Filed 3/5/20 P. v. Ramirez CA5

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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FIFTH APPELLATE DISTRICT

THE PEOPLE, Plaintiff and Respondent, v. MARCOS ANTONIO RAMIREZ, Defendant and Appellant.	F076126 (Super. Ct. No. CRF50964) **OPINION**

APPEAL from a judgment of the Superior Court of Tuolumne County. James A. Boscoe, Judge.

Jennifer Mouzis, under appointment by the Court of Appeal, for Defendant and Appellant.

Xavier Becerra, Attorney General, Gerald A. Engler, Chief Assistant Attorney General, Michael P. Farrell, Assistant Attorney General, Louis M. Vasquez and Amanda D. Cary, Deputy Attorneys General, for Plaintiff and Respondent.

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SEE DISSENTING OPINION

Marcos Antonio Ramirez (defendant) was charged, by complaint deemed an information, with first degree burglary. (Pen. Code, § 459.)[1] A jury acquitted him of that charge, but convicted him of the lesser included offense of attempted first degree burglary. (§§ 459, 664.) Imposition of sentence was suspended for five years, and defendant was placed on probation on various terms and conditions, including that he serve five months in jail and complete a residential drug treatment program. On appeal, he claims the trial court violated his constitutional rights by finding him voluntarily absent and proceeding with trial in his absence. We conclude any error was harmless.

FACTS

In June 2016, Daniel D. resided in Sonora.[2] A few days prior to June 25, he noticed that a window screen on the south side of his house was bent. From the inside of the house, he could see a smeared handprint on the window. Daniel checked the video from his security cameras, which used infrared technology, and saw that sometime between approximately 2:00 a.m. and 3:00 a.m., someone tried to pull the screen back. The man put a hand in and tried to push the window up, then sneaked off. Daniel, who did not recognize the person, made a copy of the video and took it to the Sonora Police Department the next morning.[3]

Officer Bowly of the Sonora Police Department received the video from Daniel on June 25. Bowly responded to the residence that same day. He attempted to obtain fingerprints but was unsuccessful, probably due to smudging. The first time he viewed the video, Bowly did not have a possible suspect in mind. The second time he viewed it, however, he suspected the subject possibly was defendant. This was based on Bowly's

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1 All statutory references are to the Penal Code unless otherwise stated.

2 Unspecified references to dates in the statement of facts are to the year 2016. Pursuant to California Rules of Court, rule 8.90, we refer to Daniel by his first name. No disrespect is intended.

3 The video was shown to the jury.

prior experience with defendant, who lived within walking distance of Daniel's residence.

On July 29, Bowly was conducting a traffic stop with another officer when he saw defendant walking up the street. Defendant's hat caught Bowly's attention. The Oakland Raiders logos and placement, large lettering, and two-toned coloring were consistent with the hat Bowly had observed in the security video.[4]

Bowly engaged defendant, who seemed nervous, in conversation.[5] Bowly told defendant that he had him. Defendant denied doing anything. Bowly used a ruse stating that he had defendant's thumbprint on the window. Bowly also told defendant that Bowly had defendant on video and identified him from the video. Bowly asked whether, if the window had opened, defendant would have gone inside, or what he was doing. Defendant said he was probably just looking. Bowly asked if defendant had seen something inside the residence that he wanted. Defendant said no. On about three different occasions during the encounter, defendant admitted he had just been looking, but denied he was going to go into the house. When Bowly confronted him with the fact defendant damaged Daniel's screen and asked if he was going to pay for the damage, defendant said he would, if that was what "he" wanted.[6] Bowly warned defendant that it

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[4] The black and gray on the hat showed up as lighter and darker in the infrared video. The night before he testified, Bowly tested the hat on Daniel's security video to make sure the hat matched the coloring that appeared on the original video. Video of the test was admitted into evidence at trial.

Bowly looked at Raiders hats on line. He estimated he looked at 200 different hats, and could not find any with that configuration of logos. He did not look in the Oakland Raiders online store. He conceded there were probably thousands of such hats, but he could not find one.

[5] An audio-video recording of the conversation, captured by Bowly's body camera, was played for the jury.

[6] A screen at another house in Daniel's neighborhood was cut, and the house entered, the same night as the incident at Daniel's residence. Bowly told defendant he believed defendant was the culprit in both instances, but could not prove it with respect to

was very dangerous in that county to do what he did and that he was taking his life in his hands and could be shot, and he continued to ask defendant why he would do it. Defendant said he was probably under the influence, drunk or high.

Upon arresting defendant for burglary, Bowly found a cell phone with a flashlight feature in defendant's possession. The security video showed the suspect using that flashlight feature.

Bowly transported defendant to jail, and again admonished him about the dangerousness of his behavior. Defendant responded that he was doing better now.

DISCUSSION

Defendant, who was not in custody, appeared the first day of trial, but not the second day. The court found he voluntarily absented himself, and proceeded with trial in his absence. Defendant now claims this violated his federal and state constitutional rights. We conclude any error was harmless; hence, defendant is not entitled to reversal.

A. Background

At his arraignment, defendant was released on his own recognizance. He remained on that status until the jury returned its verdict. Trial was originally set for February 1, 2017, and then continued at defense request to April 12, 2017. On April 10, 2017, the date set for a readiness conference, defendant made a motion for substitute counsel pursuant to *People v. Marsden* (1970) 2 Cal.3d 118. The motion was denied, and the April 12, 2017 trial date and time (8:00 a.m.) were confirmed. Defendant was ordered to appear.

Defendant failed to appear for trial. Defense counsel informed the court that defendant's mother had telephoned counsel's office and stated defendant was ill, and she was going to take him to "Prompt Care" as soon as defendant was able to get out of bed.

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the second house. Bowly believed there was a possibility defendant thought Bowly was talking about the screen at the second residence when they discussed whether defendant would pay for the damage.

The court vacated the jury trial and ordered issuance of a bench warrant, but stayed execution of the warrant until the next day.

The minute order reflects that the next day, defendant appeared with counsel. Trial was set for July 5, 2017. Defendant was ordered to appear.

Trial began, and the jury was selected and sworn, on July 5, 2017. Defendant was present.[7] Court recessed for the day shortly before noon. It was anticipated trial could be finished the next day, and the jurors and parties were instructed to return at 8:30 the next morning.

The matter reconvened in open court, but outside the presence of the jury, at 9:30 a.m. on July 6, 2017. The court stated:

> "It appears this morning [defendant] injected or ingested heroin and methamphetamine — at least the report to the Court indicated he overdosed and medical personnel were sent to his home . . . , and the first alert to this condition was given to [defense counsel] by [defendant's] mother, and [defense counsel] then notified [the prosecutor] by e-mail of a problem. When . . . counsel arrived today to court, I had been in chambers. We discussed the situation. My understanding was . . . that emergency personnel were at the scene and examined [defendant], who refused medical treatment.
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> "It's my understanding that Officer Norris, who was present at the scene, had observed the defendant at the time medical treatment was refused. The Court had Officer Bowly contact Officer Norris to explain the situation, and I . . . asked Officer Norris to go to the defendant's home and advise him that we were expecting him to show up for trial. And the first response from the defendant was that he . . . will be here for trial. And I advised him if he failed to appear in 15 minutes, which is a reasonable time to arrive in court given the distance of his home from the courthouse, that I would proceed to try him in his absence. [Defense counsel] then asked if he was going to go to the hospital, and the defendant then claimed he wanted to go to the hospital. And at that point I don't know if he's gone to the hospital or not."

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[7] It appears defendant was late returning to the courtroom following the morning recess. Defense counsel waived his appearance, and defendant appeared a short time later.

At this juncture, defense counsel received a telephone call from defendant's mother. Defense counsel then reported that defendant and his mother were now at the emergency room, waiting to see a physician. This ensued:

> "THE COURT: [¶] . . . [¶] All right. It's . . . my understanding that this is the second time that [defendant] has been sick on the day of trial. The first time, which I believe was back in April when this case was set for trial, on the day of trial he requested his mother report to the Court that he was sick with the flu. Court continued his trial and issued a bench warrant and ordered him to appear the next day. The next day his mother appeared, not the defendant, and she had a note from a doctor that said he was seen at the Sonora Regional Medical Center.
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> "Any other facts, Counsel, that should be on the record about this incident?
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> "[PROSECUTOR]: Yes, your Honor. . . . The Court mentioned . . . that the information was he had ingested drugs this morning. I think that the information was the mom believed he had gone out with another individual. She thinks he came back home around 2:00 a.m. It was my understanding that he ingested it sometime in the night.
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> "I received a text message from Officer Bowly . . . at 7:00 a.m. . . . indicating that at 7:00 a.m. Sonora Police Department had responded to [defendant's] home for the mother reporting that there was a potential overdose on heroin. When the officers arrived medical was there, and at 7:24 a.m. I got a message that the defendant declined medical attention and refused to go in the ambulance to the hospital. . . . Our court hearing today was at 8:30 a.m. He did not show up at 8:30.
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> "When we met with the judge and the phone call was placed and Officer Norris responded back out to the house, it was at . . . approximately 9:25. The defendant originally indicated over the phone — which we can all hear Officer Norris, that he was going to come at about 9:30 this morning. When the Court indicated that Officer Norris should give him a ride, he was then asked if he was going to the hospital. At that point he switched, instead of coming to court, that he would rather go to the hospital.
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> "Apparently, he is waiting to see the doctor. It doesn't appear that he's not conscious. It doesn't appear that he's not able to walk. We also have information that he appeared to Officer Norris to be coherent when

answering the questions to medical. He was able to walk unassisted. He was conscious and apparently still appears to be that way.

