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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA  
FIFTH APPELLATE DISTRICT

THE PEOPLE,

Plaintiff and Respondent,

v.

TERRY LEE HANNAH,

Defendant and Appellant.

F063034

(Super. Ct. No. CRF34990)

**OPINION**

APPEAL from a judgment of the Superior Court of Tuolumne County. Eleanor Provost, Judge.

Gabriel Bassan, under appointment by the Court of Appeal, for Defendant and Appellant.

Kamala D. Harris, Attorney General, Dane R. Gillette, Chief Assistant Attorney General, Michael P. Farrell, Assistant Attorney General, Michael A. Canzoneri and Angelo S. Edralin, Deputy Attorneys General, for Plaintiff and Respondent.

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Following a jury trial, appellant Terry Lee Hannah was convicted of making criminal threats (Pen. Code, § 422)<sup>1</sup> and exhibiting a deadly weapon (§ 417, subd. (a)(1)). Outside the presence of the jury, Hannah admitted that he had suffered a prior conviction for a serious and/or violent felony (§ 667, subds. (b)-(i)) and that he had served a prior prison term (§ 667.5, subd. (b)). The trial court sentenced Hannah to an aggregate term of five years in state prison.

On appeal, Hannah contends that his constitutional right to be present at trial was violated. We agree and therefore need not address his further contention that application of section 4019 violated his equal protection rights. The judgment is reversed.

### **STATEMENT OF THE FACTS**

On March 7, 2011, Myron Myers heard yelling coming from Hannah's mobile home located next to his. Myers then heard knocking at his own door. When he answered, Hannah ran toward him, pointed a crossbow at him and said, "I'm going to kill communists." Myers told Hannah there were no communists there, to which Hannah placed the crossbow under Myers' chin, tilting it back and said, "Well, I'll kill you, then." Myers tried to get the crossbow out of his face, but Hannah began punching him in the chest with his right hand. Hannah, who had his finger on the trigger of the crossbow as he pointed it at Myers, screamed, "I'm going to kill you" a total of three times. As Myers attempted to get the crossbow out of his face, Hannah stumbled off of the porch. Hannah then swung the crossbow at Myers again and said two more times that he was going to kill him. Myers was able to get inside his residence, lock the door and call 911.

That same day, Amy Conway, whose grandparents own the mobile home park, was at the mobile home park and heard Hannah walking around, moaning, and chanting her grandmother's name. Conway advised her grandmother to stay inside and lock the door. As Conway was leaving her grandmother's home, she heard a dog bark and

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

Hannah jumped up from behind a bush with something in his hand. Conway called 911 and sheriff's deputies arrived. Conway identified Hannah to them and, as she did so, Hannah yelled and screamed at Conway.

When the officers saw Hannah, he was agitated and wearing a 10-inch-long military style survival knife strapped to his waist. He also had a pocket knife on his person. A crossbow without an arrow was located inside Hannah's vehicle, parked nearby.<sup>2</sup> Another bow and a separate arrow were located in Hannah's residence.<sup>3</sup> As the officers were leaving to take Hannah to jail, Hannah stated, "First chance I get, I'm going to kill that bitch [referring to Conway] and I'm going to kill you, too [referring to one of the officers]."

## **DISCUSSION**

### I. CONSTITUTIONAL RIGHT TO BE PRESENT AT TRIAL

Hannah contends that his constitutional right to confront witnesses against him under the federal Constitution, as well as his state constitutional and statutory rights, were violated when the trial court failed to ensure his presence during "a significant portion" of the complaining witness's testimony. We agree.

#### ***Background***

The reporter's transcript in this case indicates that jury selection began on June 29, 2011, at 1:28 p.m. At a bench conference toward the end of jury selection, Hannah's trial counsel informed the trial court that Hannah had told him he had kidney stones and "very badly" needed to use the restroom. The trial court stated that it was "almost done" and it would then "break." A short while later,<sup>4</sup> at 2:20 p.m., a "short recess" was taken.

