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See Ariz. R. Supreme Court 111(c); ARCAP 28(c);
Ariz. R. Crim. P. 31.24



DIVISION ONE
FILED: 1/17/2013
RUTH A. WILLINGHAM,
CLERK
BY: mjt

**IN THE COURT OF APPEALS
STATE OF ARIZONA
DIVISION ONE**

STATE OF ARIZONA,) No. 1 CA-CR 11-0297
)
Appellee,) DEPARTMENT B
)
v.) **MEMORANDUM DECISION**
) (Not for Publication -
CORY BRETT WEBER,) Rule 111, Rules of the
) Arizona Supreme Court)
Appellant.)
)
_____)

Appeal from the Superior Court in Maricopa County

Cause No. CR2010-136642-001 DT

The Honorable Colleen L. French, Judge Pro Tem

REVERSED AND REMANDED

Thomas C. Horne, Arizona Attorney General Phoenix
By Kent E. Cattani, Chief Counsel
Criminal Appeals/Capital Litigation Division
Adriana M. Zick, Assistant Attorney General
Attorneys for Appellee

James J. Haas, Maricopa County Public Defender Phoenix
By Paul J. Prato, Deputy Public Defender
Attorneys for Appellant

H O W E, Judge

¶1 Cory Brett Weber appeals his convictions for resisting arrest and possession of dangerous drugs. Weber argues that the

trial court erred by ruling that he had forfeited his right to be present at trial by behaving disruptively. We conclude that even assuming that the trial court correctly removed him, the court erred by not thereafter employing every feasible means to allow him to hear and observe the proceedings and consult with his attorney, as Arizona Rule of Criminal Procedure 9.2(c) requires. We therefore reverse his convictions and sentences and remand for a new trial.

PROCEDURAL HISTORY

¶12 Weber was charged with resisting arrest, a class 6 felony; possession of dangerous drugs (methamphetamine), a class 4 felony; and possession of drug paraphernalia, a class 6 felony. The trial court ordered a competency evaluation and found Weber competent to stand trial. At a pretrial hearing, Weber waived his right to counsel. Over Weber's objection, the trial court appointed advisory counsel to assist Weber, explaining to him that advisory counsel could take over if Weber were to change his mind about representing himself, or if he were to waive his right to be present by being "disruptive during trial" because he had been removed before for being disruptive.

¶13 The trial court then observed that Weber was wearing a restraint, which a sheriff deputy identified as a "spit mask." The trial court stated that requiring Weber to appear before the

jury in a "spit mask" would not be fair and told Weber that, if he wanted to be present at trial, he would have to promise not to spit. Weber assured the court that he would not spit. Although Weber stated he was ready to proceed, the court continued the trial to the following week so that advisory counsel could prepare.

¶14 At the beginning of trial, the court again warned Weber about spitting:

One specific concern about your behavior is the spitting. I will tell you that there will be no spitting, Mr. Weber, in the courtroom; not on the floor, not on the desk, not in your hand, not in a cup. Spitting creates a hazard, a biological hazard in this courtroom, which will not be tolerated.

The court reiterated that "for [Mr. Weber's] benefit," it would not allow him to wear a "spit mask" in the courtroom, but repeated the warning that if Weber spat, he would be removed from the courtroom and lose his rights to be present and to represent himself at trial.

¶15 Later in the proceedings, the court admonished Weber: "Mr. Weber, you can't spit on your hand and wipe it on your pants." Shortly thereafter, two sheriff deputies observed Weber repeating the behavior and reported it to the court:

[SHERIFF DEPUTY #1]: Is it okay if I take him out? He can't control it.

. . . .

THE COURT: And what did you observe Mr. Weber doing?

[WEBER]: I did not do nothing [sic].

SHERIFF DEPUTY: I keep observing him spitting on his hand and running his-

[WEBER]: I didn't do that. I rubbed my mouth.

[SHERIFF DEPUTY #1]: Over and over.

THE COURT: Mr. Weber, I warned you twice.

[WEBER]: I didn't do that. All I did was go like that (indicating).