"As the Court mentioned, this is the second time, I believe, the defendant is voluntarily trying to avoid the process of the Court.

"Those with [*sic*] additional facts I wanted to put on the record, he declined medical and then chooses to go to the hospital . . . now almost getting to way over an hour after when he was suppose[d] to be here and two hours after medical first contacted him.

"THE COURT: [Defense counsel], would you like to put any other facts on the record?

"[DEFENSE COUNSEL]: Yes, your Honor. When we spoke to Officer Norris, Officer Norris clearly indicated that the defendant was [Health and Safety Code section] 11550, being under the influence of drugs.

"In speaking to the mother, she said that [defendant] was nodding out and being conscious and nonresponsive, and she said she was going to try to take him to the hospital. Then on the last call she said she was taking him out to the car to take him to the hospital. This latest phone call says that she was successful in getting him to the car.

"[Defendant] is 19 years old. He does have some learning disabilities. So a lot of things he says on the phone . . . cannot be taken at face value.

"And also if he's under the influence of drugs, I think he is likely to say anything to the policeman that was at his home. Therefore, I will suggest we continue the case until tomorrow [at] 8:30 or declare a mistrial.

"[PROSECUTOR]: And, your Honor, I have plans to be out of town tomorrow afternoon that have been in place for some time now.

"THE COURT: All right. . . . Penal Code Section . . . 1043(a) and B provide, the defendant in a noncapital felony case has a right to be present during his trial, and these rights are guaranteed by the Constitution and the Constitution should be protected when appropriate. However, there's an exception to 1043, that is 1043(b)(2), which provides that the absence of the defendant in a criminal felony case shouldn't prevent . . . continuing with the trial that's already been commenced, the record will reflect [defendant] was present during jury selection process and when the jury was sworn. And so, again, his absence should not necessarily prevent

the continuance of the trial all the way through verdict if the defendant is voluntarily absent from the trial.

"So the issue before the Court is whether or not [defendant] is voluntarily absent from the trial. And clearly . . . some case law supports this where the defendant escapes and absents himself from the trial or when there is disruptive behavior, and the defendant is warned he will be removed from the courtroom because of disruptive behavior.

"But I think it's clear that in any case, criminal or civil, the law doesn't allow him to take advantage of his own wrongdoing to delay the process of the court. [Defendant] voluntarily ingested controlled substances to the extent that it required emergency response by police and emergency medical care, emergency medical personnel. Apparently, he was not . . . in such a serious condition that he cannot refuse treatment and which he in fact did. And it was only when he was asked if he was going to the hospital after I advised him to be in court in 15 minutes, that Officer Norris will give him a ride, that he decides to go to the hospital.

"This is the second time on the day of trial or the first time on the day of trial before it commenced that . . . his mother . . . reported that he had a medical condition, specifically the flu, I believe, and he could not be present; he was vomiting and could not be present. It wasn't until the next day she came in with a doctor's note that he was in fact seen at the hospital. We have no idea of the nature of his condition or what he was seen for or what the diagnosis was, just that he went to the hospital the next day.

"In this case the trial commenced. We get a call in the morning of the trial or the Court was advised the morning of the trial that he has engaged in some conduct voluntarily which . . . prevented him from attending the trial. Given these circumstances, I think [defendant] voluntarily engaged in conduct that resulted in him being absent from his own trial, and I am going to proceed with this trial in his absence, and [defense counsel's] request for a mistrial is denied, request for a continuance is denied, but I think there's an adequate record here to preserve any issues that might arise on appeal.

"Anything else, Counsel? [¶] . . . [¶]

"[DEFENSE COUNSEL]: Just one, he may have voluntarily used some drugs. I think the Court is making a big assumption that he continued to voluntarily use drugs to the extent that he needed medical treatment. That portion we really don't know.

> "[PROSECUTOR]: Well, except that he did not go. The initial call for medical came at 7:00 a.m. They responded. He refused medical. He was conscious and coherent, according to Officer Norris.
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> "It's now at 9:25 when he is told he needed to be in court or the judge was going to continue with the trial, did he then decide he wanted to go to the hospital some two and a half hours after the first call for medical.
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> "THE COURT: All right. There's no evidence that somebody forcibly injected or caused [defendant] to . . . use controlled substances to put him in the condition he was in this morning when his mother made the phone call to your office, [defense counsel]. His . . . intentional use of controlled substances is a voluntary act which caused this circumstance. And I consider that an intentional act which caused him to be absent from the court. I think he waived his right to be present at his trial based on these circumstances, and we will proceed with the trial."

The trial court permitted defense counsel to contact defendant's mother to inform her the trial was proceeding. The jury was brought in, and the court instructed jurors not to consider the fact defendant was absent or the reason for his absence at all in their deliberations. The prosecutor then gave her opening statement and began presenting her case. At one point, a juror submitted a written question asking defendant's age. At sidebar, the court commented that it assumed defense counsel would be calling defendant's mother to testify at trial, and so she could answer that question. Defense counsel responded that the mother had asked about that, and he had told her that her testimony was going to be very limited and so he thought it was more important for her to stay with her son in the hospital.[8]

The People rested shortly after 11:00 a.m. At sidebar, the court offered to take a recess if defense counsel wanted to have defendant's mother come in. Defense counsel suggested they break, go over jury instructions, return at 1:15 or 1:30 that afternoon, "and

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[8] The prosecutor had moved, in limine, to exclude as irrelevant the mother's proffered testimony that the person on the security video was not defendant. The court ruled the testimony would be allowed, but cautioned that other matters were irrelevant, and if the mother disclosed those areas, the prosecutor had impeachment testimony available.

then if they're not here, then I will rest and then we will do closing. [¶] . . . [¶] . . . I said if she's done at the hospital, bring him to the courtroom. His testimony should be around 11:15 or 1:15, depending upon how quickly we move. The mom said okay. She said she will text me . . . ." The court released the jury until 1:15 p.m.

The court and counsel then reviewed the jury instructions. When they finished, the prosecutor asked if defense counsel had heard from defendant. Counsel responded that he and defendant's mother had been texting, and he had asked if she thought defendant could return at 1:30 and testify. She responded, "Not sure. Possibly, we can definitely try." Counsel stated he would call her during the lunch hour.

After the lunch recess, defense counsel renewed his request for a mistrial in light of the fact defendant was not present and had to go to the emergency room. The renewed motion was denied. This ensued:

> "[PROSECUTOR]: Is [defendant] still in the hospital? I think we should put that on the record. [¶] . . . [¶] . . . It's now — we've given him until 2:00 . . . without doing instruction and argument.
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> "[DEFENSE COUNSEL]: He's not in the hospital any longer. I think he went back home with Mom.
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> "THE COURT: Is that reflected in a text from his mother?
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> "[DEFENSE COUNSEL]: Yes, your Honor.
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> "THE COURT: All right. Well, let the record so reflect we're now five or four minutes to 2:00. And [defendant] is no longer in the hospital, and I gave him certainly an opportunity to appear here at trial and put on any testimony or defense he may have.
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> "[DEFENSE COUNSEL]: Mom said he's in no state to come to court and take the witness stand, whatever that means."

The defense subsequently rested without calling any witnesses. Defendant was present the next day when the jury returned its verdict.

B. Analysis

> "A criminal defendant's right to be personally present at trial is guaranteed under the federal Constitution by the confrontation clause of the Sixth Amendment and the due process clause of the Fourteenth Amendment. It is also required by section 15 of article I of the California Constitution and by sections 977 and 1043. [Citations.][9]
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> "A defendant, however, does not have a right to be present at every hearing held in the course of a trial. [Citations.] A defendant's right to be present depends on two conditions: (1) the proceeding is critical to the outcome of the case, and (2) the defendant's presence would contribute to the fairness of the proceeding. [Citations.] A defendant clearly has a right to be present when witnesses testify at trial. [Citations.]" (*People v. Concepcion* (2008) 45 Cal.4th 77, 81-82, fn. omitted.)

However, the right to be present "is not an absolute one. [Citation.] It may be expressly or impliedly waived. [Citation.] As relevant here, the [United States Supreme Court] has stated that 'where the offense is not capital and the accused is not in custody, the prevailing rule has been, that if, after the trial has begun in his presence, he voluntarily absents himself, this does not nullify what has been done or prevent the completion of the trial, but, on the contrary, operates as a waiver of his right to be present and leaves the court free to proceed with the trial in like manner and with like effect as if he were present.' [Citation.]" (*People v. Espinoza* (2016) 1 Cal.5th 61, 72, italics omitted (*Espinoza*), quoting *Diaz v. United States* (1912) 223 U.S. 442, 455.)

Section 1043, subdivision (b)(2), "has adopted this majority rule as state law." (*Espinoza, supra,* 1 Cal.5th at p. 72.) It provides: "(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: [¶] . . . [¶] (2) Any prosecution for an offense which is not punishable by death in which the

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9 Section 977 specifies the proceedings at which a defendant in a criminal case must be present, and sets out the means by which such defendant may expressly waive his or her right to be present. Because defendant here was present when trial began, section 1043, not section 977, governs. (*People v. Gutierrez* (2003) 29 Cal.4th 1196, 1204.)

defendant is voluntarily absent." (§ 1043.) Thus, voluntary absence constitutes a waiver of the right to be present at trial. (*People v. Howard* (1996) 47 Cal.App.4th 1526, 1538, disapproved on another ground in *People v. Fuhrman* (1997) 16 Cal.4th 930, 947, fn. 11.)