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<sup>2</sup> This crossbow was received into evidence.

<sup>3</sup> This bow and arrow were not offered into evidence.

<sup>4</sup> Four pages later in the Reporter's Transcript.

Jury selection resumed at 2:31 p.m.; Hannah was present. Jury selection concluded and the jurors were sworn. The parties gave opening statements, and Conway was called as the prosecution's first witness at 3:03 p.m. Myers, the complaining witness, was called to the stand and took the oath at 3:13 p.m. Immediately thereafter, defense counsel stated, "Your Honor, we have the same issue. Can he be excused?" The trial court replied, "He can be excused, but I'm not taking a break," to which Hannah replied, "Okay. Thank you." The reporter's transcript then notes "(Leaves the courtroom)," "(Pause in the proceedings)," and "(TIME NOTED: 3:14 P.M.)." After the "pause," the prosecution then began its direct examination of Myers. Myers testimony concluded around 3:31 p.m. (direct examination 3:14 to 3:23 p.m.; cross-examination 3:23 to 3:29 p.m.; redirect examination 3:29 to 3:30 p.m.; and recross-examination from 3:30 to 3:31 p.m.). Next, the two officers at the scene testified; the first beginning at 3:32 p.m. and the second at 3:47 p.m., concluding close to 4:03 p.m. There is no mention in the reporter's official transcript of when Hannah returned to the courtroom, but following a bench conference, the trial court took a recess for "five minutes, but five only" to allow defense counsel to discuss with Hannah whether he wished to testify. The recess is recorded from 4:08 p.m. to 4:13 p.m. Hannah chose not to testify and court adjourned at 4:21 p.m.

The minute order for the afternoon of June 29, 2011, sheds no additional light on the time frame in which Hannah was absent. The minute order mentions only that a crossbow was marked as an exhibit; that the district attorney designated Deputy Egbert as lead investigator; that the prospective jurors were called and examined and lists the numbers of those jurors sworn and empanelled; that the trial court ordered witnesses excluded from the courtroom; and that both parties made an opening statement. There is nothing in the minute order noting any request or action by Hannah.

### ***Applicable Law and Analysis***

“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.” (*People v. Waidla* (2000) 22 Cal.4th 690, 741.)

Our Supreme Court has summarized the federal law governing a defendant’s presence at trial as follows: “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.]” (*People v. Lucero* (2000) 23 Cal.4th 692, 716-717; see *People v. Waidla, supra*, 22 Cal.4th at p. 742.) 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 charges against him .... [Citation.]’ [Citation.]” (*People v. Ervin* (2000) 22 Cal.4th 48, 74; *People v. Waidla, supra*, at p. 742.)

Here, Hannah had both a statutory and a constitutional right to be present during the testimony of the complaining witness. Had Hannah been present, he could have assisted his attorney in questioning the testimony Myers gave against him. Myers’s testimony was the only direct evidence of Hannah’s actions leading to the charged offenses. Accordingly, Hannah’s presence bore a reasonable and substantial relationship to his ability to defend the charges against him. (*People v. Lucero, supra*, 23 Cal.4th at pp. 716-717.)

Nor did Hannah validly waive his right to be present under state or federal law. Section 977, subdivision (b)(1), states that in felony prosecutions “the accused shall be present” at certain proceedings, including those during portions of trial “when evidence is

taken before the trier of fact,” “unless he or she shall, with leave of court, execute in open court, a written waiver of his or her right to be personally present, as provided by paragraph (2).” Section 977, subdivision (b)(2) further provides “[t]he accused may execute a written waiver of his or her right to be personally present, approved by his or her counsel, and the waiver shall be filed with the court.” Section 1043 provides that a felony defendant “shall be personally present at the trial,” (§ 1043, subd. (a)), but that, after the trial has commenced, the trial may continue in the defendant’s absence if (1) the defendant persists in disruptive behavior after being warned (§ 1043, subd. (b)(1)); the defendant in a noncapital case is voluntarily absent (§ 1043, subd. (b)(2)); or (3) the defendant waives his right to be present in accordance with section 977 (§ 1043, subd. (d)).

