Circuit Court for Baltimore City
Case No.: 112152037-044

UNREPORTED

IN THE APPELLATE COURT

OF MARYLAND*

No. 294

September Term, 2023

DONALD GITTENS

v.

STATE OF MARYLAND

Berger,
Zic,
Alpert, Paul E.
(Senior Judge, Specially Assigned),

JJ.

Opinion by Berger, J.

Filed: September 19, 2024

*This is an unreported opinion. This opinion may not be cited as precedent within the rule of stare decisis. It may be cited for its persuasive value only if the citation conforms to Rule 1-104(a)(2)(B).

During an interview with police, appellant, Donald Gittens, admitted to sexually abusing his six-year-old niece. Following a bench trial in 2015, appellant was convicted of sexual abuse of a minor, two counts of second-degree sex offense, possession of child pornography, and causing/soliciting a minor to engage in child pornography. Thereafter, we reversed his convictions after finding that the trial court failed to follow the requirements set forth in Md. Rule 4-215 when granting appellant's request to discharge counsel. *See Gittens v. State*, No. 1990, Sept. Term, 2019 (Md. App. June 4, 2021) ("*Gittens I*").

Following reversal, appellant was tried once again, this time by a jury. At several appearances prior to and during trial, appellant disrupted the proceedings repeatedly and ultimately, was removed from trial several times. The jury found appellant guilty of sexual abuse of a minor, continuing course of conduct with a child, possession of child pornography, and creation of child pornography. On appeal, appellant presents only one question for our review, namely whether the Court erred in not allowing Appellant to use nineteen (19) of his twenty (20) available peremptory strikes. We hold that it did not, and we shall affirm the judgment of the circuit court.

PROCEDURAL BACKGROUND

As in *Gittens I*, appellant wished to represent himself at trial.[1] These proceedings, however, were marked by considerable disruptions from appellant; at hearings prior to trial, he interrupted the court and prosecutor, failed to comply with court instructions, refused to

[1] Neither appellant's waiver of counsel nor his competency is challenged in this appeal.

raise his hand to be sworn in, and accused the judge of "impersonating a [j]udge[,]" among other interruptions. At one hearing, he plainly declared that he would "not comply[] with the rules because [he's] not consenting to the rules[,]" and at another, the prosecutor noted that appellant had sent her several "explicit letters containing sexual language and acts that he wishes to perform on [her.]"

The Friday before trial, the judge attempted to discuss "procedure in the courtroom next week[,]" but appellant interrupted extensively. The court warned appellant that he may be tried in absentia if his behavior continued:

> THE COURT: In a minute, I'm going to talk a little bit about how -- about procedure in the courtroom next week, but I'm going to --
>
> MR. GITTENS: Procedure?
>
> THE COURT: Hold on. But I'm going to --
>
> MR. GITTENS: Knowledge is power not procedure.
>
> THE COURT: Donald Gittens, you – as party to this proceeding in --
>
> MR. GITTENS: I'm not a party either.
>
> THE COURT: Well, as appearing --
>
> MR. GITTENS: I'm a human being.
>
> THE COURT: As appearing as a human being --
>
> MR. GITTENS: See, you --
>
> THE COURT: -- before this court --
>
> MR. GITTENS: -- keep ignoring what I'm saying and I'm --
>
> THE COURT: -- you -- hold on. You are obligated to --

MR. GITTENS: No, I'm --

THE COURT: --follow --

MR. GITTENS: --not obligated.

THE COURT: No, you --

MR. GITTENS: When do I -- when did I sign it?

THE COURT: You are obligated --

MR. GITTENS: Where --

THE COURT: --to follow the rules of the court.

MR. GITTENS: Where any -- show me a --

THE COURT: If -- Mr. --

MR. GITTENS: -- document that you've got --

THE COURT: Donald Gittens --

MR. GITTENS: Listen.

THE COURT: -- if you don't --

MR. GITTENS: Well, listen to --

THE COURT: If you don't follow the rules of the court --

MR. GITTENS: The rules --

THE COURT: -- -- you --

MR. GITTENS: -- of the court is --

THE COURT: You --

MR. GITTENS: Who do you work for?

THE COURT: I'm not answering that. You --

MR. GITTENS: See now you're not answering because you're being in denial right now.