" ' "[I]f a defendant at liberty remains away during his trial the court may proceed provided it is clearly established that his absence is voluntary. He must be aware of the processes taking place, of his right and of his obligation to be present, and he must have no sound reason for remaining away." ' [Citation.] Under such circumstances, . . . ' "there can be no doubt whatever that the governmental prerogative to proceed with a trial may not be defeated by conduct of the accused that prevents the trial from going forward." ' [Citation.]" (*Espinoza, supra,* 1 Cal.5th at pp. 73-74.) " 'Neither in criminal nor in civil cases will the law allow a person to take advantage of his own wrong. And yet this would be precisely what it would do if it permitted an escape from prison, or an absconding from the jurisdiction while at large on bail, during the pendency of a trial before a jury, to operate as a shield.' " (*Diaz v. United States*, *supra,* 223 U.S. at p. 458.)

"The role of an appellate court in reviewing a finding of voluntary absence is a limited one. Review is restricted to determining whether the finding is supported by substantial evidence. [Citation.]" (*Espinoza, supra,* 1 Cal.5th at p. 74.)[10]

The record at the time of the trial court's ruling clearly supports that court's implied findings defendant was aware of the processes taking place and knew he had a right and obligation to be present. We conclude it also adequately supports the trial court's express finding defendant voluntarily absented himself from trial.

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10 In *People v. Waidla* (2000) 22 Cal.4th 690, 741, the California Supreme Court stated that an appellate court applies the independent or de novo standard of review to a trial court's *exclusion* of a criminal defendant from all or part of a trial. Voluntary absence by a defendant and exclusion by a court are not the same.

Defendant intentionally ingested illicit drugs in an amount sufficient to cause a suspected overdose.[11] This was not the first time his physical condition purportedly prevented him from attending trial. On this occasion, he refused to be transported by ambulance and agreed to come to court. It was only after he was offered transportation to court and defense counsel said something about going to the hospital, that defendant decided he wanted to go to the hospital. His condition was not such that he needed to be examined and treated immediately, as evidenced by the fact he did not go to the hospital until approximately two and a half hours after medical personnel and Norris responded to his home and, once at the hospital, was waiting in the emergency room instead of being quickly attended to. After he was seen at the hospital, he returned home instead of coming to court. Although his mother reported he was in no condition to come to court and take the witness stand, even defense counsel did not know what that meant. For instance, he may have been physically ill, medicated, or simply tired after a long night.[12]

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[11] Defendant says the record reflects he had serious substance abuse issues, and the trial court was aware of this fact. The portions of the record to which he cites, however, are the probation officer's report and sentencing transcript. The record does not demonstrate what, if anything, the court knew about the subject at the time defendant failed to appear. Defendant says there was no reason to believe he intentionally overdosed in order to delay or frustrate court proceedings. (Cf. *People v. Rogers* (1957) 150 Cal.App.2d 403, 412-413.) If he had serious substance abuse issues, however, it would be reasonable to conclude he was experienced in his drug use. This was not a situation in which, for example, defendant had an unforeseen reaction to a drug prescribed to him by a physician.

[12] We recognize the trial court relied, for the most part, on statements and representations made by the attorneys essentially in the form of offers of proof. Strictly speaking, offers of proof are not evidence. (*Mundell v. Department of Alcoholic Beverage Control* (1962) 211 Cal.App.2d 231, 239.) Here, however, both attorneys made representations of fact as officers of the court. Neither objected to the other doing so, contradicted the other's representations, or objected to the trial court relying on those representations. " '[A]ttorneys are officers of the court, and " 'when they address the judge solemnly upon a matter before the court, their declarations are virtually made under oath.' " ' [Citation.]" (*People v. Mroczko* (1983) 35 Cal.3d 86, 112, disapproved on another ground in *People v. Doolin* (2009) 45 Cal.4th 390, 421, fn. 22.) Because

"Where disabilities resulting in either physical or mental absence during the course of trial have been self-induced, the courts have characterized the resulting absences as voluntary and have been uniformly unsympathetic to defendant's due process claims. [Citations.]" (*People v. Cox* (1978) 81 Cal.App.3d Supp. 1, 4-5, fn. omitted.) "The defendant, by his own actions, induced the condition existing [on the second] day of the trial. This amounted to a waiver of the right to be . . . present granted by section 1043 . . . . If this were not the rule, many persons, by their own acts, could effectively prevent themselves from ever being tried." (*People v. Rogers*, *supra*, 150 Cal.App.2d at p. 415.)

At least one federal court has held that the mere voluntary ingestion of drugs — even when it results in a near-lethal overdose — "is not sufficient for a finding of voluntary absence so as to waive a basic constitutional right." (*U.S. v. Latham* (1st Cir. 1989) 874 F.2d 852, 858.)[13] There does not appear to be universal agreement on this point. (See *U.S. v. Crites* (8th Cir. 1999) 176 F.3d 1096, 1097-1098; *U.S. v. Davis* (5th Cir. 1995) 61 F.3d 291, 302-303; see also *U.S. v. Latham*, *supra*, 874 F.2d at p. 865 (conc. opn. of Selya, J.); *People v. Price* (Colo.Ct.App. 2010) 240 P.3d 557, 560-561; *Yancey v. State* (Ga.Ct.App. 1995) 464 S.E.2d 245, 245-246.) We do not find *Latham*'s statement persuasive under the facts of the present case. Defendant's absence was not occasioned by circumstances that were fortuitous or beyond his control. Rather,

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counsels' representations were neither contradicted nor objected to, we cannot fault the trial court for relying on them in determining whether defendant's absence was voluntary. (See *People v. Mirenda* (2009) 174 Cal.App.4th 1313, 1331-1332.)

13 "[W]e are not bound by decisions of the lower federal courts, even on federal questions. [Citations.]" (*People v. Crittenden* (1994) 9 Cal.4th 83, 120, fn. 3.) Nevertheless, they provide some guidance (see *People v. Cleveland* (2001) 25 Cal.4th 466, 480), inasmuch as rule 43(c) of the Federal Rules of Criminal Procedure (18 U.S.C.) contains language similar to subdivision (b) of section 1043.

defendant engaged in conduct designed to alter his physical and mental states, despite knowing he was required to be in court in a matter of hours.

Defendant presented no good reason for his actions. There was no evidence he was unable to control the timing or amount of his drug ingestion.[14] Although the trial court's initial determination defendant was voluntarily absent was not conclusive (*People v. Connolly* (1973) 36 Cal.App.3d 379, 384-385), that court had no sua sponte duty to reconsider its ruling once defendant appeared the next day (*People v. Concepcion*, *supra*, 45 Cal.4th at p. 84). "It was up to defendant to move for reconsideration, which he failed to do. Even now he has failed to identify any new information that would have tended to undermine the trial court's determination of voluntary absence." (*Id*. at pp. 84-85.)[15]

"[O]ur conclusion that defendant's voluntary absence operated to waive his constitutional right to be present at trial and permitted continuation of the trial does not end our inquiry regarding the propriety of the trial court's decision to proceed with the

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[14] Even if he could not, we decline to countenance intentional illicit drug use as a " ' "sound reason" ' " (*Espinoza*, *supra*, 1 Cal.5th at p. 74) for failing to appear at trial. To do so would mean any defendant could manipulate when — or even if — he or she were tried simply by means of such drug use. That the orderly processes of justice would be obstructed by such a result is obvious. " 'No defendant has a unilateral right to set the time or circumstances under which cases will be tried. . . .' " (*U.S. v. Davis*, *supra*, 61 F.3d at p. 302.)

[15] After the jury returned its guilty verdict, the court and counsel discussed whether defendant should be remanded into custody pending sentencing. Defense counsel asked that he be permitted to continue his recognizance release so his family could get him into a drug rehabilitation program. Counsel observed: "Aside from last April when he had the stomach flu, he has made all court appearances except for yesterday, which might have been a moment of panic." The court remanded defendant, observing: "His prior failure to appear from illness, the Court accommodated. Court established a record in the case as to why it continued in the defendant's absence. He voluntarily ingested controlled substances too, which is voluntary conduct that caused him to absence [*sic*] himself from this trial, whether he's able to be here or not, he could have appeared yesterday because he was home according to the text message [defense counsel] received, . . . and could have been in court."

trial in the absence of defendant . . . . Section 1043[, subdivision](b)(2) states that a defendant's voluntary absence 'shall not prevent' the trial from continuing, but it does not require it. Accordingly, the decision whether to continue with a trial in absentia under the statute or to declare a mistrial rests within the discretion of the trial court. [Citation.]" (*Espinoza, supra*, 1 Cal.5th at pp. 75-76; see *People v. Hines* (1997) 15 Cal.4th 997, 1038-1039.) While deferential, the abuse of discretion standard is not empty. "[I]t asks in substance whether the ruling in question 'falls outside the bounds of reason' under the applicable law and the relevant facts [citations]." (*People v. Williams* (1998) 17 Cal.4th 148, 162.)

Under the circumstances known to the court, "[t]he court was not required to reward defendant's voluntary choice to absent himself by granting a mistrial. [Citation.]" (*Espinoza, supra*, 1 Cal.5th at pp. 77-78.) A much closer question is presented by defendant's claim the court should have acceded to his request to continue the trial to the following morning. (See *U.S. v. Latham, supra*, 874 F.2d at p. 859; *id*. at p. 866 (conc. opn. of Selya, J.).) We need not decide whether the trial court erred by refusing to do so, however, since any such error was harmless.

"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, [24]. [Citations.] Error under section[] . . . 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.)' [Citations.]" (*People v. Davis* (2005) 36 Cal.4th 510, 532-533.)

