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NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION TWO

THE PEOPLE, Plaintiff and Respondent, v. RODRIGO ESCARCEGA, Defendant and Appellant.	B235280 (Los Angeles County Super. Ct. No. PA065008)

APPEAL from a judgment of the Superior Court of Los Angeles County. David B. Gelfound, Judge. Affirmed.

James M. Crawford, under appointment by the Court of Appeal, for Defendant and Appellant.

Kamala D. Harris, Attorney General, Dane R. Gillette, Chief Assistant Attorney General, Lance E. Winters, Assistant Attorney General, Scott A. Taryle and David A. Wildman, Deputy Attorneys General, for Plaintiff and Respondent.

A jury convicted defendant Rodrigo Escarcega of one count of evading an officer (Veh. Code, § 2800.2, subd. (a)) (count 2) and one count of hit and run driving, a misdemeanor (Veh. Code, § 20002, subd. (a)) (count 3). With respect to count 2, the jury found true the allegations that defendant had suffered two prior convictions for serious felonies (Pen. Code, §§ 1170.12, subds. (a)-(d), 667, subds. (b)-(i)), 667, subd. (a)(1)). After denying defendant's *Romero*[1] motion, the trial court sentenced him to a third-strike term of 25 years to life in count 2 and a jail sentence equivalent to time served in count 3.

Defendant raises several issues relating to the trial court's revocation of his in propria persona (pro. per.) status and its refusal to reinstate defendant's pro. per. status for the purpose of his researching and presenting a new trial motion. He also contends that the trial court denied his rights under the Sixth and Fourteenth Amendments by not allowing him to be present during sidebar conferences. In addition, defendant requests this court to review the sealed transcript of his *Pitchess*[2] hearing.

FACTS

I. Prosecution Evidence

On the afternoon of July 10, 2009, Officer Evan Richardson of the Los Angeles Police Department was on patrol on Foothill Boulevard in a marked black and white patrol car. Officer Richardson observed an approaching car that was traveling at a high rate of speed. Based on his training, Officer Richardson visually estimated the car's speed at 85 miles per hour. Officer Richardson made a U-turn and followed the speeding car. The car, a white Ford Escort, continued to exceed the speed limit, in addition to being driven erratically and without the use of turn signals.

Officer Richardson eventually made a traffic stop and halted his patrol car approximately 15 feet behind the Escort. Officer Richardson noted that the driver, later

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1 *People v. Superior Court* (*Romero*) (1996) 13 Cal.4th 497.

2 *Pitchess v. Superior Court* (1974) 11 Cal.3d 531 (*Pitchess*).

identified as defendant, was alone in the car. As he approached the car on foot, Officer Richardson saw defendant reach for the gear shift and begin accelerating in reverse. Officer Richardson ran toward his patrol car, believing he was going to be run over by defendant.[3] Defendant then accelerated forward and attempted to make a U-turn, but collided with a Hummer driven by John Ker. Ker could see inside the Escort and saw only one person, the driver.

Defendant drove his car between the Hummer and the patrol car, and Officer Richardson began to pursue him after calling for assistance. During the pursuit, defendant failed to stop at a stop sign and drove at approximately 50 miles per hour in a 25 mile-per-hour zone. Defendant made a turn onto Foothill Boulevard against a red light and caused other drivers to slam on their brakes to avoid a collision. Defendant continued to speed and kept swerving over the center divider into oncoming lanes. Fire began coming out of the wheel well of the Escort.

Defendant's car eventually stopped, and defendant got out and began to run. He jumped fences and ran through residential yards. Officer Richardson stayed behind to establish a perimeter and clear defendant's car while other patrol cars and a police helicopter searched for defendant. Officer Richardson saw no one else in defendant's car. Defendant was found hiding underneath a trailer.

That evening, Sergeant Michael Hammett interviewed defendant after defendant was given his *Miranda* admonishment[4] and agreed to speak. Defendant said that he had decided he was going to run when Officer Richardson first initiated contact. He collided with a Hummer while making a U-turn and decided that he would continue running. He stopped when it became unsafe to drive. He ran into a yard and hid under a motor home. A search

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[3] Defendant was charged with assault with a deadly weapon upon a peace officer in violation of Penal Code section 245, subdivision (c), but the jury was not able to reach a verdict on this charge.

