

DISRUPTIVE DEFENDANT

You may have observed [behavior] [restraint] [removal] of the defendant during the trial. You may not draw any inferences of guilt from the defendant's [behavior] [restraint] [removal]. You are not to consider it in any way or even discuss it during your deliberations. You may only consider evidence admitted during the course of the trial in determining whether the Commonwealth has proven the charge[s] beyond a reasonable doubt.

The court may follow Instruction 2.120 "What is Evidence" with this instruction.

If requested by defense counsel, the judge may give this instruction both at the time of the alleged disruptive behavior and in the final instructions.

NOTES:

1. "Shackling or gagging" and other security measures. Massachusetts Rule of Criminal Procedure 45 was revised in 2023 to remove the suggestion of shackling or gagging a disruptive defendant during trial. While not prohibited, if possible, shackling a defendant or using other unusual security measures is to be avoided because of their prejudicial effect on the jury, their potential interference with the defendant's ability to consult with counsel and because, "intrinsically they give affront to the dignity of the trial process." *Commonwealth v. Brown*, 364 Mass. 471, 475 (1973). Such measures may be necessary, within the discretion of the trial judge, in order to "prevent escape, to minimize danger of harm to those attending trial as well as to the general public, and to maintain decent order in the court room." *Brown*, 364 Mass. at 475. In considering whether security measures should be employed, the trial judge should confer with the parties and court officers, allow defense counsel to state any objections, make findings as to the necessity for the safety precautions and, where possible, employ security precautions, such as leg shackling or spacing of parties and officers, in a manner designed to ensure that the jury is not made aware of them. See *Commonwealth v. Martin*, 424 Mass. 301, 307-310 (1997). While, in *Brown*, 364 Mass. at 476, the Supreme Judicial Court stated that the trial judge "should assist the jury with an emphatic charge warning against bias and against inferring guilt of a defendant from the fact that security precautions were taken", in *Martin*, 424 Mass. at 310, the SJC noted that "such an instruction would [draw] attention to the very precautions the judge and the defendant [seek] to keep from the jury."

2. Removal of Defendant. Rule 45 has also been amended to expand the circumstances in which a trial may proceed without the defendant's presence. This provides an alternative to using unusual

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security measures to keep the defendant in the courtroom. “The right of a defendant to be present at his trial can be forfeited by his misconduct, provided he has been appropriately warned and continues his disruptive behavior despite such warning. He may be barred from the courtroom until such time as he indicates his willingness to conduct himself ‘consistently with the decorum and respect inherent in the concept of courts and judicial proceedings.’” *Commonwealth v. Senati*, 3 Mass. App. Ct. 304, 307 (1975). See also *Commonwealth v. Scionti*, 81 Mass. App. Ct. 266, 276 (2012); *Commonwealth v. Means*, 454 Mass. 81, 97 (2009). The defendant may be removed during trial if the judge makes findings on the record describing the defendant’s disruptive behavior and that the defendant’s behavior has become so disruptive that the trial cannot proceed in an orderly manner. Mass. R. Crim. P. 45(a). See *Commonwealth v. Rocheleau*, 90 Mass. App. Ct. 634, 637 (2016) (judge should make particularized findings as to defendant’s disruptive behavior). At the request of the defendant, the judge shall instruct the jury that the defendant’s removal and absence are not to be considered by the jury. See Mass. R. Crim. P. 45(a).

3. Defendant’s waiver of presence.

a. *Absence by voluntary waiver*: Under Mass. R. Crim. P. Rule 45 (b) (i), if a defendant in custody refuses to be brought into the courtroom or requests to be absent from the courtroom, the trial may proceed without the defendant’s presence. Because the right to be physically present at one’s criminal trial is fundamental, waiver of that right must be knowing and voluntary. See *Commonwealth v. L’Abbe*, 421 Mass. 262, 268-269 (1995) (judge engaged in a daily colloquy with defendant and each day the defendant signed a statement regarding the voluntariness of his waiver of presence at trial.)

b. *Absence due to prior conduct*: Rule 45 also authorizes commencing trial without the defendant’s physical presence if the defendant’s prior actions provide a substantial basis for the judge to believe that the defendant’s behavior will be so disruptive that the trial cannot proceed in an orderly manner. See Mass. R. Crim. P. 45 (b) (ii). The judge may request an assurance of good behavior from the defendant and, if the defendant declines to provide such an assurance, the trial may proceed without the defendant’s presence. See Mass. R. Crim. P. 45 (b) (ii). See also *Commonwealth v. North*, 52 Mass. App. Ct. 603, 618 (2001) (judge removed defendant from courtroom after repeated outbursts, warned defendant that such behavior would not be permitted and allowed defendant to return upon promise of good behavior). If a judge elects to proceed with a trial in the absence of the defendant due to the defendant’s prior disruptive conduct, “the court should make particularized findings setting forth the defendant’s prior actions that provide the substantial basis to believe that the defendant’s behavior will be so disruptive that the trial cannot proceed in an orderly manner.” Mass. R. Crim. P. 45 commentary. Rule 45 finally directs that, at the request of the defendant, the judge must instruct the jury that the defendant’s removal is not to be considered by the jury. Mass. R. Crim. P. 45 (b) (iii).

4. Defendant’s Courtroom Conduct and Consciousness of Guilt. The prosecution should not comment upon the defendant’s behavior in the courtroom unless specifically authorized by the court, as it may be “an improper reference to a defendant’s failure to testify; ... a suggestion or implication that the prosecutor has particular knowledge of a fact not in evidence; or ... an attempt to ask the jury to draw an inference that is not fairly warranted.” See *Commonwealth v. Young*, 399 Mass. 527, 532 (1987). While the prosecution may comment on the defendant’s physical appearance where relevant to the issues at trial, see *Commonwealth v. Kater*, 388 Mass. 519, 535 (1983), “a prosecutor should never argue that an inference of guilt should be drawn from proper conduct, such as reading transcripts, taking notes, and consulting with counsel.” *Young*, supra. But see *Commonwealth v. Smith*, 387 Mass. 900, 907 (1983) (prosecutor’s comment that defendant “squirms and smirks and laughs” during trial not improper where jury entitled to observe demeanor of defendant.) If the judge permits the prosecution to comment in closing argument on the defendant’s unruly conduct as evidence of the defendant’s consciousness of guilt, the judge is required to instruct the jury in a manner consistent with Instruction 3.580 at the defendant’s request.