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STATE OF WASHINGTON  
5/4/2020  
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IN THE SUPREME COURT  
FOR THE STATE OF WASHINGTON

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Court of Appeals No 36059-8—III

STATE OF WASHINGTON, Respondent

v.

WILLIAM NICOL, Petitioner

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PETITION FOR REVIEW

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## **I. IDENTITY OF PETITIONER**

**William Nicol requests that this court accept review of the decision designated in this petition.**

## **II. DECISION OF THE COURT OF APPEALS**

**Mr. Nicol's seeks review of the decision of the Court of Appeals filed on March 26, 2020. The Court of Appeals erred when it ruled that the trial court's inquiry established that Mr. Nicol had voluntarily waived his right to be present when the jury read its verdict. A copy of the Court of Appeals' unpublished opinion is attached to this petition in the appendix.**

### III ISSUES PRESENTED FOR REVIEW

- 1.) Whether the Court of Appeals erred when they held that Mr. Nicol had waived his presence for the reading of the verdict.
- 2.) Whether the Court of Appeals erred when they asserted that the revelation of an attorney-client privileged communication had no bearing on the trial court's determination that Mr. Nicol had voluntarily left the courthouse.

### IV STATEMENT OF THE CASE

Mr. Nicol was charged by the State of Washington with rape of a child. His jury trial began on October 17, 2016. Court ended every day at or about 4:30 pm. On October 21, 2016, the jury began its deliberations. At 4:13 pm the jury issued a question asking, "does each count of rape need to be in a

different location or just that the victim was raped multiple times?" The parties agreed on a response. The court was told the jury had reached a verdict. Mr. Nicol's lawyer returned to court without Mr. Nicol and told the court that he had told Mr. Nicol that he, Mr. Nicol, was going to be found guilty. The court proceeded to conduct an inquiry. A security officer testified that he saw a man leaving court at approximately 4:45 pm. The court concluded that the man was probably Mr. Nicol. Based on this "probability" the court determined that Mr. Nicol had waived his presence. The determined that Mr. Nicol had waived his presence and that the trial court's inquiry was not fatally corrupted by a breach of the attorney client privilege.

## V. ARGUMENT

The right to be present at trial derives from the confrontation clause of the Sixth Amendment and the due process clauses of the Fifth and Fourteenth Amendments. *United States v. Gagnon*, 470 U.S. 522, 526, 84 L. Ed. 2d 486, 105 S. Ct. 1482 (1985) (per curiam). The Washington state constitution also provides "the accused shall have the right to appear and defend in person, or by counsel . . . [and] to meet the witnesses against

him face to face". Const. art. 1, § 22 (amend. 10). The state and federal constitutional rights to be present at trial may be waived, provided the waiver is voluntary and knowing. *Johnson v. Zerbst*, 304 U.S. 458, 464, 82 L. Ed. 1461, 58 S. Ct. 1019, 146 A.L.R. 357 (1938); [\*\*\*6] *Skate v. Rice*, 110 Wn.2d 577, 619, 757 P.2d 889 (1988), *cert. denied*, 491 U.S. 910, 105 L. Ed. 2d 707, 109 S. Ct. 3200 (1989). A voluntary absence after trial has begun operates as a waiver of the right to be present. *Rice*, 110 Wn.2d at 619 (citing *Taylor v. United States*, 414 U.S. 17, 19-20, 38 L. Ed. 2d 174, 94 S. Ct. 194 (1973) (per curiam)).

A court looks to the totality of the circumstances to determine whether voluntary waiver has occurred. *State v. Washington*, 34 Wn. App. 410, 413, 661 P.2d 605 (1983). **Because the right to be present at trial is a fundamental constitutional right, the court must indulge every reasonable presumption against the waiver of that right.** *State v. LaBelle*, 18 Wn. App. 380, 389, 568 P.2d 808 (1977).

The Court of Appeals appears to believe Mr. Nicol voluntarily waived his presence at trial because it was probable that he left

the court house at or about 4:45 pm despite the fact that proceedings on each and every other day of trial ended at or before 4:30 pm. The Court of Appeals does not think that that Mr. Nicol's' attorney's revelation that he told Mr. Nicol's that he was going to be convicted affected the court's determination that Mr. Nicol had left the court house with the purpose of evading the jury's verdict. If the man who left the courthouse at 4:45 pm was in fact Mr. Nicol or some other person that person did not know the jury's verdict. The Sixth Amendment and the due process clauses of the Fifth and Fourteenth Amendments to the United States Constitution cannot be abrogated by the "probability" of the waiver of constitutional rights. Furthermore, these rights should not be abrogated by an attorney's disclosure of a private conversation between the attorney and his client in which the attorney told his client he was going to be found guilty. What if the attorney had told Mr. Nicol nothing? What if the attorney told Mr. Nicol he was going to be found not guilty? The court was allowed to surmise a state of mind because of defense counsel's breach of his duty to his client.