THE COURT: If you can't comport your conduct to the expectations of the court --

MR. GITTENS: Because right now --

THE COURT: But listen to me. Listen to me.

MR. GITTENS: But right now --

THE COURT: This is very important.

MR. GITTENS: Oh. You need to listen --

THE COURT: Hold on.

MR. GITTENS: -- but right now --

THE COURT: No, no.

MR. GITTENS: -- because you --

THE COURT: If you can't comport your conduct --

MR. GITTENS: No, you need to listen –

THE COURT: Donald Gittens --

MR. GITTENS: --because right now you --

THE COURT: No, I --

MR. GITTENS: -- you assaulting me.

THE COURT: I'm --

MR. GITTENS: You're just assaulting me.

THE COURT: I'm talking now. Okay? If --

MR. GITTENS: I'm not in that category.

THE COURT: If you can't comport your conduct to the expectations of the court and you continue to interrupt the court -- you have to listen to this -- you could be removed from these proceedings for contempt. Okay? And for failure --

MR. GITTENS: That's --

THE COURT: --hold on -- and for failure -- I'm not --

MR. GITTENS: But right now --

THE COURT: -- Saying you are.

MR. GITTENS: -- you --

THE COURT: I'm saying this could happen --

MR. GITTENS: You --

THE COURT: -- and not only would you not be represented by an attorney, but you -- if you fail to comport your conduct correctly, you could be removed from these proceedings, affectively have consented to waiver of your own appearance and the court could try you in absentia.

On December 12, 2022, the case proceeded to trial. Appellant's disruptions continued, and on the second day of trial, the court granted the State's request to discharge the jury panel after the State noted that "[a]t least one of the jurors said [during questioning] that the whole jury panel is talking about how [appellant is] crazy." The court found that the panel had been "irretrievably tainted" due to appellant's disruptive behavior and decided to begin with a new jury panel the following day.

On the third day of trial, before calling in the new venire panel, the court outlined precautions it would take to "reduce the chances that potential jurors will be exposed to any behavior in the courtroom that might affect a potential juror's ability to fairly and impartially sit on this case."[2] Appellant interrupted the court and proceeded to speak,

[2] Specifically, the court planned to call a new panel of 100 potential jurors, and, that after conducting initial voir dire, "the panel will move to [room] 556 and then for those (continued)

uninterrupted, for 20 to 25 minutes. The court responded that it "appreciates and respects" appellant's statements and asked "that [appellant] having had the opportunity to speak fully now, when the jury panel arrives, that [appellant] and the attorneys for the State comport themselves in a way that lets the [c]ourt conduct a very important process of voir dire of the panel."

Nevertheless, appellant's interruptions continued as soon as the court began posing questions to the venire panel. The court finished questioning, excused the panel, and removed appellant from trial, noting that he may return when willing to do so in a nondisruptive manner:[3]

---

that will need individual voir dire[,] groups of ten will be staged in the jury room and then from that group, those groups of ten, one juror at a time will enter the courtroom for individual voir dire."

[3] The transcript reflects interjections from appellant almost immediately following roll call. After the panel was sworn in, appellant interrupted, referenced the panel of jurors that had been discharged the previous day, and then refused the court's request to approach the bench:

> MR. GITTENS: I like how you switched that up.
> THE COURT: -- do you know anything about the
> facts --
> MR. GITTENS: On the last, on the last --
> THE COURT: -- of this case --
> MR. GITTENS: -- jury selection of voir dire.
> THE COURT: Okay. Can I have the parties approach?
> MR. GITTENS: (indiscernible - 10:06:26) can
> you hear me --
> THE COURT: Donald Gittens, you can approach.
> MR. GITTENS: -- (indiscernible - 10:06:31)
> under secrecy.
> THE COURT: Can Donald Gittens approach?
> MR. GITTENS: I'm not approaching. I'm not

(continued)

