related to this matter) to sue Komex, Korean judicial officials, and her relatives who spent all her money.

DISCUSSION

I. Kim's Request to Represent Herself

Kim was represented by appointed counsel until the trial court granted Kim's **request** to relieve appointed counsel and represent herself. Kim's appellate counsel contends Kim was not legally competent to stand trial and the trial court violated due process by granting her request for self-representation.

The Sixth Amendment guarantees criminal defendants the right to the assistance of counsel. (U.S. Const., 6th Amend.) A criminal defendant may, however, waive the right to counsel and represent herself if the waiver is competent, intelligent, and voluntary. (*Faretta v. California* (1975) 422 U.S. 806, 835 (*Faretta*).) Of course, a defendant who is not competent to be tried cannot competently waive the right to the assistance of counsel. (*People v. Lightsey* (2012) 54 Cal.4th 668, 674 [trial court erred in permitting defendant to represent himself during proceedings to determine whether he

was competent to stand trial].) “[T]he competence that is required of a defendant seeking to waive [her] right to counsel is the competence to *waive the right*, not the competence to represent [her]self.” (*Godinez v. Moran* (1993) 509 U.S. 389, 399 (*Godinez*)).

The Fourteenth Amendment to the Federal Constitution prohibits trying and punishing a criminal defendant “who is not competent to stand trial.” (*Medina v. California* (1992) 505 U.S. 437, 439.) The same right is codified in California. (§ 1367.) The test for determining whether a defendant is incompetent to stand trial is “whether [she] has sufficient present ability to consult with his lawyer with a reasonable degree of rational understanding—and whether [she] has a rational as well as factual understanding of the proceedings against [her].” (*Dusky v. United States* (1960) 362 U.S. 402.) A criminal defendant is presumed competent to stand trial. (*Booth v. Superior Court* (1997) 57 Cal.App.4th 91, 99, citing § 1369, subd. (f.)

Kim made a number of requests to relieve the public defender as counsel of record and to represent herself. At least two different judges thoroughly questioned her about her decision. The trial court granted her request to represent herself.

Kim’s counsel argues she could not competently waive her right to counsel because she had “an abnormal ideation which a medical professional should have been called upon to address.” Counsel argues the alleged “abnormal ideation” may be gleaned from her responses to questions posed by the trial court in a colloquy concerning whether Kim should be permitted to waive her right to counsel.

The court asked Kim why she wanted to represent herself even though the court predicted she would “go down in flames.” Kim said, “I want to fight against the corruptions and to expose the corruptions and I don’t understand why anybody would raise an objection to that.” Later, when asked what she would ask prospective jurors, she answered, “I am like to ask people to see whether they themselves as a citizen of the United States and as people representing United States whether they are willing to expose and take down the corporation of this legal system here for America and for the people of

America." When the court told Kim the prosecutor might object to that question, she responded, "I am—mean if you sustain it, there's nothing I can do. Please let me understand why someone would even raise an objection and someone else would even sustain that objection when the question was given for the benefit of the nation and the people of the nation."

Kim's statements do not demonstrate the existence of abnormal ideation, any more than her statement about needing, but not trusting, lawyers does. Clearly, Kim believes the justice system is corrupt. That is her opinion. While we disagree with her belief, she is entitled to it. The trial court did not think Kim suffered from an abnormal ideation indicative of mental illness. If the court did, it would have instituted competency proceedings. (See § 1368, subd. (a) [if court forms doubt of defendant's competence during proceedings court must inquire whether defendant's counsel agrees].) Moreover, in all the appearances Kim made in this matter, none of the judicial officers who presided over those hearings, or her attorneys, thought there was reason to believe Kim was not competent to stand trial. (See § 1368, subd. (b) [if counsel informs court of belief defendant is mentally incompetent, court must institute competency proceedings].) Kim was competent to waive her right to counsel.

Kim's opening brief appears to argue that even if Kim was competent to stand trial, the court still erred in granting her request for self-representation because, under the facts of this case, Kim's right to due process and a fair trial prevails over her counter-veiling right of self-representation. This argument fails as well.

In *Godinez, supra*, 509 U.S. at page 402, the Supreme Court concluded a state court could permit a defendant competent to stand trial to represent herself and plead guilty. (*Indiana v. Edwards* (2008) 554 U.S. 164, 173 (*Edwards*).) In *Edwards*, the trial court twice found defendant was not competent to stand trial. (*Id.* at pp. 168-169.) When his competence was restored the third time and criminal proceedings were reinstated, defendant sought to represent himself. (*Ibid.*) The court denied the request.