The security camera video and body camera recording were played for the jury in open court, and jurors had access to those exhibits during deliberations. Nothing prevented defense counsel from calling defendant's mother to testify that defendant was not the person shown in the security camera video; rather, counsel made a choice not to

do so. Although defendant's absence meant jurors could not compare defendant to the person in the video as the video was played in court, this circumstance was of little, if any, import. As defense counsel told the jury: "[F]ortunately everyone here got to see my client here Wednesday morning. You got to see him in person. You also got to see him on the interview with the police officer. You know what he looks like. [¶] I would . . . invite you to look at that video of the person that's removing this window screen. I would submit to you that it's not my client, doesn't look like him at all. And the picture quality is so poor you couldn't identify who it is regardless."[16]

Because defendant did not testify, he did not explain his admissions to Bowly. Defendant could not have denied making the statements, however, and the body camera recording — which was of good quality, as to both the audio and video portions — adequately allowed jurors to assess their equivocal nature, just as the jurors would have had to do if defendant had testified he was pressured by Bowly and did not really place himself at the scene of the crime. (See *People v. Davis, supra,* 36 Cal.4th at pp. 533-534.) Defense counsel emphasized this point, arguing:

> "Now, you saw the video with the police officer. I, again, would also invite you to watch that video at least twice. I think you clearly see a young man who is nervous. He's scared, and the word dumbfounded comes to mind, when he is trying to answer that policeman's questions. I think it's important to watch that video twice and that the second time you watch it, halfway through you will start seeing a transition of [defendant]. Instead of just saying stuff like, I don't know, yeah or looking down and folding his arms, he starts saying stuff to agree with the policeman — I — well, I guess that could have happened, maybe I was high. But he's not saying to the policeman, yes, on June 19th, five weeks ago, I did a burglary over here . . . . He's not saying anything close to that.
>
> "One of the jury instructions . . . says consider with caution any statement made by the defendant tending to show his guilt unless the statement was written or otherwise recorded. . . . And again, even though

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16 We have viewed the security camera video. It is grainy and the person's full face is never shown.

> it's recorded, you should treat it with caution. Is this kid really saying, hey, I am guilty or is he just trying to appease the police officer? Well, there's two police officers there at the time. Is he trying to appease the police officer so he can be on his way or is he actually saying, yeah, I am guilty of a burglary? I submit to you, I do not hear him saying I am guilty of a burglary."

The jury appears to have deliberated for approximately five and a half to six hours. They asked for a transcript of the body camera recording (none was available) and to be allowed to view the portion of the recording not shown in open court (they were permitted to watch the first 35 seconds, as the court found the rest, which simply showed defendant standing around and waiting to enter the jail, irrelevant). They obviously carefully considered all the evidence. At no time was any disagreement among them reported to the court.

After considering the record in its entirety, we conclude that if the trial court abused its discretion by proceeding with trial in defendant's absence, the error was harmless beyond a reasonable doubt. (*Chapman v. California*, *supra*, 386 U.S. at p. 24; see *Sullivan v. Louisiana* (1993) 508 U.S. 275, 279.) It follows that it is not reasonably probable a result more favorable to defendant would have been reached absent the error. (*People v. Davis*, *supra*, 36 Cal.4th at p. 534.)

DISPOSITION

The judgment is affirmed.

_____
DETJEN, J.

I CONCUR:

_____
POOCHIGIAN, Acting P.J.

SMITH, J., Dissenting.

The trial court conducted trial in absentia in this case, in which Ramirez, a 19 year old with no criminal history, was charged with burglary, a strike offense, and convicted of attempted burglary, also a strike offense.

The trial court was notified, on the second day of trial, that Ramirez was not present in court because his mother had found him "nonresponsive" and "nodding off" that morning. Suspecting he had overdosed on drugs, she had taken him to an emergency room for treatment. The court did not hold a hearing to ascertain all the facts concerning Ramirez's absence. Nor did the court consider the question whether, in ingesting the drugs, Ramirez had intended to waive his constitutional rights to be present at trial and to testify in his own defense. Rather, the court summarily determined, on an inadequate record, that Ramirez was voluntarily absent and could thereby be deemed to have waived these constitutional rights, rights that are basic to a fair adversarial system.

The trial court was aware, having been advised by defense counsel, that Ramirez had every intention of testifying in his own defense at trial. Defense counsel repeatedly requested an overnight continuance for this purpose. The court, without so much as inquiring whether an overnight or other brief continuance would prejudice the People, summarily rejected the defense request for a continuance and convened the trial immediately after finding Ramirez was voluntarily absent.[1] The trial in absentia commenced before 10:00 a.m. that same morning, very shortly after the situation was first brought to the court's attention. The proceedings before the jury—opening statements, evidence, and closing arguments—took about an hour and a half. The case was submitted to the jury by 3:00 p.m. the same day.

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[1] In contrast, on the previous day, when defendant was present in court, the trial court ended proceedings just before noon, evidently because the court had other commitments.

Notwithstanding the quick trial, the jury deliberated for almost six hours, spread over two days, without the benefit of Ramirez's obviously critical testimony. Ultimately, the jury acquitted Ramirez of the charged offense (burglary) but convicted him of a lesser included offense (attempted burglary), which is also a strike. The trial in absentia, while notably short, was severely consequential for Ramirez as it resulted in a felony, and a strike, conviction.

The majority affirms the judgment. The majority concludes the trial court properly found, based merely on the fact of Ramirez's drug overdose, that he was voluntarily absent. The majority then sidesteps resolving, on the merits, the question whether the court abused its discretion in rejecting the defense's request for an overnight continuance and immediately convening trial. Rather, the majority conveniently finds that any error in this regard was harmless beyond a reasonable doubt. The majority's decision ignores the fundamental importance, in our system of justice, of a defendant's constitutional rights to be present at his own trial and to testify in his own defense. I therefore dissent.

I would reverse the judgment in this matter for multiple reasons. First, the trial court misinterpreted and misapplied the applicable law in finding that, in overdosing on drugs on one occasion during the entire pendency of the case, Ramirez was voluntarily absent from trial. Second, without a hearing, the record was insufficient for the trial court to find that Ramirez's ingestion of drugs reasonably supported an inference that he intended to waive his fundamental constitutional right to be present at his trial. Third, the trial court's summary rejection of the defense request for an overnight continuance—when the purpose of the request was to permit Ramirez to exercise his constitutional rights to be present at his trial and to testify before the jury—was an abuse of discretion. Finally, the trial court's erroneous denial of Ramirez's constitutional rights—rights that are the foundation of our adversarial system—was prejudicial under any standard of prejudice.

A. Trial Court Improperly Found Ramirez was Voluntarily Absent

(1) Applicable Law

The federal constitutional right to be present at one's own trial "is rooted in both the due process and confrontation clauses of the Constitution." (*United States v. Latham* (1st. Cir. 1989) 874 F.2d 852, 856 (*Latham*); see, e.g., *United States v. Gagnon* (1985) 470 U.S. 522, 526 ["'[The] presence of a defendant is a condition of due process to the extent a fair and just hearing would be thwarted by his or her absence.'"]; *Rushen v. Spain* (1983) 464 U.S. 114, 117 (*Rushen*) [the right to personal presence at all critical stages of the trial is a fundamental right of each criminal defendant]; *People v. Gonzales* (2012) 54 Cal.4th 1234, 1254 [""'Due process guarantees the right to be present at any 'stage that is critical to [the] outcome' and where the defendant's 'presence would contribute to the fairness of the procedure.'"""]; *People v. Butler* (2009) 46 Cal.4th 847, 861, quoting *Kentucky v. Stincer* (1987) 482 U.S. 730, 744-745, fn. 17 ["Under the Sixth Amendment, a defendant has the right to be personally present at any proceeding in which his appearance is necessary to prevent 'interference with [his] opportunity for effective cross-examination.'"].)

The right to be present is not absolute. Although the right to be present for the commencement of trial arguably cannot be waived (see *Crosby v. United States* (1993) 506 U.S. 255, 258-262), the right to be present thereafter is waived if (1) the defendant is disruptive (*Illinois v. Allen* (1970) 397 U.S. 337, 343; *King v. Superior* Court (2003) 107 Cal.App.4th 929, 943), or (2) the defendant is voluntarily absent (*Taylor v. United States* (1973) 414 U.S. 17, 18-20 (*Taylor*); *People v. Espinoza* (2016) 1 Cal.5th 61, 72 (*Espinoza*) ["'operates as a waiver of his right to be present,'" italics omitted]; *People v. Concepcion* (2008) 45 Cal.4th 77, 82, fn. 7 ["the doctrine that a defendant impliedly waives the right of presence by voluntarily absenting himself from trial has been well established … for almost a century"].).

"In determining whether a defendant is absent voluntarily, a court must look at the 'totality of the facts.'" (*People v. Gutierrez* (2003) 29 Cal.4th 1196, 1205 (*Gutierrez*) [noting that "a defendant's express waiver in front of the judge might be the surest way of ascertaining the defendant's choice"].) In addition, courts must indulge every reasonable presumption against the loss of constitutional rights. (*Johnson v. Zerbst* (1938) 304 U.S. 458, 464 (*Zerbst*) ["A waiver is ordinarily an intentional relinquishment or abandonment of a known right or privilege."]; *In re Tahl* (1969) 1 Cal.3d 122, 127 [waiver of constitutional rights is not lightly inferred].) In sum, "[a]s a matter of both federal and state constitutional law … a defendant may validly waive his or her right to be present during a critical stage of the trial" only if "the waiver is knowing, intelligent, and voluntary." (*People v. Cunningham* (2015) 61 Cal.4th 609, 633; see *People v. Lewis* (1983) 144 Cal.App.3d 267, 279 (*Lewis*) [holding that the defendant "by words and conduct … waived his right to be present voluntarily and with full knowledge that the trial was continuing without his presence"]; see also *People v. Wall* (2017) 3 Cal.5th 1048, 1059-1060 [the defendant's waiver of constitutional right to be present at trial was knowing and intelligent where defendant was advised of his right to be present at trial, counsel discussed the waiver with defendant, and defendant personally and expressly waived his right to be present before the court].)