> THE COURT: The [c]ourt finds at this point, much like it determined yesterday that Donald Gittens is unable at this point to participate in this trial at this point in a way that is not disruptive to the proceedings. So we're going to do just as we did yesterday. Donald Gittens is going to be removed from the courtroom. He will be taken down to lock up. The deputy -- excuse me, the corrections officer will be posted with him. When Donald Gittens, if Donald Gittens --
>
> MR. GITTENS: (indiscernible - 10:32:51).
>
> THE COURT: -- decides he wants to return --
>
> MR. GITTENS: Is out or order.
>
> THE COURT: -- to the courtroom in a way that is not disruptive, he can communicate that to the correctional officer who will immediately communicate it to --
>
> MR. GITTENS: (indiscernible - 10:33:07).
>
> THE COURT: -- the clerk of the Court.
>
> MR. GITTENS: I've seen (indiscernible) --
>
> THE COURT: If we receive such a call --
>
> MR. GITTENS: -- (indiscernible).
>
> THE COURT: -- we will bring Donald Gittens up immediately. The [c]ourt will also on a regular basis, just like it did yesterday --
>
> MR. GITTENS: I'm being polite.

> (indiscernible - 10:06:44). See, how he just ordered me (indiscernible).
> THE COURT: Okay. All right. So --
> MR. GITTENS: Like I'm a robot.

The court noted that it "ignored his initial remarks with -- in hopes given his past behavior that he would cease" but that it had since become clear that appellant "would not stop interrupting the course of the proceedings."

> THE COURT: -- will call down to lock up to see if Donald Gittens is ready to return to the courtroom and conduct himself --
>
> MR. GITTENS: You can't --
>
> THE COURT: -- in a way that's not --
>
> MR. GITTENS: You can't accept --
>
> THE COURT: -- disruptive --
>
> MR. GITTENS: -- the fact that I'm --
>
> THE COURT: -- to the [c]ourt.

The court brought the panel back and continued with voir dire. The clerk checked in with appellant twice; he refused to return at first but was ready to return just before noon. The court broke for lunch and returned with appellant present that afternoon. Nonetheless, appellant's behavior continued, and the court noted that the "same procedure… as… we employed yesterday and this morning… will be employed again[,]"[4] and appellant was removed twice more from trial that afternoon.[5] Appellant thereafter refused to return to trial for the remainder of the day.

The court continued voir dire and concluded for the day, noting that it hoped to "get through individual voir dire in the morning and be prepared to seat a jury[,]" but that

[4] Appellant's interruptions are omitted here (indicated by ellipses) for readability.

[5] Prior to the appellant's first removal that afternoon, the court asked, through appellant's interruptions, if he would agree to only speak when it is his turn to speak, to which appellant responded, "No, I don't agree." Prior to the second removal, the court warned that, "[i]f [appellant] continues to speak over the [c]ourt, the [c]ourt will conclude that he does not want to participate in this trial at this time in a cooperative manner." Appellant was removed after his disruptions continued.

"everything is unpredictable depending on [appellant's] disposition." The court acknowledged the difficulty with proceeding with trial in the way it did, and noted its reasons for doing so:

> The [c]ourt is continuously and continually evaluating whether the [c]ourt should exercise its authority to appoint counsel for the defendant. In light of the defendant's continued disruption of this trial, weighed against a decision to exercise that authority are some simple uncontroverted facts.
>
> He has been found competent to stand trial. The [c]ourt addressed this this morning. He has been competent - - found competent on multiple occasions to represent himself. His behavior appears based both on the competency evaluation and the [c]ourt's own perception of what has gone on in the courtroom since Friday, his behavior is based on his personality and his belief system. And these are things that compel him to act as he does.
>
> Those are not aspects from the [c]ourt's observations of any sort of mental disorder, but merely an aspect of this individual's personality. The [c]ourt believes it would be futile to postpone this trial to appoint counsel because the [c]ourt sees no reason, or the [c]ourt finds no reason to believe that the appointment of counsel and representation at trial with counsel, appearance at trial with counsel would change the defendant's conduct in any measurable way.
>
> In fact, the [c]ourt believes that if the defendant were to appear with counsel, that that would be an added measure of disagreement for the defendant, such that his conduct would be worse. Given his insistence upon representing himself, his repeated statements related to distrust for any sort of authority, distrust for his own representation.
>
> So as difficult as this is, and as difficult as it is to proceed with this trial in this way, the [c]ourt finds that this is the only way to try this case, this case will be tried because the defendant is competent to stand trial.