[4] *Miranda v. Arizona* (1966) 384 U.S.436 (*Miranda*).

of the Escort revealed several homemade CD's labeled with defendant's nickname, "Pistol Pete," and numerous pieces of mail in defendant's name.

II. Defense Evidence

Barry Koper, a passenger in the Hummer, did not believe the driver of the white car was trying to hit the officer, but rather to escape. Koper only saw one person in the white car. Koper could not make a positive identification of defendant in court but testified that defendant's booking photograph "looks more like the person I remember behind the wheel of the car." Koper told Gary Cooper, a private investigator, that he did not see the police officer jump out of the way.

Defendant testified and admitted having three prior felony convictions. On the afternoon in question, defendant was the passenger in the white car, and the driver was a man known as Sid Vicious. Defendant was fully reclined in his seat with his eyes closed and was unaware of the contact with the police officer until the car accelerated. Defendant did not drive the car at all that day. His belongings were in the car because the lock on his truck was broken, and he did not want to leave his belongings there. When the car stopped on Foothill Boulevard, defendant and Sid got out and ran. Defendant ran because he was a felon out on parole and he did not know what Sid might have left in the car, such as a gun or contraband.

DISCUSSION

I. *Pitchess* Transcript

Defendant requests this court to review the sealed *Pitchess* transcript for error. According to defendant's testimony, he was a victim of police overreaching. If the officers involved in his case had a history of making false reports, it is reasonably probable the jury would have given their testimony less weight. A failure by the trial court to order the custodian to provide the defense with relevant information would therefore have been prejudicial.

Defendant filed a *Pitchess* motion with respect to Officer Richardson and six other officers. Defendant requested records and statements regarding, inter alia, complaints of the

use of unnecessary force, unauthorized use of tasers, false arrest, acts of racial profiling, and any falsification of arrest or investigation reports. On November 15, 2010, after hearing argument from defendant and the deputy city attorney, the trial court granted the *Pitchess* motion with respect to Officers Richardson, Flores, and Olive, and Sergeant Hammett on the issue of false statements only. The court ruled that defendant failed to show the materiality of the excessive force issue. After an in camera hearing, the trial court stated it had found three discoverable complaints: one complaint each for Officers Flores, Richardson, and Olive.

Upon a showing of good cause, a defendant has a right to discover information from a police officer's personnel file that is relevant to the proceedings against the defendant. (*People v. Mooc* (2001) 26 Cal.4th 1216, 1226-1227 (*Mooc*); Evid. Code, §§ 1043, 1045, subd. (a).) We review the trial court's ruling on a motion to discover personnel records for abuse of discretion. (See *People v. Samayoa* (1997) 15 Cal.4th 795, 827.)

We conclude that the trial court properly exercised its discretion in this case. The trial court's findings during its review, as reflected in the sealed transcript, are sufficient to permit appellate review of its rulings. (See *Mooc, supra,* 26 Cal.4th at pp. 1228-1230.) The transcripts of the in camera hearings contain a number for each complaint filed against each officer, the type of complaint, a summary of the events surrounding each complaint, and the trial court's ruling as to the relevance of the complaint to the issues on which discovery was allowed. Our independent review reveals no abuse of discretion in the trial court's rulings concerning disclosure.

II. Issues Regarding Defendant's Right of Self-Representation

A. Defendant's Argument

Defendant contends that the trial court violated his right of self-representation, and the conviction and sentence must be reversed. He asserts that his act of speaking over the trial court on several occasions did not serve as a sufficient basis for the trial court to revoke his right of self-representation and force counsel upon him. Defendant also argues that the trial court denied defendant the ability to present a defense in violation of the Sixth and

Fourteenth Amendments when it revoked his pro. per. status. Defendant claims that the trial court further erred when it refused to reinstate defendant's pro. per. status to allow him to present a new trial motion.