"On appeal the reviewing court must determine, on the whole record, whether defendant's absence was knowing and voluntary." (*People v. Connolly* (1973) 36 Cal.App.3d 379, 385; see *People v. Waidla* (2000) 22 Cal.4th 690, 741 [in so far as the trial court's decision in excluding a criminal defendant from trial "entails a measurement of the facts against the law," an appellate court reviews the decision de novo]; *Gutierrez, supra,* 29 Cal.4th at p. 1202 [same]; but see *Espinoza, supra,* 1 Cal.5th at p. 74 [review of a finding of voluntary absence "is restricted to determining whether the finding is supported by substantial evidence"].)

The trial court's finding that a defendant is voluntarily absent does not, however, end the inquiry. The trial court's decision to proceed with the trial after a finding of voluntary absence is reviewed for abuse of discretion. (*Espinoza, supra,* 1 Cal.5th at pp. 75-76; *Latham, supra,* 874 F.2d at p. 857 [proceeding with the trial when the defendant is voluntarily absent "is within the discretion of the trial judge," to be utilized only in "extraordinary" circumstances].)

(2) Legal Analysis

To recapitulate, this case requires resolution of the following issues: (1) whether Ramirez voluntarily absented himself from his trial; (2) if the absence was voluntary, whether the trial court properly rejected the defense request for an overnight continuance; and (3) to the extent the court erred in making one or both of the above determinations, was the error prejudicial.

I contend the trial court's conclusion that Ramirez was voluntarily absent from trial was erroneous under both de novo and substantial evidence standards of review. As mentioned, the United States Supreme Court has long held that if a defendant voluntarily absents himself from the courtroom during trial, it "operates as a waiver of his right to be present and leaves the court free to proceed with the trial in like manner and with like effect as if he were present." (*Diaz v. United States* (1912) 223 U.S. 442, 455.) In other words, a determination that the defendant is voluntarily absent both reflects and effectuates a finding that he has voluntarily, knowingly, and intelligently waived his constitutional right to be present at his own trial.

Since conducting a trial in the defendant's absence has extremely serious implications, the applicable caselaw appropriately urges trial courts to proceed with extreme caution before concluding the defendant is voluntarily absent. (See, e.g., *United States v. Benavides* (1979) 596 F.2d 137 (*Benavides*) ["the right to be present at one's own trial must be carefully safeguarded"]; *Lewis, supra,* 144 Cal.App.3d at p. 279 [noting "the grave danger" of conducting trial without a defendant's presence].) The caselaw

further clarifies that before finding a defendant voluntarily absent, courts must make an adequate inquiry in order to ascertain whether the defendant intended to waive his right to be present at his own trial. (*People v. Brown* (1951) 102 Cal.App.2d 60, 63 ["the record must show that diligent effort has been made to find the defendant, and the reason for his absence"]; *Espinoza*, *supra*, 1 Cal.5th at p. 78 ["The trial court did not rush to proceed with trial, but recessed for a day while multiple attempts were made to locate defendant."]; *Gutierrez*, *supra*, 29 Cal.4th at p. 1209 [because a "defendant's right to presence is 'fundamental to our system of justice and guaranteed by our Constitution,' … [a] trial court should not 'summarily plung[e] ahead' with trial in a defendant's absence," but must take "reasonable steps to determine that defendant was 'voluntarily absent' before continuing with trial in his absence"]; *Taylor*, *supra*, 414 U.S. at pp. 19-20, fn. 3 ["'[if] a defendant at liberty remains away during his trial the court may proceed *provided it is clearly established* that his absence is voluntary,'" italics added], quoting *Cureton v. United States* (D.C. Cir. 1968) 396 F.2d 671, 676.)

In determining whether a defendant is voluntarily absent, the touchstone of the analysis is whether the defendant's absence was intended to thwart the pending proceedings. (*Lewis*, *supra*, 144 Cal.App.3d at p. 276 ["The defendant's constitutional right to be present at his trial can be surrendered … if it is abused for the purpose of frustrating the trial."]; *Gutierrez*, *supra*, 29 Cal.4th at pp. 1204-1205 [restrictions on the defendant's right to be present at his trial were "'designed to prevent the defendant from intentionally frustrating the orderly processes of his trial by voluntarily absenting himself'"]; *People v. Pigage* (2003) 112 Cal.App.4th 1359, 1369 (*Pigage*) ["'A crucial question must always be, "Why is the defendant absent?"'"]; *United States v. Partlow* (1970) 428 F.2d 814, 816 (*Partlow*) ["we cannot presume the waiver of constitutional rights"].)

The court ruled Ramirez was voluntarily absent because his absence was engendered by an apparently voluntary decision to ingest drugs. However, a defendant

may ingest drugs for any number of reasons, including reasons that have nothing to do with his trial. It follows that, when a defendant is absent because of a drug overdose, the court cannot simply assume, without more, that the defendant took the drugs for the purpose of thwarting or frustrating the legal proceedings. In other words, a defendant's failure to appear for trial because he overdosed on drugs does not mean, in every case, that in ingesting the drugs he intended to waive his right to be present at trial and was, in turn, voluntarily absent. Therefore, the notion—adopted by the trial court and the majority here—that a defendant who "voluntarily took drugs" is "*ipso facto* voluntarily absent from the trial," is simply not tenable. (*Latham*, *supra*, 874 F.2d at p. 858.) On the contrary, the voluntary ingestion of drugs, by itself, "is not sufficient for a finding of voluntary absence so as to waive a basic constitutional right." (*Id.* at p. 858.)

In ruling Ramirez was voluntarily absent, the trial court improperly rushed to judgment, as the record did not support even a prima facie showing of voluntary absence. There was no evidence before the trial court as to why, for what purpose, and under what circumstances, Ramirez ingested the drugs. Ramirez could very well have taken the drugs to calm himself or to fortify himself, so as to enable him to attend the proceedings, rather than in a bid to avoid the trial and relinquish his right to testify in his own defense. (See *Latham*, *supra*, 874 F.2d at p. 858 [noting that the defendant, who missed a part of the trial because of a cocaine overdose, plausibly explained that "he ingested the cocaine to calm himself because he was very nervous about the trial, and fully intended to attend the trial"].) Although the majority seems unconcerned about motivation and assumes *any* failure to appear arising from ingestion of drugs sufficiently demonstrates voluntary absence, this facile approach ignores the fact that people ingest drugs, or consume alcohol for that matter, for a variety of reasons, including physiological and psychological reasons that are not fully understood and are the subject of scientific study.

The trial court did not consider the question whether, in ingesting the drugs, Ramirez had intended to waive his constitutional rights to be present at trial and to testify

in his own defense. Furthermore, without holding a hearing to further develop the record, the trial court simply did not have sufficient information to determine whether Ramirez took the drugs to thwart the judicial proceedings that were underway, thereby waiving his right to be present, or whether he took the drugs for other reasons. Thus, without an adequate hearing, the court could not properly have deemed Ramirez's use of drugs to constitute a voluntary and intelligent waiver, on his part, of his right to be present at his trial.[2] (See *Gutierrez*, *supra*, 29 Cal.4th at p. 1206 ["a trial court should take reasonable

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[2] The trial court relayed a warning through a police officer to the effect that Ramirez was required to show up in court in 15 minutes or the trial would proceed without him. However, Ramirez was under the influence of heroin, a potent drug (his mother said he was "nodding out" and "unresponsive") and defense counsel pointed out Ramirez suffered from learning disabilities. Given the undeveloped record in the absence of a hearing, it remains unclear whether Ramirez understood the warning or was in any condition to do anything about it. His subsequent absence therefore cannot be said to represent a knowing, intelligent, and voluntary waiver of his constitutional and statutory rights to be present at his own trial.

The trial court also noted that Ramirez refused medical treatment at home from paramedics, but the record shows that paramedics were with Ramirez for approximately two hours until his mother drove him to the emergency room. Again, in the absence of a hearing, it is unclear whether Ramirez refused all forms of assistance from paramedics or merely refused transport to the hospital by ambulance. Similarly, we do not know what, and how much, assistance the paramedics actually rendered. The majority indulges in conjecture about Ramirez's levels of intoxication and comprehension, as well as his medical condition and the necessity of treatment, since these issues are not clarified in the undeveloped record. The majority's efforts serve only to underscore the limited nature of the record and highlight the critical importance of a hearing to ascertain the relevant facts. In the absence of a hearing, the court was reduced to speculation. In sum, the trial court did not have the requisite information to make a ruling affecting Ramirez's most basic constitutional rights and the fairness of the proceedings in a case that resulted in a felony, and a strike, conviction.

Notably, the court did not hold a hearing even to consider the comprehensive testimony of the police officer the court itself dispatched to Ramirez's house, who had personally interacted with Ramirez. In addition, Ramirez's mother and the attending paramedics could have testified at the hearing. The failure to hold a hearing is particularly concerning because the court was kept apprised of Ramirez's whereabouts throughout the day, indicating Ramirez did not want to waive his constitutional rights to be present at trial and to testify in his own defense. Had the court delayed proceedings

steps to ensure that being absent from trial is the defendant's choice"]; *Latham*, *supra*, 874 F.2d at pp. 858-859 [trial court's finding that defendant's voluntary ingestion of cocaine, by itself, amounted to a voluntary waiver of his constitutional right to be present at trial was "clearly erroneous"]; *Zerbst*, *supra*, 304 U.S. at p. 464 ["A waiver is ordinarily an *intentional* relinquishment or abandonment of a known right or privilege." (italics added)]; *Lewis*, *supra*, 144 Cal.App.3d at p. 277 ["'Defendant's constitutional right to be present at trial is involved and consequently … the appropriate test [is] that defendant's absence was knowing and voluntary.'"].)