[SHERIFF DEPUTY #2]: . . . I observed the same.

[WEBER]: You can look right now.

[SHERIFF DEPUTY #1]: It's all over on the side of the chair.

[WEBER]: Can I have a Kleenex, please?

THE COURT: Mr. Weber, I warned you before proceedings began that if you spit, that you're going to lose your right to be present.

[WEBER]: Can I have a Kleenex? I'm not going to spit on nobody [sic]. I mean, I have bad taste in my mouth.

The court ruled that Weber had "forfeited" his right to be present at trial for being "seriously disruptive." Weber objected stating, "I have a right to testify and face my accusers."

¶16 After removing Weber from the courtroom, the court explained that it is "required to check into less restrictive alternatives to removing someone" and that it had considered placing Weber in a press room as an alternative to removal. After speaking with the Sheriff's Department, however, it determined that Weber was "not an appropriate candidate for the press room." The court then put a Sheriff's Department sergeant on the stand to testify about the security concerns. Based on this testimony, the court ruled that "[t]here is no other means available for us to have him even partially present at these proceedings, so he's forfeited his right to be present."

¶17 The court noted, however, that it would permit Weber to return if he assured the court that he would behave. Weber stated that he did not want to sit in the back room and that he still wanted to represent himself. The court advised Weber that representing himself was no longer an option. Weber responded that he would like to be present at the trial, assuring the court that he would not spit in the courtroom. The court allowed Weber to return to the courtroom, but warned him that "[i]f there is any spitting, we're going to take a break in the proceedings and you'll be removed again."

¶18 When trial resumed, jury selection proceeded without incident. After the parties completed their preemptory strikes,

however, the court again warned Weber that he could be removed from the courtroom unless he stopped disrupting the proceedings:

I'd like to tell you, Mr. Weber, you've got to keep your hands away from your mouth. The deputies are telling me that you're licking your hands and you're wiping them on your pants.

. . . .

You can't do that. So keep that in mind. There was a pen taken away from him. You took the pen. So you know that now. He's been licking his hand and handling the pen. Licking his hands and wiping them on his pants. You can't do that or they're going to take you out.

After a brief recess, the court stated that it had been informed that Weber had "been gathering saliva" on his hand "and flicking it onto the floor and onto the paperwork" and his clothing. The court noted that, underneath the desk, "[t]here are wet spots all over the carpeting, and [Weber's] paperwork [wa]s blurred and wet, and [his] shirt ha[d] wet spots down the front of it." Advisory counsel urged the court, "I just ask that [Weber] be given the opportunity to stay. He says he has a problem, he's been trying to control himself." The court responded, "I know he's been trying" Weber further explained that he has "a saliva gland that's discharging fluid." The court ruled that Weber had forfeited his right to be present:

You've given me little choice, Mr. Weber, based on your behavior, which evidently you're unable to control.

. . . .

I am going to rule at this point that by your behavior, you're spitting in the courtroom, you've forfeited your right to be present. So I'm asking the deputies to take you out now.

Weber asked the court, "Can I still take the witness stand? I'd like to take the witness stand and talk, whatever." The court did not respond to this inquiry or make any accommodation for Weber to testify at trial.

¶9 The next day, Weber was tried *in absentia*. No explanation was offered to the jury for his absence. The jury was later instructed, however, "not to consider or speculate about the defendant's absence from the courtroom." Following less than two hours of testimony from State witnesses, the jury convicted Weber of resisting arrest and possession of dangerous drugs, but acquitted him of possession of drug paraphernalia.

¶10 When Weber appeared for sentencing, he wore a "spit mask," as he had during pre-trial proceedings. Weber complained that he was not allowed to talk to his attorney or assist him in the defense at trial. The court found two prior historical felony convictions and sentenced Weber to concurrent prison terms, the longest being a mitigated eight-year prison term for possession of dangerous drugs. In explaining the mitigated

sentence, the trial court stated, "I think you have significant mental health issues."