RCW 5.60.060(2)



provides:

- (a) An attorney or counselor shall not, without the consent of his or her client, be examined as to any communication made by the client to him or her, or his or her advice given thereon in the course of professional employment.

Here, defense counsel, made a communication to the court about a conversation he had with his client which was a conversation which was protected by the attorney-client privilege and which was forbidden by this statute. The Court of Appeals believes this attorney's revelation had no bearing on the court's decision. If the trial court had not heard the defense lawyer's testimony, the court would have known the following as a result of its inquiry. An elderly man scurried out of the courthouse at approximately 4:45 pm. Defense counsel said he could not reach his client on the phone. These facts are not enough to conclude that Mr. Nicol voluntarily left the courthouse or left with the purpose escaping the jury's verdict.

**CONCLUSION**

The Supreme Court should grant this petition and review the decision of the Court of Appeals.

Dated the 29<sup>th</sup> day of April 2020 at Richland Washington

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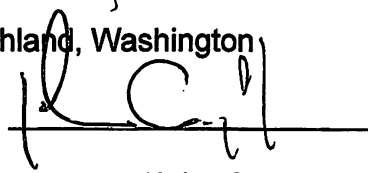
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**DECLARATION OF SERVICE**

I, the undersigned, hereby declare that on this date, I served a true and correct copy of this Petition for Review by emailing a copy to Benton County Assistant Prosecuting Attorney Terry Jay Bloor at Terry.Bloor.co.benton.wa.us

I declare under penalty of perjury under the laws of the State of Washington that the foregoing is true and correct

Signed this 29<sup>th</sup> Day of April 2020 at Richland, Washington

A handwritten signature in black ink, appearing to read "J. Metro", written over a horizontal line.

s/John Gary Metro  
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# APPENDIX

IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON  
DIVISION THREE

STATE OF WASHINGTON,	)	No. 36059-8-III
	)	
Respondent,	)	
	)	
v.	)	UNPUBLISHED OPINION
	)	
WILLIAM GEORGE NICOL,	)	
	)	
Appellant.	)	

PENNELL, C.J. — William Nicol appeals his convictions for two counts of first degree rape of a child and one count of first degree child molestation. We affirm.

BACKGROUND

The facts relevant to Mr. Nicol’s appeal pertain to events that happened during and after his jury trial. We therefore limit our discussion to those circumstances.

Mr. Nicol was released from custody pretrial. Once trial began on October 17, 2016, Mr. Nicol timely appeared for each day of trial. Deliberations began on October 21, 2016, at approximately 11:49 a.m. At 4:13 p.m., the jury issued a question, asking “[d]oes each count of rape need to be in a different location or just that the victim was raped multiple times?” Clerk’s Papers at 77. Mr. Nicol was present as the court read the question and the parties agreed on a response. But when court reconvened in response to the bailiff’s report that the jury had reached a verdict, Mr. Nicol did not appear.

The trial court asked Mr. Nicol’s attorney about Mr. Nicol’s whereabouts. The attorney stated he did not know Mr. Nicol’s location. The attorney explained that he spoke with Mr. Nicol after the jury’s question and informed Mr. Nicol he “thought that [Mr. Nicol] was going to be found guilty.” Report of Proceedings (RP) (Oct. 21, 2016) at 845. Mr. Nicol responded to this information by telling his attorney that he was heading to the bathroom. When the attorney learned the jury reached a verdict, he called Mr. Nicol by phone, but Mr. Nicol did not respond. To determine how to proceed, the court considered CrR 3.4 and *State v. Thomson*, 123 Wn.2d 877, 880-81, 872 P.2d 1097 (1994) (considering waiver of right to be present at trial under state and federal constitutions and rules of criminal procedure).

A security officer provided testimony relevant to Mr. Nicol’s absence. The officer explained he screened individuals entering the courthouse the week of trial. At about

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4:45 p.m. on October 21, 2016, the security officer noticed a man in his late sixties leaving the courthouse and jogging away. The officer recognized the man as someone he had seen coming and going from the courthouse earlier in the week. The trial court later made a factual finding that the man observed by the security officer was “probably” Mr. Nicol. RP (Oct. 21, 2016) at 857.

After hearing the security officer’s testimony, the court asked Mr. Nicol’s attorney to again explain for the record, “as an officer of the court,” his efforts to contact Mr. Nicol *Id.* at 854-55. The court first emphasized it was not asking the attorney to “disclose any conversations” with his client. *Id.* at 854. The attorney then reiterated he talked with Mr. Nicol, Mr. Nicol left for the bathroom, and the attorney called Mr. Nicol twice without answer. The attorney did not repeat the substance of his conversation with Mr. Nicol, although the prosecutor emphasized the attorney had already stated on the record that he “told his client he thought he was going to be found guilty.” *Id.* at 856. Mr. Nicol’s attorney further indicated he could not waive his client’s right to be present at the verdict.