The next day, the court started individual voir dire with appellant present. After questioning the first juror, the State moved to strike the juror for cause, and appellant objected. The court overruled appellant's objection -- the juror had indicated that he believed it was appellant's burden to prove his innocence, not the State's burden to prove his guilt -- and appellant again accused the judge of "impersonating a judge[.]" After refusing to stay silent once the next juror entered the courtroom, appellant was removed from trial and the court ordered that the clerk inquire "every 15 to 20 minutes" as to whether appellant was willing to return in "a cooperative manner." Before appellant was escorted out of the courtroom, the court stated, once again, that:

> Donald Gittens is free at any time to inform the correctional officers that he's ready to return to the courtroom in a cooperative manner and if he does that, the correctional officers will communicate immediately to the clerk of the [c]ourt that he has done so.

Appellant returned to court that afternoon, but shortly thereafter began asking rambling questions to jurors, such as whether they were human, or whether they believed he was human. The court removed appellant and took a break. After the break, trial resumed with appellant present, where the court explained the process of peremptory challenges. The court asked appellant, through his interruptions, if he understood the peremptory process, and appellant responded that he did:

> THE COURT: If you do anything more --
>
> MR. GITTENS: -- (indiscernible - 3:09:32) ask you -- sir --
>
> THE COURT: -- then answer the questions --
>
> MR. GITTENS: I don't participate. Is --

THE COURT: -- as to each juror --

MR. GITTENS: -- that an order? Is that an order?

THE COURT: -- and disrupt it in any way, the [c]ourt will understand that to mean that you have elected not to participate in the seating of your jury. Do you acknowledge that I just said that to you?

MR. GITTENS: Sir, may I remind you --

THE COURT: Okay.

MR. GITTENS: -- are required pursuant to your oath --

THE COURT: All right.

MR. GITTENS: -- to be impartial.

THE COURT: The fact that Donald Gittens responded to the [c]ourt means he acknowledges what the [c]ourt said to him. So continuing on with how this will work. The next individual that comes up, the question will first be posed to Donald Gittens, and then to the State, we call this alternating challenges. So essentially --

MR. GITTENS: Alternating --

THE COURT: -- the first, third, fifth, seventh, ninth, and so forth and so on individual that comes in the State exercises the challenge, has the opportunity to exercise the challenge first. For those in the sequence, the even numbers, two, four, six, eight, so forth and so on, the -- Donald Gittens is entitled to exercise the challenge first. Okay. Any questions about how we're going to do that?

MR. GITTENS: Man, I don't even (indiscernible - 3:11:03).

THE COURT: Okay. He answered my question with a question that didn't indicate to the [c]ourt that he has a probing question about the process. So the [c]ourt –

MR. GITTENS: (indiscernible - 3:11:18).

> THE COURT: -- understands that Donald Gittens understands the process. Is -- do you understand the process?
>
> MR. GITTENS: *Yeah, I'm challenging my* --
>
> THE COURT: Okay. So --
>
> MR. GITTENS: I'm challenging my referendum.
>
> THE COURT: -- the next thing --
>
> [THE PROSECUTOR]: Your Honor --
>
> MR. GITTENS: And that's long live local rebellion, long established human being custom and tradition, there's no paternity -- excuse me, laws of rebellion.

(Emphasis added.)

The court noted that the peremptory process was appellant's "opportunity to participate fully in the seating of your jury" and appellant responded, "[a]nd I decline that service." Before the court called the first juror, it reiterated:

> So the [c]ourt is absolutely crystal clear on this, any disruption, any outburst, any speaking other than in response to the question posed by the clerk as to each juror, will be understood as an election to be removed voluntarily from the trial for disruptive reasons.

The court called its first juror, whom appellant struck. After the second juror was brought in, appellant refused to answer whether the juror was acceptable:

> THE CLERK: Juror 4122, take one step forward. Does Donald Gittens consent to Juror 4122?
>
> MR. GITTENS: Are you aware of what's going on, sir?
>
> THE COURT: Sir, don't answer that question. Donald Gittens, you are to answer yes or no.