¶11 Weber timely appealed. We have jurisdiction pursuant to Arizona Revised Statutes ("A.R.S.") sections 12-120.21(A)(1), 13-4031, and -4032(1) (Westlaw 2012).¹

DISCUSSION

¶12 Weber argues that the trial court violated his constitutional right to be present by removing him from the proceedings for conduct that he could not control and without first considering less restrictive means of addressing the problem. We need not address those issues, however, because we agree with Weber's additional argument that the court erred by not employing "every feasible means" of allowing him to observe and hear the proceedings after he was removed, as Rule 9.2(c) requires.

¶13 Whether a defendant was properly excluded from a trial proceeding must be considered in light of the entire record. *Snyder v. Massachusetts*, 291 U.S. 97, 115-17 (1934), *overruled in part by Malloy v. Hogan*, 378 U.S. 1 (1964). We review a defendant's exclusion for an abuse of discretion. See *State v. Jones*, 26 Ariz. App. 68, 73, 546 P.2d 45, 50 (1976) (stating that a trial court has "considerable latitude" to determine

¹ We cite the current version of the applicable statute because no revisions material to this decision have since occurred.

whether a defendant should be removed from the courtroom until he promises to conduct himself properly). A court abuses its discretion if it commits an error of law in making a discretionary decision. *State v. Butler*, 646 Ariz. Adv. Rep. 10, 2, ¶ 5 (App. 2012).

¶14 The United States and Arizona Constitutions guarantee an accused the right to be present at trial. See U.S. Const. amend. VI and XIV; Ariz. Const. art. 2, § 24; *United States v. Gagnon*, 470 U.S. 522, 526 (1985) (due process); *Illinois v. Allen*, 397 U.S. 337, 338 (1970) (Sixth Amendment); *State v. Garcia-Contreras*, 191 Ariz. 144, 146, ¶ 8, 953 P.2d 536, 538 (1998) (Arizona Constitution, article II, section 24). The right to be present at trial is one of the most basic rights of the criminal defendant, and "must therefore be zealously guarded." *State v. Ayers*, 133 Ariz. 570, 571, 653 P.2d 27, 28 (App. 1982). This right is not absolute, however, and a defendant can forfeit it if, "after he has been warned by the judge that he will be removed if he continues his disruptive behavior, he nevertheless insists on conducting himself in a manner so disorderly, disruptive, and disrespectful of the court that his trial cannot be carried on with him in the courtroom." *Allen*, 397 U.S. at 343. A trial court has the right and responsibility of seeing that trials are conducted properly and without disruption, and is permitted to take those necessary measures to provide for the

orderly disposition of criminal cases. *State v. Delvecchio*, 110 Ariz. 396, 400, 519 P.2d 1137, 1141 (1974).

¶15 In Arizona, Rule 9.2 governs the procedure for a defendant's exclusion from the courtroom for disruptive or disorderly conduct. Subsection (a) provides that a defendant "shall forfeit his or her right to be present at that proceeding" if the defendant "engages in disruptive or disorderly conduct after having been warned by the court that such conduct will result in the defendant's expulsion from a proceeding." Ariz. R. Crim. P. 9.2(a). Under subsection (b), the court must allow the defendant to return upon a "personal assurance of good behavior," but if the defendant exhibits "[a]ny subsequent disruptive conduct," the court may remove the defendant without another warning. Ariz. R. Crim. P. 9.2(b). Subsection (c) provides that the court has a "continuing duty" to "employ every feasible means" to enable a defendant who has been removed from the courtroom "to hear, observe or be informed of the further course of the proceeding, and to consult with counsel at reasonable intervals." Ariz. R. Crim P. 9.2(c). The drafter's commentary to Rule 9.2 explains that the purpose of this duty is to permit the defendant to hear and observe the proceedings even when he has been properly removed:

The first sentence in section (c) directs the court to use every feasible means to permit the defendant to hear and

observe the proceedings. The language is intended to encourage use of any practical audiovisual devices in communicating the progress of the trial to the defendant. The rule directs the court to employ means that will let the defendant hear and observe, not participate. The cost of a simple loudspeaker system can be afforded by any small court in Arizona. No court is required to use impractical and expensive technology.

Comment to Ariz. R. Crim. P. 9.2.