Nonetheless, that's exactly what the court did. It held the mere fact that Ramirez had ingested drugs to an extent that prevented him from timely coming to court meant, by itself, that Ramirez was voluntarily absent. However, as explained above, Ramirez may have taken the drugs for any number of reasons, perhaps even to facilitate his attendance at his own trial. Thus, the court's finding that Ramirez was voluntarily absent reflects a misinterpretation and misapplication of the applicable law. (See *Zerbst*, *supra*, 304 U.S. at p. 464 ["courts must indulge every reasonable presumption against the loss of constitutional rights"]; *Partlow*, *supra*, 428 F.2d at p. 816 ["we cannot *presume* the waiver of constitutional rights," italics added].) In addition, on the limited record that exists, the court's finding is unsupported by evidence. Thus, the ruling is improper under both the de novo and substantial evidence standards of review. Furthermore, since the court misinterpreted the law in ruling that ingestion of drugs automatically meant that Ramirez had waived his constitutional right to be present at his trial, it was futile for defense to request reconsideration of the initial ruling or to bring a motion for new trial.

The majority points to the rule that, "[i]f a defendant at liberty remains away during his trial the court may proceed provided it is clearly established that his absence is

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for a few hours and scheduled an afternoon hearing, Ramirez potentially could have explained his intentions telephonically, after the effect of the drugs was sufficiently mitigated.

voluntary. He must be aware of the processes taking place, of his right and of his obligation to be present, and he must have no sound reason for remaining away." (*Taylor, supra*, 414 U.S. at p. 19, fn. 3; see *Espinoza*, *supra*, 1 Cal.5th at pp. 73-74.) Although here the court did not hold a hearing to develop an adequate record, the majority states, "If [Ramirez] had serious substance abuse issues … it would be reasonable to conclude he was experienced in his drug use." (Maj. opn. *ante*, at p. 13, fn. 11.) The majority further posits, "There was no evidence he was unable to control the timing or amount of his drug ingestion." (Maj. opn. *ante,* at p. 15.) The majority concludes: "Even if he could not, we decline to countenance illicit drug use as a '"'sound reason'"' (*Espinoza*, *supra*, 1 Cal.5th at p. 74) for failing to appear at trial. To do so would mean any defendant could manipulate when—or even if—he or she were tried simply by means of such drug use." (Maj. opn. *ante,* at p. 15, fn. 14.)

There are several problems with the majority's analysis. First, the rule cited above states, "'[i]f a defendant at liberty remains away during his trial the court may proceed provided it is clearly established that his absence is voluntary.'" (See *Taylor*, *supra*, 414 U.S. at p. 19, fn. 3.) A determination that the defendant's absence is voluntary requires an analysis whether it can reasonably be inferred from the circumstances that he intended to waive his fundamental right to be present at his trial. The majority does not analyze this issue, declaring instead: "we decline to countenance illicit drug use as a '"'sound reason'"' … for failing to appear at trial." (Maj. opn. *ante,* at p. 15, fn. 14.) However, the admonition that, before finding a defendant to be voluntarily absent, the court must ascertain that the defendant had "'no sound reason for remaining away'" is meant to ensure proper consideration of the question whether a waiver of constitutional rights may reasonably be inferred under the circumstances. It is not meant to be used as a cudgel to force a finding of voluntary absence in the face of evidence that the defendant did not intend to waive his fundamental constitutional right to be present at trial.

Here, the question of voluntary absence would best have been resolved at an appropriate hearing. Even in the absence of a hearing, the limited, existing record makes clear that Ramirez did not intend to waive his constitutional rights to be present at trial and to testify in his own defense. On the morning when Ramirez was found voluntarily absent, counsel and the court were apprised of Ramirez's condition and whereabouts, in advance of the time set for trial. Specifically, Ramirez's mother was in contact with defense counsel in the early hours of the morning. She informed him that the police and paramedics had been called to the house because she suspected Ramirez had overdosed on drugs, as he was "nonresponsive" and "nodding off." When the trial court sent a police officer to Ramirez's house, the officer also told the court that Ramirez was under the influence of drugs. Nonetheless, the court, with the assistance of the police officer, telephonically conveyed to Ramirez that the court expected him to appear in court in 15 minutes and Ramirez said he would comply. Ultimately, however, Ramirez went to the emergency room with his mother (who evidently determined it was necessary for Ramirez to obtain medical attention).[3] After Ramirez was treated, his mother—who had maintained regular contact with defense counsel throughout the day—advised defense counsel that Ramirez was not in a condition to take the witness stand that day.

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3 Before the court ruled that Ramirez was voluntarily absent, defense counsel made his record. He stated: "When we spoke to [the officer dispatched to Ramirez's house by the court], [he] clearly indicated that the defendant was [Health and Safety Code section] 11550, being under the influence of drugs." Counsel added: "In speaking to the mother, she said that [Ramirez] was nodding out and being conscious [*sic*: unconscious] and nonresponsive, and she said she was going to try to take him to the hospital. Then on the last call she said she was taking him out to the car to take him to the hospital. This latest phone call says that she was successful in getting him to the car." Counsel continued: [Ramirez] is 19 years old. He does have some learning disabilities. So a lot of things he says on the phone, your Honor, cannot be taken at face value. [¶] And also if he's under the influence of drugs, I think he is likely to say anything to the policeman that was at his home. Therefore, I will suggest we continue the case until tomorrow 8:30 [a.m.] or declare a mistrial."

Significantly, Ramirez never told the police officer dispatched by the court that he did not want to attend his trial. Defense counsel, while concerned for Ramirez's health in the moment, was also confident Ramirez would appear in court to testify in his own defense upon recovery, in all likelihood the very next day.[4] Thus, the limited record before the court more reasonably suggested that Ramirez wanted to attend his trial but was unable to on account of his intoxicated condition. I disagree with the majority's conclusion that, under these circumstances, Ramirez nevertheless was voluntarily absent because the ingestion of drugs automatically operates as a voluntary and intelligent waiver of constitutional rights.

The majority next expresses concern that a finding to the contrary "would mean any defendant could manipulate when—or even if—he or she were tried simply by means of such drug use." (Maj. opn. *ante*, at p. 15, fn. 14.) However, the majority forgets that courts must "balance a felony defendant's constitutional and statutory right to be present at trial with the society's interest in the orderly process of [the] court." (*Pigage*, *supra*, 112 Cal.App.4th at p. 1369.) Furthermore, as mentioned above, "[i]n determining whether a defendant is absent voluntarily, a court must look at the 'totality of the facts.'" (*Gutierrez*, *supra*, 29 Cal.4th at p. 1205.) It is notable that Ramirez had made all court appearances during the pendency of the matter, except for one instance in which counsel and the court were timely apprised that he had the flu and was vomiting. As to the latter instance, the defendant appeared in court the very next day, with a note certifying that he had been seen at the hospital the previous day. It also bears mention, in this context, that "courts have an 'independent interest' in ensuring that criminal trials are fair and accurate." (*Espinoza*, *supra*, 1 Cal.5th at p. 78.) "That interest is clearly implicated when continuing an ongoing trial in a defendant's absence will result in an empty defense table." (*Ibid*.) Here—given the brevity of the trial, the limited potential for serious

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[4] Ramirez did in fact appear in the court at 8:00 a.m. the very next morning.

disruption of the process, and the fact that Ramirez intended to testify in his own defense—the importance of Ramirez's right to be present at trial outweighed society's interest in orderliness of the proceedings.

The majority supports its contrary decision by citing to an opinion by the Appellate Division of the Los Angeles Superior Court in a *misdemeanor* case, *People v. Cox* (1978) 81 Cal.App.3d Supp. 1 (*Cox*). *Cox*, which is also cited in the People's brief, is not helpful, because as the opinion itself notes, "It is well established that misdemeanor prosecutions do not require a defendant's presence at trial." (*Id*. at p. 5.) In other words, the balancing inquiry regarding voluntary absence works differently in misdemeanor cases as compared to felony cases, because the right to be present weighs far more heavily in felony cases (especially where the defendant is charged with a strike offense).

The majority also cites another case mentioned in the People's brief, *People v. Rogers* (1957) 150 Cal.App.2d 403, 415 (*Rogers*). The *Rogers* court found the defendant—who induced insulin shock in court then refused to eat a lunch provided to him, which would have mitigated the condition—had waived his right to be mentally present at trial. (*Id*. at p. 413 [noting the issue in the case was "whether a defendant in a felony case can waive his right to be mentally present at his trial by voluntarily absenting his mental self after the trial has commenced"].) However, the defendant there had a long history of delaying and obstructing the judicial process and there was evidence he had previously feigned symptoms in court. The trial court had nonetheless accommodated the defendant by granting numerous continuances during the pendency of the matter. (*Id.* at pp. 412-413 [noting the trial court had granted 13 continuances within a seven-month period, "all based on the defendant's claim of his ill health" and despite the existence of "evidence of malingering on the part of the defendant"].) Since the *Rogers* defendant had repeatedly engaged in disruptive incidents in court and, on the day in question, refused to eat a lunch that would have mitigated his condition, the trial court there properly inferred that the defendant was intentionally thwarting the judicial process

and had thereby voluntarily, knowingly, and intelligently waived his right to be present at trial. (*Id.* at p. 413 ["It is a reasonable inference from the record that the state of affairs existing on that afternoon was intentionally brought on by defendant for the purpose of forcing a continuance."].) In contrast in the instant matter, in the absence of a hearing, the record does not show that Ramirez intentionally overdosed on drugs for the purpose of forcing a continuance. Given its unique facts, *Rogers* does not apply here.

