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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION FIVE

THE PEOPLE,

Plaintiff and Respondent,

v.

HANIF GEREAU,

Defendant and Appellant.

B268563

(Los Angeles County  
Super. Ct. No. NA100658)

APPEAL from a judgment of the Superior Court of Los Angeles County, Halim Dhanidina, Judge. Affirmed.

Vanessa Place, under appointment by the Court of Appeal, for Defendant and Appellant.

Kamala D. Harris, Attorney General, Gerald A. Engler, Chief Assistant Attorney General, Lance E. Winters, Senior Assistant Attorney General, Marc A. Kohm and Steven E. Mercer, Deputy Attorneys General, for Plaintiff and Respondent.

Defendant and appellant Hanif Gereau was convicted of three counts of committing a forcible lewd act on a child under fourteen years old (Pen. Code, § 288, subd. (b)(1)). The trial court sentenced defendant to state prison for a term of 30 years, consisting of consecutive 10-year upper terms on all three counts. Defendant contends the trial court violated his constitutional rights to due process and a fair trial by removing him from the courtroom during trial. We affirm the judgment.

## **DISCUSSION<sup>1</sup>**

### **A. Standard of Review**

“An appellate court applies the independent or de novo standard of review to a trial court’s exclusion of a criminal defendant from trial, either in whole or in part, insofar as the trial court’s decision entails a measurement of the facts against the law.’ [Citation.]” (*People v. Mayham* (2013) 212 Cal.App.4th 847, 850.) In making this determination, we “give considerable deference to the trial court’s judgment as to when a disruption has occurred or may reasonably be anticipated.” (*People v. Welch* (1999) 20 Cal.4th 701, 773 (*Welch*); see also *Illinois v. Allen* (1970) 397 U.S. 337, 343 [“trial judges confronted with disruptive, contumacious, stubbornly defiant defendants must be given sufficient discretion to meet the circumstances of each case”].)

### **B. Applicable Law**

“A criminal defendant, broadly stated, has a right to be personally present at trial under various provisions of law,

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<sup>1</sup> A factual summary of the crimes is excluded as it is not necessary to resolution of the issue on appeal.

including the confrontation clause of the Sixth Amendment to the United States Constitution, as applied to the states through the due process clause of the Fourteenth Amendment; the due process clause of the Fourteenth Amendment itself; section 15 of article I of the California Constitution; and sections 977 and 1043 of the Penal Code.’ [Citation.] But a defendant may be removed from the courtroom during trial in ‘[a]ny case in which the defendant, after he has been warned by the judge that he will be removed if he continues his disruptive behavior, nevertheless insists on conducting himself in a manner so disorderly, disruptive, and disrespectful of the court that the trial cannot be carried on with him in the courtroom.’ [Citations.]” (*People v. Mayham*, *supra*, 212 Cal.App.4th at p. 850.)

## **C. Relevant Proceedings**

### **1. Defendant’s Conduct at the Preliminary Hearing**

During the preliminary hearing, defendant spoke in Arabic to a witness, the victim’s father. The language used, when translated into English was, “You’re going to speak lies.” The magistrate warned defendant: “Sir, I’m going to remove you from the preliminary hearing.” Defendant continued, “He’s going to dishonor you. (Phonetically:) Wallah[i] adeem.” The magistrate ordered the bailiff to remove defendant, but he continued to speak in Arabic, and told the witness, “You’re going to lose your honor, brother. (Phonetically:) Wallah[i] adeem. Wallah[i] adeem. Cut lies on me and you do not follow what Mohamed said because you’re letting your anger—you’re letting your anger

control you. Wallah[i] adeem. Wallah[i] adeem. Wallah[i] adeem.” Defendant told the magistrate, “She’s going to tell lies.”

After defendant was removed from the courtroom, the witness testified. The witness translated some of defendant’s remarks made to him as repeatedly “asking [the witness] to fear God and to not let [the witness’s] daughter . . . lie against him.”

The People ultimately rested, and the magistrate requested defendant be returned to the courtroom. Defendant, however, refused to leave his cell. The magistrate expressed concern about defendant’s behavior, which it deemed “very disruptive and threatening which, of course, was the reason why [the magistrate] had him removed.” Defendant’s counsel later commented, “I don’t believe anything he did was threatening, although it was disruptive.” The magistrate disagreed, stating, “It certainly sounded threatening to me. The tone of voice, the look in his eye, the repetitious aspect of it. It sounds threatening to me.”