¶16 Although Weber argues that he could not control his behavior, he does not dispute that the behavior was seriously disruptive to the courtroom. Weber's conduct created an unsanitary situation, which the court was properly concerned about and had the authority to address. The court also permitted Weber to return because he promised to behave, but Weber repeated the conduct. Assuming therefore, without deciding, that the trial court complied with Rule 9.2(a) and (b) in removing Weber, we conclude that it erred by failing to discharge its continuing duty under Rule 9.2(c).

¶17 After removing Weber, the trial court made no effort to allow Weber to "hear and observe" the proceedings, as Rule 9.2(c) requires. Although the court considered placing Weber in the pressroom, it did so as an alternative to removing him from the courtroom, not to comply with its "continuing duty" under Rule 9.2(c).

¶18 Even if the court had considered placing Weber in the pressroom as a means of allowing him to observe and hear the proceedings, it failed to consider other options when the pressroom became unavailable for security concerns. Given technological advancement and the commonplace use of the type of audiovisual equipment referenced in Rule 1.6, nothing in the record demonstrates that the court was unable to use such equipment here. For instance, the court could have readily satisfied its obligations under Rule 9.2(c) by allowing Weber to listen in on the hearings telephonically from another secure location or, as noted in the comment to the rule, by employing "a simple loudspeaker system." Doing so would have also remedied the "spitting" problem while avoiding the concern about prejudice to Weber from appearing before the jury in a "spit mask."²

² The court could have also required Weber to use a "spit mask." While we fully understand the trial court's concern about the potential prejudice Weber faced from appearing in front of the jury in a spit mask, the possibility of prejudice must be weighed against Weber's assertions of his constitutional rights. See *State v. Forte*, 222 Ariz. 389, 392, ¶ 9, 214 P.3d 1030, 1033 (App. 2009) (noting "we indulge every presumption against the forfeiture of a defendant's constitutional right to be present"). In light of Weber's protests that removing him from the courtroom would prevent him from asserting his constitutional rights to be present, to represent himself and to testify, Weber should have been given the option to waive any prejudice and wear the spit mask. The court could have provided an appropriate limiting jury instruction.

¶19 Additionally, the record does not show that advisory counsel communicated with Weber during breaks or that Weber was otherwise informed of the progress of the proceedings after his removal. Indeed, when Weber spoke at sentencing, he complained that he was not allowed to talk to his attorney or assist him in the defense at trial. Because the trial court did not "employ every feasible means" of allowing Weber to follow the proceedings and consult with his attorney after he was removed, it erroneously excluded Weber from the entire evidentiary portion of his trial.

¶20 Ordinarily, we review a presence error for harmless error. *Garcia-Contreras*, 191 Ariz. at 148, ¶ 16, 953 P.2d at 540. "On occasion, however, presence error may 'so undermine the integrity of the trial process that [it] will necessarily fall within that category of cases requiring automatic reversal.'" *Id.* (quoting *Hegler v. Borg*, 50 F.3d 1472, 1476 (9th Cir. 1995)). Harmless presence error has generally only been found where the defendant has been absent from some minor portion of the trial. *Id.* at ¶ 17. Where, as here, the presence error involved the defendant's total exclusion from the evidentiary portion of the trial, we are unable to meaningfully quantify the resulting harm, and the matter is not amenable to harmless error review. *Id.* at 148-49, ¶¶ 17, 20, 953 P.2d at 540-41.

¶21 Weber further claims that the trial court's decision to remove him from the courtroom violated his constitutional rights to represent himself and to testify. Because we hold that the violation of Weber's right to be present at trial requires reversal of his conviction, we need not decide whether the deprivation of his rights to represent himself and to testify constitute separate and independent reversible error under the circumstances of this case.

CONCLUSION

¶22 For the foregoing reasons, we reverse Weber's convictions and remand for proceedings consistent with this decision.

 /s/
RANDALL M. HOWE, Judge

CONCURRING:

 /s/
MAURICE PORTLEY, Presiding Judge

 /s/
PATRICIA A. OROZCO, Judge