The facts of the instant case most closely resemble those of *Latham,* where the defendant had severely overdosed on cocaine. The trial court "found that the ingestion of cocaine by the defendant constituted a voluntary absence from the trial," but the First Circuit Court of Appeals reversed. (*Latham, supra,* 874 F.2d at p. 858.) *Latham* noted: "While there is some suggestion by defense counsel that Latham may have been forced to take this overdose, it is not necessary to determine the specific circumstances surrounding the ingestion of the cocaine, because even if Latham had voluntarily ingested the cocaine, that does not mean that he voluntarily absented himself from the trial." (*Ibid*.) *Latham* emphasized that a defendant's overdosing on lethal drugs "is markedly different from [him] fleeing to avoid the trial altogether." (*Ibid*.) *Latham* explained, "[i]t defies common sense to maintain" that a sane defendant would overdose on drugs simply to avoid a trial, particularly as "upon recovery [he] would still have to stand trial." (*Ibid*.) Indeed, if a defendant's aim were to avoid trial, rather than ingesting drugs to the point of requiring medical attention, he could simply flee. (See *Lewis, supra,* 144 Cal.App.3d at p. 279 [a defendant who is out of custody and does not want to participate in his trial merely has to walk "out of the courtroom at the first opportunity, never to return"].) *Latham* observed that the "explanation offered by the defendant" there, "that he ingested the cocaine to calm himself because he was very nervous about the trial, and fully intended to attend the trial, seems a more plausible interpretation of the events." (*Latham,* at p. 858.) *Latham* concluded that one instance of voluntary ingestion of drugs

is not, by itself, "sufficient for a finding of voluntary absence so as to waive a basic constitutional right." (*Ibid.*)

Latham's facts and reasoning are more apposite to the instant case than are those of *Cox* and *Rogers,* the cases relied on by the majority. I would apply *Latham* here. Under *Latham*, the trial court erred in finding voluntary absence by equating Ramirez's one-time overdose with a voluntary, knowing, and intelligent waiver of the right to be present at his own trial.

B. Trial Court Improperly Denied Defense's Request for an Overnight Continuance

After validating the trial court's erroneous finding that Ramirez was voluntarily absent, the majority bulldozes through the remaining hurdles to affirming Ramirez's strike conviction for attempted burglary. Specifically, the majority declines to address the critical question whether the trial court abused its discretion in denying the overnight continuance that Ramirez's attorney had requested, to ensure Ramirez could avail his fundamental constitutional rights to be present at his own trial and to testify in his own defense. (See *Espinoza, supra,* 1 Cal.5th at pp. 75-76 [both Pen. Code, § 1043, subd. (b)(2) and Fed. Rules Crim.Proc., rule 43 (18 U.S.C.) provide courts with latitude in deciding whether to proceed with trial after determining the defendant was voluntarily absent]; *United States v. Beltran-Nunez* (5th Cir. 1983) 716 F.2d 287, 291 (*Beltran-Nunez*) [if an inquiry reveals there is a reasonable probability that the absent defendant can be located shortly, and no argument has been made that the government's witnesses will be jeopardized, the trial court abuses its discretion by proceeding with the trial in defendant's absence]; *Latham, supra,* 874 F.2d at p. 857 [proceeding with the trial when the defendant is voluntarily absent "is within the discretion of the trial judge," to be utilized only in "extraordinary" circumstances].)

The majority announces that the "defendant's claim the court should have acceded to his request to continue the trial to the following morning" presents a close question.

(Maj. opn. *ante*, at p. 16.) However, notwithstanding the fact that Ramirez's right to be present at his own trial and his right to testify in his own defense were at stake, the majority proclaims it "need not decide" whether the trial court erred in denying the request (apparently because the trial court's error on this point is undeniable). (Maj. opn. *ante*, at p. 16.) Rather, in an exercise that smacks of expediency, the majority declares that any error on the trial court's part resulting in the denial of Ramirez's fundamental constitutional rights, was harmless beyond a reasonable doubt. In other words, although the majority cannot purport to know what Ramirez would have said in his testimony or how the jury would have assessed his credibility, it concludes that the erroneous preclusion of Ramirez's testimony *conclusively would not have contributed* to the verdict.

I could not disagree more with the approach adopted by the majority. In my view, not only was the trial court's rejection of an overnight continuance patently erroneous under the circumstances, but the court's error was obviously prejudicial, requiring reversal of the judgment and remand for a new trial.

A continuance was clearly warranted here. The case was a straightforward one, with a single defendant and only two government witnesses. There was no argument that delay would jeopardize the testimony of the government witnesses. The evidentiary phase of trial was notably short. Opening statements began before 10:00 a.m. (shortly after the court was notified of Ramirez's overdose and trip to the emergency room). As mentioned, the government had only two witnesses, Daniel (the homeowner), whose testimony was very brief (five pages in the reporter's transcript), and Officer Bowly, whose testimony was also fairly limited (25 pages in the reporter's transcript). The People rested approximately an hour later, before 11:16 a.m. Closing arguments collectively took another 13 minutes. The matter was submitted to the jury before 3:00

p.m. the same day. In sum, the trial was wrapped up within hours of the time that the court was first notified of Ramirez's condition.[5]

Although it was clear the defense intended to call both Ramirez and his mother as witnesses—and there was no indication that a continuance to ensure Ramirez's attendance would have prejudiced the People—the court made no inquiry into the feasibility of delaying proceedings overnight and summarily denied the request for an overnight continuance.[6] I can discern no reason why a short continuance would have prejudiced the People. In the absence of prejudice to the People, and given the importance of the rights at stake—Ramirez's right to be present at his trial and to testify in his own defense—an appropriate continuance was warranted here. The trial court's summary rejection of the defense's request to continue proceedings until the next morning was an abuse of discretion.[7] (See *Beltran-Nunez*, *supra*, 716 F.2d at pp. 290-

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[5] Despite the brevity of the trial, the jury deliberated for approximately six hours over two days and acquitted Ramirez of the charged offense (burglary) but convicted him of a lesser included offense (attempted burglary).

[6] The record reveals defense counsel intended to call both Ramirez and his mother as trial witnesses. Ramirez's mother intended to testify that the person on the surveillance video was not Ramirez. When the trial court proceeded with trial in Ramirez's absence, defense counsel told Ramirez's mother, "I think it's probably more important for you to stay with your son in the hospital." Thereafter, Ramirez's mother stayed in regular contact with defense counsel while Ramirez was treated at the emergency room. She said she would "definitely try" to get Ramirez to court after lunch, so he could testify. When proceedings resumed after the lunch recess, with Ramirez not present, defense counsel moved anew for mistrial, which request was denied by the trial court. Ultimately, at approximately 2:00 p.m., Ramirez's mother informed counsel that she was taking Ramirez home from the emergency room because "he's in no state to come to court and take the witness stand."

[7] The prosecutor had mentioned, at one point, that she was scheduled to be out of town for the afternoon, the next day. However, inconvenience to the prosecutor does not weigh more heavily in the analysis than providing Ramirez an opportunity to exercise his constitutional rights in a felony case. In any event, the court could have conducted the trial in a manner that accommodated the prosecutor's plans or, given the relative brevity

291 [abuse of discretion to proceed with trial where court "made no inquiry into the possibility of delaying the commencement of the trial slightly or of rescheduling the trial in order to obtain [the defendant's] attendance"]; *Benavides, supra*, 596 F.2d at pp. 139-140 [trial court's failure to make "any inquiry into whether or not the trial could soon be rescheduled with the defendants in attendance" was an abuse of discretion]; *Espinoza, supra,* 1 Cal.5th at p. 78 [approving of court taking recess of one day to determine the defendant's whereabouts].)

C. The Erroneous Denial of Ramirez's Rights to be Present at his Own Trial and to Testify in his Own Defense was Prejudicial under Any Standard of Prejudice

The trial court's errors resulted in the denial of Ramirez's right to be present at his own trial as well as Ramirez's right to testify in his own defense. As mentioned, the right to be present at one's own trial is a fundamental constitutional right. (See *Rushen, supra,* 464 U.S. at p. 117 [the right to personal presence at all critical stages of the trial is a fundamental right of each criminal defendant]; *Gutierrez, supra,* 29 Cal.4th at p. 1209 [a "defendant's right to presence is 'fundamental to our system of justice and guaranteed by our Constitution'"].) Just as a defendant's right to be present at his own trial is a fundamental constitutional right, so too is a defendant's right to testify in his own defense. (See *Rock v. Arkansas* (1987) 483 U.S. 44, 51-52 (*Rock*) [the right to testify in one's own defense is rooted in multiple provisions of the United States Constitution, including the Fifth, Sixth, and Fourteenth Amendments].) "In fact, the most important witness for the defense in many criminal cases is the defendant himself." (*Id.* at p. 51 [the right to testify on one's own behalf "is one of the rights that 'are essential to due process of law in a fair adversary process'"]; *In re Oliver* (1948) 333 U.S. 257, 273 [the

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of the trial, another prosecutor from the district attorney's office could have handled the matter.

"opportunity to be heard" in one's own defense is "basic in our system of jurisprudence"].)