B. Relevant Authority

A trial court must allow a defendant to represent himself if he knowingly and intelligently makes an unequivocal and timely request. (*Faretta v. California* (1975) 422 U.S. 807, 835-836; *People v. Valdez* (2004) 32 Cal.4th 73, 97-98.) Once granted, however, "'[t]he right of self-representation is not a license to abuse the dignity of the courtroom. Neither is it a license not to comply with relevant rules of procedural and substantive law.'" (*People v. Carson* (2005) 35 Cal.4th 1, 8 (*Carson*), quoting *Faretta*, *supra*, 422 U.S. at pp. 834-835, fn. 46.) A defendant who represents himself must be "'*able and willing to abide by rules of procedure and courtroom protocol.*' [Citation.] This rule is obviously critical to the viable functioning of the courtroom. A constantly disruptive defendant who represents himself, and who therefore cannot be removed from the trial proceedings as a sanction against disruption, would have the capacity to bring his trial to a standstill." (*People v. Welch* (1999) 20 Cal.4th 701, 734 (*Welch*).)

When determining whether termination is appropriate, the trial court should consider factors such as the nature of the misconduct, its impact on the trial proceedings, the availability and suitability of other sanctions, whether the defendant was warned that particular misconduct would result in termination, and whether the defendant intentionally sought to disrupt and delay the trial. (*Carson*, *supra*, 35 Cal.4th. at p. 10.) The defendant's intent to disrupt is not a "necessary condition," but is relevant to the effect of the misconduct on the trial proceedings. (*Ibid*.) "Each case must be evaluated in its own context, on its own facts . . . ." (*Ibid*.)

We review the revocation of a defendant's pro. per. status for abuse of discretion. (*Welch*, *supra*, 20 Cal.4th at p. 735.) The trial court's "judgment call" is to be accorded deference. (*People v. Clark* (1992) 3 Cal.4th 41, 116).

C. Proceedings Below

Defendant was granted pro. per. status by the magistrate at his preliminary hearing. Defendant represented himself at his February 5, 2010 preliminary hearing and at his arraignment and plea proceeding.

During pretrial proceedings on February 7, 2011, as the trial court was asking the prosecutor if he intended to file an opposition to defendant's entrapment motion, defendant interrupted the court. The trial court asked him not to interrupt. Defendant apologized. At the motion hearing on March 2, 2011, the trial court told defendant, "Okay. Sir, I don't want to interrupt you, but I've read your document. You seem to be just reading the document that you filed with the court. So—" Defendant interrupted the court to say he was bringing facts to light. The court replied, "Please don't interrupt me again while I am speaking. I'm allowing you to speak. When I speak to you please allow me to finish what I'm saying. Okay?" The court asked defendant to summarize.

When the court denied defendant's motion, defendant interrupted the court, and the court asked him to please not interrupt the court. When defendant asked to return and reargue a motion that had been denied, the court stated it had made its ruling and began to discuss the next proceeding, when defendant interrupted the court. The court stated, "Again, do not interrupt me. You've done that for the third time today." At the end of the session, the court admonished defendant, "Again, you are going to have to act in a professional manner in my court, sir. Again, I'm counseling you to act in an appropriate manner."

On March 30, 2011, the court took up more of defendant's motions. When the court noted that the first motion had been previously denied, it asked defendant if he wished to be heard on two other motions. When defendant insisted on going back to the motion that had been denied, the trial court stated, "Sir, again, please don't interrupt me. I made my ruling. And I've made my ruling. Okay. Going on to the next motion." While the court was addressing the prosecutor during a hearing on one of defendant's motions, defendant

interrupted the court. The court stated, "Again, sir, you've interrupted me again. Please don't do that. I'm asking you to allow me to finish my response before you interrupt me."

Later in the proceeding, defendant again interrupted the court in mid-sentence, and defendant was admonished, "Again, you repeatedly, time after time I admonish you not to interrupt me. You continue to interrupt me. That isn't appropriate. And again, I'm advising you and admonishing you not to interrupt the court." At one point, defendant lectured the prosecutor about his not receiving a copy of a CD. The court stated, "Again sir, hold on. Again, you have interrupted me for another time. You are engaged in a combative argument with the prosecutor. I have had [*sic*] made my rulings." The defendant interrupted the prosecutor, who was taking defendant's time waiver, to ask him about another motion. The trial court again admonished defendant not to interrupt and not to confer with counsel but to address the court with any remarks.