## ***2. Defendant’s Conduct at Pretrial/Trial***

### **a. Pretrial**

Despite the trial court’s orders for defendant to appear at several pretrial appearances, defendant did not do so. The trial court therefore ultimately issued an order to have defendant extracted from his jail cell.

### **b. April 1, 2015**

The case was called for trial, but defendant again refused to appear in court (he was not extracted pursuant to the prior

order). The trial court issued another extraction order, and the matter was continued to the following day.

**c. April 2, 2015**

Defendant appeared in court constrained to a chair used to transport him safely from his cell to the courtroom. He instructed, “Now, in the name of Allah you need to stop doing this to me before Allah punishes you because you are doing injustice to me.” Defendant demanded his restraints be removed,<sup>2</sup> and commented, “You have no right to do this. In the name of Allah, you need to take these off of me. In the name of Allah, the most gracious, the most merciful. You need to fear Allah. You have no right to do that.”

The trial court told defendant he has a right to be present at the proceedings, but before the trial court had completed its thought, defendant interrupted and said, “I know I do.” The trial court replied, “Sir, can you be quiet for a minute[?]” Defendant however continued to speak and argue with the trial court. When the trial court attempted to explain defendant’s rights to him, defendant again interrupted. The trial court warned, “Sir, I am going to remove you if you don’t be quiet. You are not giving me—.” Defendant nevertheless interjected, and did so repeatedly. The trial court was eventually able to explain to defendant his right to be present, but cautioned, “If you are disruptive in the trial courthouse, courtroom, or holding cell, you will be deemed to have waived those rights. The trial will proceed in your absence.”

The trial court acknowledged the record from the preliminary hearing showed defendant had been removed for

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<sup>2</sup> Defendant does not contend he was improperly restrained.

being disruptive and cautioned as follows: “[Defendant] is refusing to allow [the] parties to litigate appropriately,” and “keeps stating things without allowing . . . the trial court to respond. That’s not going to happen. If he is disruptive, he will be removed.” After addressing other matters, the trial court noted, “[W]e are having a very difficult time getting [defendant] . . . to court,” and explained, “I will get an extraction order if he doesn’t come out, because we already had five straight ‘miss outs.’”

**d. April 28, 2015**

Defendant refused to leave his cell and the trial court enforced the standing extraction order. Once defendant was brought to the courtroom, the trial court reminded him that he would be removed if he was disruptive, and he would not be allowed to delay the proceedings by refusing to leave his holding cell. Defense counsel asked whether defendant could listen remotely (presumably from his holding cell) if he became uncooperative or disruptive. The trial court was not aware of any such technology in the courthouse, and indicated “[t]he mechanism by which he can be made aware of the proceedings [is] to continue to be silent so that he can stay in the courtroom.” The trial court advised defendant he could discuss his case with his counsel during breaks and in the attorney conference room.

**e. April 29, 2015**

During jury selection, but out of the presence of the panel, defense counsel requested a continuance to obtain a medical expert to show defendant was incapable of having an erection. Defendant interrupted with, “I have one testicle. It would not be

hard for a doctor to understand.” The trial court replied, “You are not invited to comment at this time.” Defendant then stated, “It would not be hard for a doctor to—.” The trial court interrupted defendant, told him that he was being disruptive, and stated “you will be excluded from your trial if you continue to speak without the trial court’s permission.” Defendant continued, “I have one testicle.” The trial court asked defendant, “Are you asking to be excluded? I’m deeming this to be a waiver and I’ve warned you twice.”

Shortly thereafter, defendant asked to represent himself. The trial court refused, stating, “The court finds your request to be gamesmanship[]. You’ve done this before and you’re not invited—.” Defendant interrupted again whereupon the trial court said, “We are bringing in the jury and if you’re speaking when the jury comes in you will be excluded from the court.” Defendant interrupted yet again, causing the trial court to respond, “You have been warned.”

As the prospective jurors were entering the courtroom, the trial court directed defendant not to speak. Defendant said, “I would like to have a *Marsden* motion<sup>[3]</sup> please.” The trial court ordered the bailiff to remove defendant from the courtroom. Defendant said, “In all due respect, I’m the one facing 70 years.”