(*Id.* at p. 168.) The jury convicted defendant on two of the charged counts, but was unable to reach a verdict on two others. (*Id.* at pp. 168-169.) The prosecution decided to retry defendant on the two remaining charges. (*Id.* at p. 169.) Once again, the court denied defendant's request to defend himself. This time the court noted the many psychiatric reports filed in defendant's case and held defendant was competent to stand trial, but not competent to defend himself. (*Ibid.*) The *Edwards* Court stated the issue as follows: "whether the Constitution *permits* a State to limit that defendant's self-representation right by insisting upon representation by counsel at trial—on the ground that the defendant lacks the mental capacity to conduct his trial defense unless represented." (*Id.* at p. 174, italics added.) The issue was whether a trial court could deny self-representation to an individual with a severe mental illness. (*Id.* at pp. 174, 178.) The Court did not consider whether the Constitution *required* denial of the right of self-representation.

The Court concluded a state could deny the request of self-representation made by a defendant who had been found competent despite "severe mental illness." (*Edwards, supra*, 554 U.S. at pp. 177-178.) Thus, *Edwards* has no application here, as there is no evidence suggesting Kim suffered from any mental illness, much less a severe one. Kim validly waived her right to counsel.

Kim's reliance on Judge Reinhardt's concurring opinion in *United States v. Farhad* (9th Cir. 1999) 190 F.3d 1097 (*Farhad*), is misplaced. While Judge Reinhardt concluded that in "many, if not most, cases the right to proceed pro se 'deprives the defendant of due process of law by defeating the ability of judges to ensure basic fairness and justice in a criminal trial," the Judge agreed that is not the law of the land and the court was bound by *Faretta, supra*, 422 U.S 806. (*Farhad, supra*, 190 F.3d at p. 1101 (conc. opn. of Reinhardt, J.)) So are we. (*People v. Superior Court (Williams)* (1992) 8 Cal.App.4th 688, 702.)

If the test to waive counsel were to include consideration of whether the defendant would likely perform at a standard that would be considered effective assistance of counsel if performed by an attorney, the ability to waive representation by counsel would be available only to a very select few. Additionally, such a rule would build into the system a ground for appeal in many cases. A shrewd defendant who does not want to represent herself at trial could move for self-representation, knowing the request would likely be denied, thereby building into the appeal at least one issue—the court's wrongful denial of a request for self-representation.

II. Kim's Other Contentions Lack Merit

Kim contends her statements, interpreted by a Korean speaking interpreter were so unintelligible and confused, no reasonable lay juror could have understood her defense. We reject the argument.

The opening brief does not contain any citations in support of this contention. The only citation in that portion of her opening brief stands for the proposition that jurors may be allowed to ask questions. Although Kim certainly lacked the skill of a trained attorney, and she often repeated herself, she made the jury aware of her defense. She stressed the fact she did not have a special relationship with Komex and, therefore, could not have committed embezzlement, a form of grand theft. (See e.g., *People v. Fenderson* (2010) 188 Cal.App.4th 625, 635 [grand theft may be shown by proof of "larceny, embezzlement, or obtaining money by false pretenses"].) She also stressed she did not intend to keep the money Komex wired to her. (See e.g., *People v. Davis* (1998) 19 Cal.4th 301, 305 [intent to steal, an element of larceny, "is the intent, without a good faith claim of right, to permanently deprive the owner of possession"].)

Lastly, Kim contends tension between the trial court and her prejudiced the jurors against her. In this one paragraph argument, Kim asserts the palpable tension from the courtroom can be gleaned from reading the transcript. We read the transcript. Kim's narrative testimony was interrupted on a number of occasions, especially when she

discussed the events concerning the prosecution in Korea. Those interruptions occurred when the court sustained the prosecution's relevance objections to testimony concerning the Korean court proceedings. Additionally, there was nothing in the trial transcript to suggest the court was anything other than respectful of Kim and her rights.

CONCLUSION

The judgment is affirmed.

O'LEARY, P. J.

WE CONCUR:

BEDSWORTH, J.

THOMPSON, J.

Plotted on 8/10/18
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SUPREME COURT
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IN THE SUPREME COURT OF CALIFORNIA

~~Entered 7/26/18
by [unclear] En Banc~~

~~11/1/18~~
~~appendix C-20~~

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SOON YOUNG KIM, Defendant and Appellant.

The petition for review is denied.

~~new evidence~~

~~Exhaustion means~~

~~you need to
raise the argument
in state court.~~

~~If you raised
these arguments
on direct appeal in
state court, you~~

CANTIL-SAKAUYE

Chief Justice

~~Do not need a
State needs to exhibit~~

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