On May 4, 2011, during a discussion on a motion that had already been ruled upon, the court told defendant, "Again, it's important not to talk over me Mr. Escarcega. I appreciate that. Again, the record will reflect he's done that." After an ex parte hearing with defendant on the same date, the trial court again admonished defendant for interrupting the court.

At the next proceeding on June 7, 2011, the trial court again admonished defendant for interrupting the court as it was going through the list of discovery. The trial court also admonished defendant for interrupting the prosecutor multiple times. The court cautioned defendant to act in an appropriate manner. After the court again chided defendant for interrupting the court, defendant implied that the court had approved his request to receive a copy of the LAPD policy about releasing vehicles, an issue that had been litigated several times. The trial court stated, "Sir, that was never approved, sir. Please do not—that was not approved. . . . I will not revisit rulings I've heard. Again, I'm counseling you to again act in an appropriate manner in this court. Please sir."

At the next court session on July 6, 2011, the trial court was obliged to admonish defendant twice for interrupting. Defendant also implied that the court did not seem to

concern itself with California law, prompting the court to say his remark was uncalled for. At the next session, the court had to ask defendant not to speak when the court asked the prosecutor to speak. The trial court also admonished the defendant shortly thereafter for interrupting the court and had to tell defendant to lower his voice because of his aggressive tone during argument. The court told defendant that if he continued to engage in disruptive conduct the court would have no alternative but to revoke defendant's pro. per. status, stating, "Again, consider yourself warned. Your conduct has been inappropriate . . . ." In addition to admonishing defendant not to interrupt, the trial court noted that defendant was argumentative with the prosecutor and was raising his voice.

At a further proceeding on July 25, 2011, the trial court admonished defendant repeatedly for interrupting the court. The trial court warned defendant his conduct might lead to revocation of his pro. per. status.

In the afternoon session, on the eve of jury selection, after testimony and argument on defendant's section 1538.5 motion, defendant interrupted the court as it made its ruling and stated that he wished to "readdress." The trial court chided defendant for interrupting again, and defendant attempted to interject. The trial court stated, "Sir, again you are interrupting me as you are continually talking. At this point, sir, I'm revoking your pro. per. privileges. They are revoked. Stand-by counsel Mr. Avery is appointed. He'll resume the case." As defendant protested and stated he had the right to address the court and be heard, the trial court stated, "Again you are arguing with me. You are raising your voice in an aggressive tone. Sir, if you continue to interrupt me I'll have no alternative but to have you removed from the court during the course of this trial. Sir, you are on notice."

On the following day, the trial court stated for the record that it revoked defendant's status "based on the defendant repeatedly engaging in disruptive conduct, and by that I mean constantly interrupting the court that has been disruptive despite court warnings. I note—and again, I note the defendant has been repeatedly admonished not to interrupt the court. He was admonished on a number of occasions dating back to, I believe, March 30

until yesterday. He was repeatedly admonished not to interrupt the court, and despite that he continued to do so. His conduct threatens to impair the integrity of the proceedings."

D. No Abuse of Discretion

"[A] trial court must undertake the task of deciding whether a defendant is and will remain so disruptive, obstreperous, disobedient, disrespectful or obstructionist in his or her actions or words as to preclude the exercise of the right to self-representation." (*Welch*, *supra*, 20 Cal.4th at p. 735.) "We are also aware that the extent of a defendant's disruptive behavior may not be fully evident from the cold record, and that one reason for according deference to the trial court is that it is in the best position to judge defendant's demeanor." (*Ibid*.) To continue representing himself, a defendant must be "able and willing to abide by rules of procedure and courtroom protocol." (*McKaskle v. Wiggins* (1984) 465 U.S. 168, 173.)