The trial court instructed the prospective jurors to “not consider those outbursts for any purpose.” But in the prospective jurors’ presence, defendant demanded to know whether he could

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<sup>3</sup> *People v. Marsden* (1970) 2 Cal.3d 118 (*Marsden*). A motion for the substitution of new counsel in place of existing appointed counsel on the ground existing counsel is providing inadequate representation “is commonly called a *Marsden* motion.” (*People v. Smith* (2003) 30 Cal.4th 581, 604.)

file a motion for a new attorney, and stated he had a due process right and a right to self-representation. Defendant continued: “I would not like to do 70 years in prison without at least having a *Marsden* motion, please. It is very important to this matter. I have a wife and children, as well, and I think that’s the important part of this case, in all due respect. I would like to have that motion heard before this court so that these ladies and gentlemen could hear from me myself. Okay?” The trial court again admonished the prospective jurors to ignore the comments, and to base their verdicts only on the evidence presented. Defendant was removed from the courtroom and jury selection resumed in defendant’s absence.

**f. April 30, 2015**

Jury selection was scheduled to resume but defendant was “refusing to come out of his cell.” The trial court opted to proceed with jury selection in defendant’s absence. Defense counsel argued defendant’s prior removal from the courtroom was improper for several reasons: defendant had not used profanity nor was he physically disruptive; his removal from the courtroom was “extremely prejudicial”; and it was obvious to the prospective jurors that defendant was in custody. The trial court replied to counsel’s argument by noting: (1) it had excluded defendant under section 1043<sup>4</sup>; (2) defendant had been given “multiple

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<sup>4</sup> Section 1043 provides in relevant part: “(a) Except as otherwise provided in this section, the defendant in a felony case shall be personally present at the trial. [¶] (b) The absence of the defendant in a felony case after the trial has commenced in his presence shall not prevent continuing the trial to, and including, the return of the verdict in any of the following cases: (1) Any case in which the defendant, after he has been warned by



warnings throughout his monologue yesterday;" (3) despite the warnings, defendant continued to speak when the jurors entered the courtroom; (4) defendant "started talking quite loudly in an attempt to communicate with the jury;" and (5) "[a] trial cannot proceed with a defendant trying to communicate with jurors. That's just common sense."

The trial court indicated no listening device was available in the lockup area, however regular breaks would be taken to allow defense counsel an opportunity to speak with defendant. The trial court stated, "But the court is not going to allow the defendant's intransigence to continue to delay the trial. That has been his tactic thus far in the trial court's experience. There has hardly been even half a day where the defendant hasn't had some issue with the trial court's orders and with comporting himself in an appropriate fashion." The trial court left the door open for defendant regain access to the court if he could "demonstrate or explain to the court that he is willing to conduct himself appropriately," and the court offered to "entertain that on a regular basis." Defense counsel later made a continuing objection to all proceedings conducted in defendant's absence.

After the jury was sworn, but before opening statements, a Sheriff's Department sergeant stated defendant was "refusing to

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the judge that he will be removed if he continues his disruptive behavior, nevertheless insists on conducting himself in a manner so disorderly, disruptive, and disrespectful of the court that the trial cannot be carried on with him in the courtroom. [¶] . . . [¶] (c) Any defendant who is absent from a trial pursuant to paragraph (1) of subdivision (b) may reclaim his right to be present at the trial as soon as he is willing to conduct himself consistently with the decorum and respect inherent in the concept of trial courts and judicial proceedings."

change out of his county blue uniform and refusing to come out to court.” Defense counsel indicated defendant was frustrated the trial had continued without him, and objected to defendant’s removal as a violation of his constitutional rights. The trial court stated the “obvious solution is to have him come . . . to court,” but “he’s unwilling to do that.”

Following opening statements, defense counsel asked for a brief recess. After an unreported bench conference, the trial court directed the jury to wait in the jury deliberation room, and defendant appeared in court.

When the jury returned to the courtroom, defendant began to speak. The trial court admonished defendant, “There will be no talking.” As the prosecutor’s first witness was approaching the witness stand, defendant said, “In all due respect, my due process—.” The trial court requested the jury to return to the jury deliberation room, and apologized for the delay. Defendant then said, “My rights are being violated. How could I not be present? I was not presented—.” The trial court instructed the jurors not to consider defendant’s attempts to communicate with them as evidence in the case. Defendant again questioned his absence from jury selection, said he was being denied his constitutional due process rights, and said he wanted to represent himself. The trial court found “the defendant is continuing to be disruptive and continuing to waive his right to be present under 1043 of the Penal Code,” and ordered the bailiff to “escort the defendant from the courtroom.”

After defendant was removed, defense counsel argued defendant had not been “sufficiently disruptive, disrespectful or discourteous to the [trial] court [such] that he prevented [the] proceedings from continuing,” and “the [trial] court could

certainly admonish the jury with regard to what he was saying.” The trial court disagreed because “[t]he defendant was speaking without permission and was attempting to communicate with the jury while the trial court was attempting to swear a witness.”