Since the court's errors resulted in the denial of Ramirez's constitutional rights, prejudice to the defense as a result of the errors must be evaluated under the *Chapman* standard.[8] (See *People v. Mendoza* (2016) 62 Cal.4th 856, 902 ["'[u]nder the federal Constitution, error pertaining to a defendant's presence is evaluated under the harmless-beyond-a-reasonable-doubt standard set forth in [*Chapman*]'"]; *People v. Davis* (2005) 36 Cal.4th 510, 532 [same]; *People v. Cutting* (2019) 42 Cal.App.5th 344 [same]; *People v. Allen* (2008) 44 Cal.4th 843, 871-872 (*Allen*) [prejudice from improper denial of a defendant's right to testify is evaluated under the *Chapman* standard]; *People v. Johnson* (1998) 62 Cal.App.4th 608, 634-636 [same].) Our Supreme Court has admonished that "'it is only the most extraordinary of trials in which a denial of the defendant's right to testify can be said to be harmless beyond a reasonable doubt.'" (*Allen,* at p. 872, quoting *Martinez v. Ylst* (9th Cir. 1991) 951 F.2d 1153, 1157 (*Ylst*).)

Here, it is undeniable that Ramirez's testimony had exculpatory potential. Had Ramirez testified, he could potentially have told the jury that he did not commit the charged burglary. Not only could he have told his version of events in his own words, he could have directly addressed and neutralized all the prosecution's evidence. We simply do not know all the myriad ways in which Ramirez could potentially have shown his innocence. Had he been able to testify, the jury would also have had the chance to evaluate his credibility, face to face. It is clear Ramirez's right to testify was critical to his defense and essential for purposes of ensuring a fair adversarial process.

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8 *Chapman v. California* (1967) 386 U.S. 18, 24 (*Chapman*) ["before a federal constitutional error can be held harmless, the court must be able to declare a belief that it was harmless beyond a reasonable doubt"].

Importantly, the evidence against Ramirez was not particularly strong. It consisted principally of three categories of evidence: (1) a surveillance video provided by Daniel, the homeowner; (2) the fact that when Officer Bowly encountered Ramirez on the street five weeks after the incident, Ramirez was wearing a hat that matched the hat worn by the suspect in the surveillance video; and (3) a video-recording of Bowly's questioning of Ramirez when Bowly encountered him on the street five weeks after the incident.

Daniel's surveillance video did not conclusively tie Ramirez to the incident. The video shows a person at a window of Daniel's house, but the face of the person is never visible, and the video itself is not particularly distinct. It is not possible to definitively connect the person in the video to Ramirez based on any physical features. Indeed, defense counsel dismissed the video, arguing: "I would also invite you [the jury] to look at that video of the person that's removing this window screen. I would submit to you that it's not my client, doesn't look like him at all. And the picture quality is so poor you couldn't identify who it is regardless." However, contrary to the majority's suggestion, counsel's argument is no substitute for Ramirez's in-court testimony to the effect he was not the person in the video. (See *Green v. United States* (1961) 365 U.S. 301, 304 ["The most persuasive counsel may not be able to speak for a defendant as the defendant might, with halting eloquence, speak for himself."].) Not only would the jury have been able to assess Ramirez's credibility but, had Ramirez been present in court when the surveillance video was played, the jury would also have been able to compare him, *in real time*, with the suspect in the video.

As for the hat, while that was relatively strong circumstantial evidence, it was a mass-produced Raiders hat and did not conclusively tie Ramirez to the incident. Had Ramirez been afforded the opportunity to testify, he could potentially have explained that he obtained his hat well after the date of the charged burglary, or provided other exonerating details.

Finally, the video of Bowly's questioning of Ramirez was similarly not conclusive evidence, in that Ramirez never directly admitted he had burgled Daniel's house on the night in question. Initially, Ramirez denied any knowledge of the incident. However, Bowly continued to press him, stating he was clearly captured on video and had also been positively identified by a thumbprint left on the window. Ramirez responded it was not him and he did not know why his thumbprint was there. After a significant amount of pressing from Bowly, Ramirez said he was probably just looking. Later, Ramirez said he did not remember the incident. He repeated he did not know anything about the incident. He also said he may have been drinking or under the influence of something. During the questioning, Bowly never showed Ramirez a picture of Daniel's house or the surveillance tape; nor did he take Ramirez by the house. *Bowly also acknowledged he was not positive Ramirez knew which incident Bowly was talking about*.

In closing argument, the prosecutor forcefully argued that during the questioning, Ramirez admitted he was the person in the surveillance video. She argued, for example: "And Mr. Ramirez admits that it is him that was there. He doesn't say I never went to that house. Once confronted by the officer, the officer has to confront him a few times. He says, 'I was just looking. I wasn't going to take anything. I was just looking.' Is that reasonable if you're not going to take anything? … You know his intent was to get into that house and take something. There's no other reasonable explanation as to why you try to enter somebody's house at 2:00 or 3:00 o'clock in the morning."

For his part, defense counsel argued: "Now, you saw the video with the police officer. I, again, would also invite you to watch that video at least twice. I think you clearly see a young man who is nervous. He's scared, and the word dumfounded comes to mind, when he is trying to answer that policeman's questions. I think it's important to watch that video twice and that the second time you watch it, halfway through you will start seeing a transition of [Ramirez]. Instead of just saying stuff like, I don't know, yeah or looking down and folding his arms, he starts saying stuff to agree with the policeman –

I – well, I guess that could have happened, maybe I was high. But he's not saying to the policeman, yes, on June 19th, five weeks ago, I did a burglary over here up off Morning Star Drive. He's not saying anything close to that."

As clear from counsels' arguments, Ramirez's statements to Bowly were used against him by the prosecution but the import of the statements was hotly contested by the defense. Furthermore, contrary to the majority's characterization, Ramirez's statements on the recording of the interaction are very difficult to decipher as he is soft spoken and can barely be heard. Indeed, Bowly admitted on the stand that Ramirez was "mostly mumbling." The jury even asked for a transcript of the recording, evidently because of the difficulty of understanding what Ramirez was saying (no transcript was provided--one was not immediately available and defense counsel's request to have one prepared by the court reporter was rejected by the court). The jury also asked to see an additional portion of the recording that was apparently in evidence but not shown during the trial (this request was granted). Clearly, the jury was struggling to interpret the statements and gauge their significance.

Had Ramirez been able to exercise his constitutional right to testify, he would have been able to explain, in his own words, what he conveyed to Bowly during the interaction on the street, five weeks after the date of the charged burglary. (*United States v. Martinez* (5th Cir. 2017) 872 F.3d 293, 300 (*Martinez*) [denial of the defendant's right to testify was prejudicial because he would have told "'his version' of events" from the perspective of the defense].) For example, Ramirez could have explained to the jury that he did not know what Bowly was talking about and made certain seemingly incriminating statements because Bowly pressured him for an explanation. To the extent many of Ramirez's statements to Bowly may be viewed as ambiguous, Ramirez could have clarified what he meant, for the benefit of the jury. (See *United States v. Walker* (5th Cir. 1985) 772 F.2d 1172, 1179 (*Walker*) [denial of the defendant's right to testify was

prejudicial where his testimony had "'exculpatory potential'" and "'would have enhanced [his] defense'"].)

The trial court's decision to proceed with trial in absentia, resulted in the erroneous preclusion of Ramirez's testimony in his own behalf. A defendant's testimony in his own defense at a criminal trial is unique and inherently significant. As the United States Supreme Court has observed: "Even more fundamental to a personal defense than the right of self-representation … is an accused's right to present his own version of events in his own words." (*Rock, supra,* 483 U.S. at p. 52; *Walker, supra,* 772 F.2d at pp. 1178-1179 [defendant's "testimony would be of particular interest to the fact finder because he would be testifying as the alleged active participant in the activities which were the focus of the trial"]; *Martinez, supra,* 872 F.3d at p. 300 [although the government might have impeached his testimony and defense counsel did not believe his testimony was a good idea, the defendant's presence on the stand "'would have afforded him the opportunity to have the jury observe his demeanor and judge his veracity firsthand'"].) Indeed, "[w]here the very point of a trial is to determine whether an individual was involved in criminal activity, the testimony of the individual himself must be considered of prime importance." (*Walker,* at p. 1179.)

"Apart from what [Ramirez] would have testified to, his presence on the stand would have afforded him the opportunity to have the jury observe his demeanor and judge his veracity firsthand." (*Walker, supra,* 772 F.2d at p. 1179.) Our Supreme Court has explained that "issues of credibility are for the jury to resolve" and "[f]or this reason, 'it is only the most extraordinary of trials in which a denial of the defendant's right to testify can be said to be harmless beyond a reasonable doubt.'" (*Allen, supra,* 44 Cal.4th at p. 872; see *Ylst, supra,* 951 F.2d at p. 1157 [only in an extraordinary case can an appellate court conclude "there is not even a reasonable doubt whether the jury might have believed" the defendant's testimony].) The case at bar does not constitute such an "extraordinary" trial.

The jury deliberated for approximately six hours: from 2:55 p.m. until the end of the day on July 6, 2017, and from 8:00 a.m. to noon on July 7, 2017. The jury had the case for far longer than the evidentiary phase and arguments put together, which collectively took only about an hour and a half. As mentioned, the jury asked for a transcript of Officer Bowly's interrogation of Ramirez. The jury also asked to watch an additional portion of the interrogation. The jurors asked other questions as well. Ultimately, the jury acquitted Ramirez of the charged offense of burglary but convicted Ramirez of the lesser included offense of attempted burglary, possibly indicating a compromise verdict. I conclude the trial court's erroneous denial of Ramirez's rights to be present at his trial and to testify in his defense was prejudicial under any standard of prejudice.

For all of the foregoing reasons, I would reverse the judgment and remand for a new trial.

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SMITH, J.