Our Supreme Court in *People v. Gutierrez* (2003) 29 Cal.4th 1196 (*Gutierrez*) addressed the interplay between sections 977 and 1043 and concluded that

“[S]ection 977, subdivision (b)(1)’s presence requirement does not preclude a defendant from being ‘voluntarily absent’ during the taking of evidence under section 1043, subdivision (b)(2). Section 977, subdivision (b)(1), provides that under certain circumstances, a defendant may execute a written waiver of the right to presence. Under that provision, a trial may commence even in the defendant’s absence if the defendant executes a written waiver. (§ 977, subd. (b).) For example, a defendant may be absent when the jury is selected, but he cannot be absent from the entire trial without ever appearing. But when a trial has commenced in a defendant’s presence, section 1043 applies. As relevant here, section 1043, subdivision (b)(2), provides that a defendant’s voluntary absence does not prevent the trial from continuing. We perceive that these statutes address different concerns and do not conflict; rather, executing a written waiver and being voluntarily absent are treated as different events under these two statutes.<sup>5</sup>” (*Gutierrez, supra*, 29 Cal.4th at pp. 1203-1204.)

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<sup>5</sup> “Section 1043, subdivision (b)(2), ‘shall not limit the right of a defendant to waive his right to be present in accordance with Section 977.’ (§ 1043, subd. (d).)”

Accordingly, because Hannah “was present when the trial began, section 1043, subdivision (b)(2), governs, notwithstanding section 977, subdivision (b)(1)’s presence requirement.” (*Gutierrez, supra*, 29 Cal.4th at p. 1204.)

Here, there is no evidence that Hannah was disruptive in court and therefore no claim that Hannah’s behavior allowed the complaining witness to testify in his absence. Instead, we look to see whether Hannah was voluntarily absent under section 1043. That section does not define “voluntarily absent,” but Black’s Law Dictionary defines “voluntary” as “[u]nconstrained by interference; not impelled by outside influence,” and “voluntarily” as “[i]ntentionally; without coercion.” (Black’s Law Dict. (8th ed. 2004) p. 1605, col. 2.) To determine whether a defendant is absent voluntarily under section 1043, a court must look at the “totality of the facts.” (*Gutierrez, supra*, 29 Cal.4th at p. 1205.)

In *Gutierrez*, the court found no error to proceed with trial in defendant’s absence where the defendant refused to leave court lockup, and refusal was confirmed in the lockup in the presence of defense counsel, bailiff, and court reporter. (*Gutierrez, supra*, 29 Cal.4th at p. 1206.)

“[U]nder section 1043, subdivision (b)(2), a trial court may continue a trial in a custodial defendant’s absence after the trial has commenced in the defendant’s presence – without first obtaining the defendant’s written or oral waiver of the right to presence – if other evidence indicates the defendant has chosen to be absent voluntarily. While a defendant’s express waiver in front of the judge might be the surest way of ascertaining the defendant’s choice, it is not the only way. A defendant’s ‘consent need not be explicit. It may be implicit and turn, at least in part, on the actions of the defendant.’ (*United States v. Watkins* (7th Cir. 1993) 983 F.2d 1413, 1420, fn. omitted; [citation].) In determining whether a custodial defendant who refuses to leave the lockup is ‘voluntarily absent’ (§ 1043, subd. (b)(2)), a trial court should take reasonable steps to ensure that being absent from trial is the defendant’s choice.” (*Gutierrez, supra*, at p. 1206.)