**g. May 4, 2015**

When the morning session commenced defendant was not present and his attorney stated it was her understanding that he was in “medical.” Counsel reiterated her previous objections to defendant’s absence. She then took aim at the trial court’s admonishment to the jury, arguing that, because defendant was speaking to the trial court (as opposed to the jury), the trial court improperly and prejudicially told the jury to disregard what defendant was saying. Counsel moved for a mistrial. The trial court denied the motion, for the following reasons:

“The court instructed the jury not to consider the defendant’s attempts to communicate with them precisely to attempt to cure any prejudice the defendant was creating [by] his own conduct.

“. . . As the defendant was making his outbursts he was looking directly at the jury which is why the court made the instruction that the court did so that the jury would know instantaneously not to consider those attempts to communicate with them for any purpose.

“[¶] . . . [¶]

“[T]he defendant has repeatedly throughout this trial from the very beginning, despite ample warnings from the trial court, willfully disregarded the trial court’s orders, intentionally attempted to speak at times when he was not permitted to speak while the jury was present, including attempts to communicate

with the jury. So the trial court feels that the defendant has been properly excluded up to this point under 1043. But I will give the defendant an opportunity as the court has every day to come to court willfully and to indicate that he's willing to abide by the court's orders."

Defendant was present in court at the commencement of the afternoon session. The trial court addressed and denied defendant's requests for a continuance and to represent himself.

Defendant "objected" to the rulings, said his due process rights were being violated, and said he wanted to make a motion for mistrial. The trial court explained to defendant that his attorney, not he, may make such motions, and his attorney's mistrial motion had already been denied. The defendant replied, "Please, [judge], fair and law. Fair and law. Be just—." The trial court responded, "Mr. Gereau—Mr. Gereau, let's not do this again." But defendant persisted: "Just be just, Okay?" The trial court told defendant, "This is not the time for you to be speaking. I need to talk to your attorney." Defendant did not let the issue go: "We have a right to be just. Fair and law, please." The trial court responded, "You are being warned again." Defendant remained present during the testimony of the next prosecution witness, and the direct examination of the victim.

At a subsequent sidebar discussion, defense counsel indicated defendant wanted to represent himself, which request the trial court denied. Immediately thereafter, in the jury's presence and before defense counsel could begin cross-examination of the victim, defendant insisted on renewing his motion to represent himself, despite the trial court having advised defendant he was "not invited to comment at this time," and instructing him "[p]lease do not talk." Defendant questioned

the court about his right to represent himself. The trial court excused the jury and the victim from the courtroom, and then ordered, “The defendant is to be removed 1043.” When the jurors returned, the trial court again directed them to disregard defendant’s comments. Defense counsel cross-examined the victim in defendant’s absence.

After the victim was excused, defense counsel objected to defendant’s latest exclusion from the courtroom, to which the trial court responded, in part: “The court finds the following: The defendant has engaged in repeated misconduct since the beginning of this trial. The trial court has warned the defendant several times. He’s been excluded from court two times before.” The trial court further said it had issued a separate warning “each and every time he speaks out,” and had “asked the defendant to be present in trial court every day even though that is not required in an attempt to determine whether the defendant has changed his mind about being a serious obstructionist during the course of this trial as demonstrated.”

The trial court also noted it had warned defendant three times earlier that day, yet defendant continued to speak while the witness was on the stand and the jurors were present. The trial court explained it was “justified fully under 1043” to exclude defendant, and observed defendant “intentionally tried to obstruct this trial, to manipulate the proceedings, to control the proceedings to his advantage and to cause delay and disruptions throughout. He has been repeatedly warned and advised both by the trial court and by his attorney that that behavior would get him removed and, yet, he has continued with that behavior.”

The trial court found it had no recourse other than to remove defendant from the courtroom, and defendant’s removal

was appropriate under the circumstances to satisfy the trial court's ethical responsibilities and to maintain decorum and the efficient operation of the proceedings. The trial court explained that every day it ordered defendant to appear at court, despite the "serious problem" it caused the Sheriff's Department, so the trial court could again ask defendant whether he would be willing to comply with court orders.

**h. May 5, 2015**

When the case was called, defendant was "in custody delaying his entry into the courtroom." Defense counsel indicated: "[H]e's washing up." The trial court relayed a message from a Sheriff's Department sergeant that defendant "indicated he would take his time" going to the courtroom.<sup>5</sup> The trial court accommodated defendant and waited for him to arrive.