In the instant case, defendant clearly abused the dignity of the courtroom and flouted the rules of procedure and courtroom protocol. (*People v. Carson*, *supra*, 35 Cal.4th at p. 9.) Defendant's insistence on continually interrupting the court was disrespectful to the court as were some of his comments, such as when he insinuated that the trial court ignored the law. Mindful that our somewhat lengthy account of the proceedings is nevertheless a mere summary, it is clear that the trial court did not abuse its discretion, but rather exhibited great patience in attempting to explain to defendant how to conform to the courtroom protocol. Defendant refused to do so, even after specific requests by the court. Defendant also insisted on making repetitive motions and refusing to accept that the motions had been ruled upon. He also raised his voice and became argumentative with the trial court and the prosecutor. The court warned defendant that self-representation would be revoked if he did not refrain from abusing the dignity of the court, but the warnings had no effect on defendant. After attempting to control defendant's misconduct for several months, the court concluded that defendant would continue his unrelenting misconduct and revoked self-representation. The court stated for the record that defendant's misconduct was not isolated but a repetitive problem that threatened to impair the integrity of the proceedings. We

believe the trial court properly exercised its discretion.[5] (*Welch*, *supra*, 20 Cal.4th at pp. 734-735; *People v. Clark*, *supra*, 3 Cal.4th at p. 117.)

As for the new trial motion, we find the trial court did not abuse its discretion by refusing to reinstate defendant's pro. per. status. Defendant's disruptive behavior was unremitting during trial, and the trial court stated for the record that defendant's conduct was the reason for the refusal. Just before trial began, during the court's examination of an officer, the court was obliged to say to defendant, "Mr. Escarcega, please. You are talking loudly and it's disrupting the court. Please don't engage—" At which point defendant interrupted the court. The court asked him to refrain from interrupting and defendant said he had the right to speak. The court warned him to refrain from outbursts or the court would have no alternative but to have him removed. At the end of the court's examination of the officer, the court again warned defendant about raising his voice. Defendant argued with the court, and the court noted that defendant was belligerent and aggressive.

Toward the end of the first day of testimony, the trial court was obliged to tell defendant, "Sir, during the procedures you have been speaking quite loud and somewhat argumentative to your attorney. It is causing somewhat of a disruption. Jurors are having difficulty hearing." After the court told him that court was adjourned, defendant said, "Man, this is bullshit."

On the following day, defense counsel asked for a sidebar in the midst of cross-examining a witness. Counsel told the court that defendant was criticizing him in a loud voice. The court was required to admonish the jury to disregard anything it might have heard that was not evidence. At the close of the prosecution's case, the trial court stated for

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[5] Lest it appear that the trial court was overly annoyed by defendant's behavior, we note that a prior judge handling defendant's case was obliged to continually warn defendant not to interrupt the court. Defendant also argued with that court over its rulings. Defendant insulted the court by accusing it of trying to rewrite the law, and he called it a "kangaroo court." The court was obliged to tell defendant he did not have the right to run the proceedings, and that he was held to the same conduct standards as an attorney.

the record that defendant had blurted out that he wanted to represent himself and had spoken in a loud voice to counsel. The court allowed defendant to address the court. The court admonished the defendant for interrupting its remarks in reply. Defendant said, "Yeah, keep on smiling, your Honor."

When defendant took the stand he refused to answer his counsel's questions and instead took the opportunity to berate counsel for not doing what defendant wanted. He attempted to instruct his attorney as to the questions he should ask. Finally, as defendant persisted in arguing with the court during the jury instruction discussion, the court had him removed.[6] Defendant referred to the court as a kangaroo court as he left.

After the verdicts were read, defendant told the court he wanted to represent himself and prepare and present a new trial motion before the trial of his prior conviction allegations. The trial court admonished defendant for talking over the court. Defendant persisted in speaking loudly, and the court next noted that defendant was yelling at the court. The court had defendant removed from the proceedings. Defendant was permitted to return for the trial on the prior convictions.

Subsequently, defense counsel told the court that defendant wanted to prepare a new trial motion. Defendant wished to argue ineffective assistance of counsel and have his pro. per. status restored in order to have access to the law library and prepare the motion. The trial court replied that defendant's pro. per. status was not going to be reinstated. At the sentencing hearing, the trial court stated for the record that it did not grant the request due to defendant's disruptive nature. Defendant interjected that his attorney did not follow his instructions to recall a witness on the defense case. The trial court, in an abundance of caution, conducted an ex parte hearing with defendant to allow defendant to discuss his complaints about counsel. The court acknowledged that, since defendant had not requested another attorney, it was not obliged to undertake the hearing. Defendant aired all of his

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[6] Defendant was absent for the reading of the jury instructions but returned for argument.

grievances, which the trial court determined did not arise to colorable claims of ineffective assistance.