> MR. GITTENS: Now, you can't -- he don't want me to answer you a question because now he can't handle adversity. He wanted me to have a say partial --
>
> THE COURT: Okay. Juror 4122, please --
>
> MR. GITTENS: -- trial where I'm entitled --
>
> THE COURT: -- exit the courtroom. Please –

Appellant's interruptions continued as the court struck the juror for cause and once more removed appellant from the courtroom. The court thereafter proceeded with seating the jury and four alternates. After checking on appellant twenty minutes later, the clerk was told that appellant was "still screaming[,]" and the court concluded that based upon "the long history of what's transpired in the last few days[,]" that appellant was not ready to return:

> So based on that, yeah, based on that report, the [c]ourt and the long history of what's transpired in the last few days and the defendant's conduct, the [c]ourt concludes that the defendant is not ready to return to the courtroom and participate fully in an undisruptive manner.

After the jury was seated and given preliminary instructions, the court notified appellant that the State was ready to begin with its opening statement. Appellant returned to trial once more, but was removed during his opening statement for continuing to disregard the court's instructions.

On the fifth day of trial, the State presented its case in chief and called several witnesses. Appellant did not testify or present any evidence on his behalf. On the sixth and final day of trial, both parties presented closing arguments, with appellant arguing that

his six-year-old niece consented to the acts he admitted to committing. The jury returned a guilty verdict on all counts. This timely appeal followed.

DISCUSSION

Appellant asserts that he "was only given the opportunity to exercise one (1) peremptory strike before he was removed from the courtroom" and that the court erred in failing to give him an "any opportunity to use his nineteen (19) remaining strikes[.]" The State responds that the trial court "properly exercised its discretion in removing [appellant] from the courtroom" following his "blatant disregard of courtroom decorum and procedure[,]" and therefore, this Court should affirm.

As a general matter, "[a] defendant has the right to be present at every stage of his or her trial." *Cousins v. State*, 231 Md. App. 417, 448 (2017). However, "[t]he right to be present at trial is not absolute and may be waived." *Tweedy v. State*, 380 Md. 475, 492 (2004). Indeed, as set forth in Md. Rule 4-231(c), a defendant who "acquiesces in being absent[,]" is "voluntarily absent[,]" or, relevant to the matter before us, "who engages in conduct that justifies exclusion from the courtroom" waives his or her right to be present. Md. Rule 4-231(c)(1)-(3). *See also Pinkney v. State*, 350 Md. 201, 221 (1998) (noting that "[c]ircumstances exist when an accused's voluntary absence and defiance of the court is itself sufficient to justify a trial in the defendant's absence.").

This Court has observed that "[w]hen faced with a disruptive defendant, a trial judge can '(1) bind and gag him, thereby keeping him present; (2) cite him for contempt; [or] (3) take him out of the courtroom until he promises to conduct himself properly.'" *Cousins*,

231 Md. App. at 448 (quoting *Illinois v. Allen*, 397 U.S. 337, 344 (1970)). Indeed, we have stated that when a defendant's conduct

> interferes with the dignity, order, and decorum of a courtroom, the trial court has the discretion to order "constitutionally permissible" accommodations made, after warning the defendant of those potential consequences, up to and including expelling the defendant from the courtroom.

In re D.M., 228 Md. App. 451, 463 (2016) (quoting *Allen*, 397 U.S. at 343-44). If removed from the courtroom, a defendant "must be advised of the opportunity to return upon a promise to behave." *Biglari v. State*, 156 Md. App. 657, 671 (2004).

The appellant in *Cousins* also represented himself at trial, where he was removed after announcing an intention to disrupt the proceedings, and ultimately, convicted of robbery. 231 Md. App. at 423-24. He appealed, asserting that "[t]he court should have given him a video or audio feed of the proceedings so that he could remain apprised of what was happening" and that "the court's failure to do so obstructed his constitutional right to present a defense and to confront and cross-examine witnesses[,]" citing to *Biglari v. State*, 156 Md. App. 657 (2004). *Id*. at 448.

We disagreed, noting that "*Biglari* requires only that a trial court give a defendant the opportunity to return upon a promise to behave appropriately[,]" and that "[i]n compliance with *Biglari*, the court afforded Mr. Cousins multiple opportunities to return to the courtroom if he promised to behave properly." *Id*. at 449-50. We explained that "the trial court made it abundantly clear to Mr. Cousins how he could, if he chose, exercise his right to re-enter the trial[,]" and that the court did not err in removing him after he

"refused to conform his conduct to the court's reasonable expectations, and those of civil society." *Id*.