Defense counsel repeated her prior arguments and objections regarding defendant's earlier removals from the courtroom, and moved for a mistrial. The trial court denied the motion and repeated its prior explanations, stating in part that defendant "has been gaming the system from the get go, both in this court and every other court that he's been in[,] according to the court's review of the minutes from other court appearances."

Defendant interrupted again, stating, "My life is not a game." The trial court responded that defendant had not been invited to comment, was "gaming the system from the beginning," and had "been delaying arrival to trial court on almost every single day." The trial court pointed out "every single day the court has been in session the defendant has had to be warned

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<sup>5</sup> The trial court was later advised defendant had refused to come out of his cell for at least 30 minutes.

repeatedly before being removed,” and “contrary of the representation of his defense attorney,” defendant had been “extremely disruptive.” The trial court found defendant was intentionally delaying and disrupting the proceedings, and said it “cannot conduct a trial while the defendant is speaking from counsel table while the jury is present and the witness is present.”

Defendant stated his complaints concerning the proceedings and defense counsel. The trial court then engaged in an exchange with defendant in which it ultimately interpreted defendant’s comments as a request to represent himself. The trial court denied the request in light of defendant’s claim he was requesting to proceed pro per “under duress.” Defendant also made another *Marsden* request, which the trial court denied because it was untimely and defendant had not claimed the performance of his appointed counsel was deficient.

Defendant remained present in the courtroom for additional testimony. After the trial court excused the jury for lunch, defendant repeated his *Faretta*<sup>6</sup> and *Marsden* requests. Following a hearing, the trial court denied the *Marsden* motion. However, after securing a promise from defendant that he would not be disruptive, the trial court granted his request to proceed in pro per.

#### **i. The Final Days of Trial**

Defendant represented himself until the jury returned its verdicts and was excused, at which point he chose to be represented by retained counsel. The trial court denied defense

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<sup>6</sup> A defendant’s right to self-representation has its genesis in *Faretta v. California* (1975) 422 U.S. 806 (*Faretta*).

counsel's motion for a new trial which was based in part on defendant's exclusion from the courtroom during trial.

#### **D. Analysis**

The trial court did not err in removing defendant from the courtroom. This is not a close case. Despite being warned on numerous occasions that he would be excluded from the proceedings if he persisted with his disruptive behavior, defendant regularly failed to accede to the trial court's admonitions. On multiple occasions, he made comments to witnesses, interrupted counsel and the trial court, spoke in the presence of the jury, and attempted to communicate with the jury. The record reflects the trial court exercised remarkable patience and poise with defendant and, in fact, seemed to go out of its way to provide defendant with a daily opportunity to exercise his right to personally appear.

Although the trial court made reference to defendant speaking "loudly," we are not privy to the overall intensity of defendant's voice or his demeanor. The trial court witnessed that. But based on the persistent defiance of the trial court's admonitions and warnings, it is difficult to believe defendant was respectful and well-mannered. Indeed, the record reflects that, at his preliminary hearing, the magistrate found defendant's "tone of voice, the look in his eye, the repetitious aspect of [his comments]" were "threatening."<sup>7</sup> As noted, we are required to "give considerable deference to the trial court's judgment as to when a disruption has occurred or may reasonably be

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<sup>7</sup> The trial court reviewed the record of the preliminary hearing and recognized defendant had been removed from that proceeding for being disruptive.



anticipated.” (*Welch, supra*, 20 Cal.4th at p. 773; accord, *Illinois v. Allen, supra*, 397 U.S. at p. 343.)

The record undoubtedly demonstrates defendant engaged in persistent disruptive and defiant behavior which justified his removal from the courtroom. But, even if the trial court somehow erred in so doing, defendant fails to demonstrate he was prejudiced. “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. [Citations.]’ [Citation.] “A defendant claiming a violation of the right to personal presence at trial bears the burden of demonstrating that [the defendant’s] personal presence could have substantially benefited the defense. [Citation.]” [Citations.]’ [Citations.]” (*People v. Johnson* (2013) 221 Cal.App.4th 943, 949.) Perhaps this would be an issue for habeas corpus (assuming defendant was improperly excluded from trial proceedings). Nonetheless, defendant has not explained how his defense would have benefited from his presence.

## **DISPOSITION**

The judgment is affirmed.

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KUMAR, J.\*

We concur:

KRIEGLER, Acting P. J.

BAKER, J.

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\* Judge of the Superior Court of the County of Los Angeles, assigned by the Chief Justice pursuant to article VI, section 6 of the California Constitution.