Given defendant's prolonged tendency to be disrespectful of the court with repeated interruptions, to speak loudly and aggressively to his attorney and the court during trial, and to insult the court on several occasions, we believe the trial court did not abuse its discretion in denying the request to reinstate pro. per. status.

We also reject defendant's claim that revocation of his pro. per. status violated his Sixth Amendment right to present his own defense. Defendant cites *Ferrel v. Superior Court* (1978) 20 Cal.3d 888, 891-892 (*Ferrell*) and asserts that *Ferrell* "concluded that revocation of defendant's pro. per. status not only violated the Sixth Amendment right of self-representation but further infringed on the Sixth Amendment's guarantee of the accused's right to personally present his or her own defense." Defendant relies on dicta in the *Ferrell* opinion, and he misconstrues this dicta. *Ferrell* held that the defendant's violation of jail rules did not constitute a basis for removing the defendant's pro. per. status, and that only conduct that disrupts the trial or abuses the dignity of the courtroom warrants such a denial. (*Id*. at p. 891.) As one of the bases for this holding, *Ferrell* pointed out that the right of self-representation, i.e., the guarantee that an accused can *personally* present his own defense, necessarily must be exercised in the courtroom. (*Ibid*.)

Defendant also slants his interpretation of *Faretta*. It is true that *Faretta* eloquently discusses the right of a defendant to make his own defense personally, as defendant quotes at length. (*Faretta*, *supra*, 422 U.S. at pp. 819-821.) This language, however, is not recognition of the *interplay* of the right to self-representation and the right to present a defense, as defendant asserts. Rather, it is an explanation of the logical reasoning behind its holding, i.e., that the right found in the Sixth Amendment is a right held by an accused personally. A defendant may consent to relinquish the presentation of his case and the power to make binding decisions of trial strategy to a lawyer, but he is not obliged to do so. *Faretta* itself acknowledges that "the trial judge may terminate self-representation by a

defendant who deliberately engages in serious and obstructionist misconduct." (*Faretta*, *supra*, 422 U.S. at p. 834, fn. 46.)

Moreover, defendant made clear that his defense was that he was not driving the car but was a mere passenger. An important part of this defense for defendant was that, although the car had been impounded, it was released before defendant could have fingerprints obtained from the car to prove his theory. The police did not obtain fingerprints from the car. Mr. Avery presented the same defense that defendant wished to present in argument and by cross-examining the witnesses on their ability to see who was driving and their ability to see inside the car. He cross-examined on police policy with regard to impounded vehicles and the police failure to preserve the Escort after it was impounded. He also called a fingerprint expert to the stand.[7]

We conclude defendant's arguments based on the denial and refusal to reinstate his right of self-representation are to no avail.

II. Defendant's Right to be Present at Sidebar Conferences

A. Defendant's Arguments

Defendant argues that the trial court's act of conducting numerous reported and unreported bench conferences outside of defendant's presence was a violation of his Sixth and Fourteenth Amendment right to be present at every critical stage of the court proceedings.

B. Relevant Authority

"'"A criminal defendant's right to be personally present at trial is guaranteed by the Sixth and Fourteenth Amendments of the federal Constitution . . . . [Citations.] A defendant, however, 'does not have a right to be present at every hearing held in the course of a trial.' [Citation.] A defendant's presence is required if it 'bears a reasonable and substantial relation to his full opportunity to defend against the charges.' [Citation.] The

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[7] John Green, a forensic print specialist, testified that there are various surfaces in a car, such as the mirrors and the windows, where latent prints can be found.

defendant must show that any violation of this right resulted in prejudice or violated the defendant's right to a fair and impartial trial. [Citation.]" [Citations].' The same analysis applies under article I, section 15 of the California Constitution. [Citations.] 'The standard under sections 977 and 1043 is similar. "'[T]he accused is not entitled to be personally present during proceedings which bear no reasonable, substantial relation to his opportunity to defend the charges against him . . . . [Citation.]' [Citation.]" [Citations.]' [Citation.]" (*People v. Virgil* (2011) 51 Cal.4th 1210, 1234-1235.)