Here, as in *Cousins*, appellant refused to conform his conduct to the court's reasonable expectations. Over the course of several pre-trial hearings and several days of trial, appellant spoke over the court, refused to answer the court's questions, and rejected the court's requests not to interrupt the proceedings. The court "expressly warned [appellant] that his continued interruptions would require his removal[,]" and appellant's disruptions continued. *Biglari*, 156 Md. App. at 673 (internal quotation marks and citation omitted). Accordingly, the court removed appellant from trial, making it "abundantly clear[,]" that appellant could return once willing to do so in a nondisruptive manner. *Cousins*, 231 Md. App. at 449.

Additionally, as in *Cousins*, the appellant in this case was afforded "multiple opportunities to return to the courtroom if he promised to behave properly[,]" and indeed, exercised his right to do so. *Id*. at 450. Further, prior to seating the jury, the court made clear that the peremptory process was appellant's "opportunity to participate in the seating of your jury[,]" and appellant expressly "decline[d] that service." The court began seating the jury, first noting that "any speaking other than in response to the question posed" would be understood "as an election to be removed voluntarily from the trial[.]" Nevertheless, appellant refused to comply; his disruptions continued, and he was removed from trial. Accordingly, because appellant waived his right to be present at trial, including to be present to use his remaining peremptory strikes, we see no abuse of the court's discretion.

Appellant cites to *Spencer v. State*, 20 Md. App. 201 (1974), *King v. State Roads Commission*, 284 Md. 368 (1979), and *Sharp v. State*, 78 Md. App. 320 (1989) in support of his position. Notably, none of these cases address the waiver of the right to be present at trial. *Spencer* involved an "arbitrary and unexplained" procedure where the clerk skipped over several names during voir dire after the defendant used all of his peremptory strikes. *Spencer*, 20 Md. App. at 208. On appeal, this Court reversed, holding that the appellant was entitled to the expectation that the court's voir dire rules "will not strangely cease to operate once his options have been exhausted." *Id*. at 209. No such arbitrary or unexplained procedure is present in the facts before us. Instead, the court went to great lengths to explain its expectations and what course of action would take place if appellant continued to interrupt the proceedings. Appellant continuously failed to follow the court's instructions and, as promised, was thereafter removed from the courtroom.

Moreover, in *King*, both parties used each of their peremptory strikes, and five remaining prospective jurors were "eliminated by the trial judge to obtain a panel of twelve." 284 Md. at 372. The Supreme Court of Maryland reversed, noting that the "the trial judge, with five strikes, had more to say about who would not sit on the panel than either of the parties." *Id*. Further, in *Sharp*, the trial court incorrectly determined that peremptory strikes must be shared among several defendants, rather than allotted to each defendant. *Sharp*, 78 Md. App. at 324. This Court reversed, noting that the statute and rule in place at the time "contemplate that each defendant, rather than each group of defendants, be permitted four peremptory challenges." *Id*. at 326. Neither the circumstances in *King* nor *Sharp* apply to the case before us.

As our Maryland Supreme Court has noted, "[t]rial in absentia should be the extraordinary case, 'undertaken only after the exercise of a careful discretion by the trial court.'" *Pinkney*, 350 Md. at 221 (quoting *In re Dunkerley*, 376 A.2d 43, 48 (1977)). Here, appellant's exceptionally disruptive behavior "left the court with little choice but to remove him[.]" *Cousins*, 231 Md. App. at 448. The trial judge demonstrated exceptional patience and understanding in trying to urge the appellant to behave in a manner that would allow him to participate in the trial. Accordingly, we see no abuse of discretion in removing Gittens from the courtroom during jury selection because of his chronic disruptive behavior that operated as a waiver of his right to be present during the phase of jury selection where he could have exercised his peremptory challenges. We, therefore, affirm.

JUDGMENT OF THE CIRCUIT COURT FOR BALTIMORE CITY AFFIRMED. COSTS TO BE PAID BY APPELLANT.