Here, during trial proceedings, Hannah, through counsel, asked to be excused, noting that Hannah had the “same issue.” Despite respondent’s argument to the contrary, we infer that to mean Hannah’s urgent need to again use the restroom was due to his

kidney stone condition. When the trial court informed Hannah that he could be excused, but it was not suspending proceedings, Hannah responded, “Okay. Thank you,” acknowledging the court’s decision, and left the courtroom. The trial court was aware that Hannah was suffering from kidney stones requiring the need to use the restroom when it excused Hannah from the courtroom, but failed to recess the trial. There is no evidence in the record that Hannah’s medical condition was feigned. (See, e.g., *People v. Rogers* (1957) 150 Cal.App.2d 403, 413 [self-induced medical condition for the purpose of disrupting the proceedings is a waiver of the right to be present].) There is nothing in the record to suggest that Hannah was informed by counsel or the trial court that he had a right to be personally present at all stages of the proceeding. Nor can we say that the trial court took “reasonable steps to ensure that being absent from trial” was Hannah’s choice. (*Gutierrez, supra*, 29 Cal.4th at p. 1206.) Although Hannah left the courtroom, we cannot conclude that his absence during the testimony of the complaining witness was voluntary, given his indication that his departure to leave was due solely to his kidney stone condition.

We turn now to the question of whether the violation of Hannah’s right to be present resulted in prejudice or violated his right to a fair and impartial trial. (*People v. Lucero, supra*, 23 Cal.4th at p. 717.) Under the federal Constitution, error pertaining to a defendant’s presence is evaluated under the harmless beyond a reasonable doubt standard set forth in *Chapman v. California* (1967) 386 U.S. 18, 23. (*People v. Robertson* (1989) 48 Cal.3d 18, 62; see *Campbell v. Rice* (9th Cir. 2005) 408 F.3d 1166, 1171-1172.) Error under sections 977 and 1043 is state law error only, and therefore is reversible only if “it is reasonably probable that a result more favorable to the appealing party would have been reached in the absence of the error.” (*People v. Watson* (1956) 46 Cal.2d 818, 836.)” (*People v. Jackson* (1996) 13 Cal.4th 1164, 1210, 1211; see also *People v. Mayfield* (1997) 14 Cal.4th 668, 738-739.)

The record is not clear as to how long Hannah was absent, but as Hannah notes, even if he was able to return to the courtroom within five minutes, he still would have missed more than half of the direct testimony of the complaining witness, the only direct testimony against him.<sup>6</sup> In addition, the record does not indicate that there was a break in the proceedings before the witness was excused. Had such a break occurred, it would have allowed Hannah's trial counsel to adequately summarize Myers' testimony for Hannah and, in essence, allow Hannah to assist in cross-examination of the witness.

We therefore conclude that Hannah was prejudiced by his absence because his presence was necessary for an "opportunity for effective cross-examination," for purposes of the Sixth Amendment confrontation clause (*Kentucky v. Stincer* (1987) 482 U.S. 730, 744-745, fn. 17); or would have "contribute[d]" to the trial's "fairness" in any marginal way, for purposes of the Fourteenth Amendment's due process clause (*Kentucky v. Stincer, supra*, at p. 745); or bore a "reasonable substantial relation to the fullness of his opportunity to defend . . .," for purposes of section 15 of article I of the California Constitution and also sections 977 and 1043 of the Penal Code (*People v. Bradford* (1997) 15 Cal.4th 1229, 1357).

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<sup>6</sup> Because the record in this case was not clear, this court, on its own motion, directed the superior court to conduct a hearing to determine whether Hannah was present during any or all of complaining witness Myers' testimony on June 29, 2011, and if so, for what portion. The evidentiary hearing conducted on May 10, 2013, confirms our previous conclusion that Hannah was absent from the courtroom for about five minutes during Myers' testimony. In our analysis, we do not consider the court reporter's unofficial transcript of Myers testimony submitted at the May 10 hearing. Although the court reporter had been subpoenaed to testify at the hearing, she refused to appear and was therefore not present for cross-examination on issues related to her unofficial transcript. (*Crawford v. Washington* (2004) 541 U.S. 36, 50-51.)

**DISPOSITION**

The judgment is reversed.

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Franson, J.

WE CONCUR:

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Poochigian, Acting P.J.

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Detjen, J.