"'On appeal, we apply the independent or de novo standard of review to a trial court's exclusion of a criminal defendant from pretrial and trial proceedings, either in whole or in part, "insofar as the trial court's decision entails a measurement of the facts against the law." [Citation.]' [Citation.]." (*People v. Virgil*, *supra*, 51 Cal.4th at p. 1235.)

C. No Error

Our independent review leads us to the conclusion that there was no error. Defendant's constitutional right to be personally present was not violated.

Defendant specifies only two bench conferences in his brief. In the first, defendant asserts, counsel complained to the judge that defendant had made prejudicial statements and that defendant had been interrupting him and whispering to him during trial. Defendant argues he was given no chance to set forth his position in this matter or reassert his right of self-representation. In the second, counsel advised the court that defendant wanted him to recall Officer Richardson to examine him about the failure to preserve the car for fingerprinting by the defense. Defense counsel told the judge that the testing for fingerprints was necessary "in Mr. Escarcega's mind."

Defendant argues that his attorney's dialogue with the trial court in these instances demonstrates that there was animosity and hostility between defendant and his attorney and disagreement on how to proceed with trial. Together with defendant's strong desire for self-representation, defendant would have been in a position to renew his request for self-representation during these bench conferences. Because he was not allowed to participate, however, he could not do so. This resulted in a denial of his Sixth and Fourteenth

Amendment right to be present during all critical stages of his trial, and the error is reversible per se.

At the outset, defendant is incorrect when arguing that the absence of a defendant from a critical stage of the proceedings is structural error requiring reversal. "Erroneous exclusion of the defendant is not structural error that is reversible per se, but trial error that is reversible only if the defendant proves prejudice." (*People v. Perry* (2006) 38 Cal.4th 302, 312 (*Perry*), citing *Rushen v. Spain* (1983) 464 U.S. 114, 118-119.)

In any event, we conclude that the bench conferences to which defendant alludes were not critical to the outcome of the case, and defendant's presence would not have contributed to the fairness of the proceeding. (*Perry*, *supra*, 38 Cal.4th at p. 314.) The first conference was occasioned by defendant's disruptive behavior, and its purpose was principally to protect defendant from the consequences of his own actions. There was no decision-making that took place that had the potential to affect the trial's outcome. Counsel told the court that his major concern was that defendant's comments might poison the jury and that counsel had an ethical duty to protect defendant from having any juror poisoned against him. Moreover, the trial court remarked for the record that defendant was being loud and disruptive, which clearly indicates that the defendant had no chance of convincing the court to let him represent himself at this juncture. Thus, defendant was not prejudiced by not participating in this bench conference, and the conference did not adversely affect the fairness of the trial. The trial court agreed with counsel's suggestion that the jury be admonished to disregard anything that was not evidence and then to admonish defendant in private not to behave in a disruptive manner, which the trial court did. Defendant had no position to set forth in this matter—his disruptive behavior was not beneficial to his case, and his counsel wisely sought to prevent further damage by having the trial court advise the jury to ignore defendant's remarks.

As for the second conference of which defendant complains, this conference was initiated by the trial court after defense counsel told the court that defendant wanted him to recall Officer Richardson, and defense counsel had not had an opportunity to notify the

prosecutor of this wish. Counsel told the court that defendant had made this request and others without giving counsel time to plan ahead. Counsel explained that defendant believed an insufficient record had been made as to the applicability of Vehicle Code section 6171 to his case. Defendant believed that Vehicle Code section 6171 created an affirmative duty for the prosecution and the police department to hold the car for fingerprints. Defense counsel explained he was making the request under his ethical obligation to present what defendant wished to present to the court. The trial court found the offer of proof insufficient to allow the defense to recall Officer Richardson. The discussion at this bench conference was likewise not critical to the outcome of the case. Defendant's presence at the conference would not have made a noticeable contribution to the fairness of the proceeding, since virtually the entire discussion at the bench conference was subsequently repeated with defendant as a participant.

Defendant's absence from the bench conferences did not adversely affect his opportunity to defend against the charges and caused him no prejudice. (*People v. Virgil*, *supra*, 51 Cal.4th at pp. 1234-1235.)

DISPOSITION

The judgment is affirmed.

NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS.

_____, P. J.
BOREN

We concur:

_____, J.
DOI TODD

_____, J.
ASHMANN-GERST