Based on the foregoing circumstances, the trial court found Mr. Nicol voluntarily absented himself from trial. The court decided to hear the verdict without Mr. Nicol present. Mr. Nicol was convicted as charged.

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After discharging the jury, the court ordered a nationwide bench warrant for Mr. Nicol's arrest. Mr. Nicol did not reappear for over a year. Once back in court and represented by new counsel, Mr. Nicol filed a motion to set aside the court's finding of voluntary absence. The motion was denied. A judgment and sentence was issued on April 19, 2018.

Mr. Nicol appeals.

#### ANALYSIS

The only argument on appeal pertains to the trial court's determination that Mr. Nicol voluntarily absented himself at trial. We review this issue for abuse of discretion. *State v. Thurlby*, 184 Wn.2d 618, 624, 359 P.3d 793 (2015).

"The Sixth Amendment and the due process clauses of the Fifth and Fourteenth Amendments to the United States Constitution, and article I, section 22 of our state constitution all guarantee the right of the criminal defendant to be present at his or her own trial." *Thurlby*, 184 Wn.2d at 624 (citing *Thomson*, 123 Wn.2d at 880). A defendant can knowingly and voluntarily waive this right. *Thurlby*, 184 Wn.2d at 624. Waiver "may be express or implied." *Id.* "If a trial has begun in the defendant's presence, a subsequent voluntary absence of the defendant operates as an implied waiver of the right to be present." *Id.* "Our rules of criminal procedure similarly permit the court to continue with trial despite a defendant's voluntary absence, provided that the defendant was present



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when the trial commenced.” *Id.* at 624-25 (citing CrR 3.4(b)); *see also Thomson*, 123 Wn.2d at 880-81 (Noting CrR 3.4’s consistency “with its federal counterpart,” Federal Rule of Criminal Procedure 43.)

A three-part test governs a trial court’s determination of whether a defendant waived the right to be present. The court must (1) “make a sufficient inquiry into the circumstances of the defendant’s absence[,]” (2) “make a preliminary finding of voluntariness[,]” and (3) “provide the defendant with an opportunity to explain the absence when he or she is returned to custody and before any sentence is imposed.” *Thurlby*, 184 Wn.2d at 625-26 (citing *Thomson*, 123 Wn.2d at 881). “In performing this analysis, the trial court must . . . indulge every reasonable presumption against waiver.” *Thurlby*, 184 Wn.2d at 626.

Here, the trial court expressly considered appropriate precedent, *Thomson*, before examining the totality of the circumstances to find Mr. Nicol waived his right to be present at his verdict. Mr. Nicol chose to be present in a timely manner for every day of trial, and was present immediately before the court was ready to hear the verdict. He did not respond to his attorney’s attempts to contact him over the phone. The court also found, based on the security officer’s testimony, Mr. Nicol quickly left the courthouse before the verdict. This inquiry into Mr. Nicol’s absence was limited, but Mr. Nicol does not argue it was insufficient. Mr. Nicol instead cites precedent regarding a defendant who

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attended only various pretrial proceedings before trial went forward in his absence. *State v. Jackson*, 124 Wn.2d 359, 878 P.2d 453 (1994). This precedent does not apply to a defendant who attended all five days of his trial only to disappear immediately before his verdict.

Mr. Nicol also emphasizes his trial attorney's public admission of the conversation they shared just before Mr. Nicol's disappearance. The propriety of the attorney's explanation is not relevant to this appeal. After the attorney recounted his explanation of the predicted jury verdict to Mr. Nicol, the trial court expressly directed that the attorney need not reveal the substance of his communications with his client. The court instead focused on the attorney's efforts to contact Mr. Nicol. The court made no findings regarding the attorney-client communication, and did not mention the communication when concluding Mr. Nicol was voluntarily absent. The trial court's inquiry was sufficient. Given that inquiry, the court also had ample basis to preliminarily find Mr. Nicol voluntarily absent.

The record does not indicate whether the trial court ever completed the third prong of the aforementioned test. However, Mr. Nicol's appellate brief does not raise this issue. After Mr. Nicol's reappearance, he had ample opportunity to explain his absence prior to sentencing. Given the lack of explanation, there is no indication the court abused its


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discretion by finding Mr. Nicol was voluntarily absent from trial, and then hearing the verdict without him present.

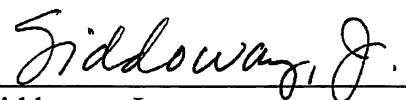
CONCLUSION

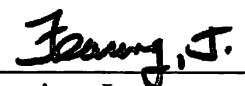
The judgment of conviction is affirmed.

A majority of the panel has determined this opinion will not be printed in the Washington Appellate Reports, but it will be filed for public record pursuant to RCW 2.06.040.

  
\_\_\_\_\_  
Pennell, C.J.

WE CONCUR:

  
\_\_\_\_\_  
Siddoway, J.

  
\_\_\_\_\_  
Fearing, J.

**METRO LAW OFFICE**

**May 01, 2020 - 1:14 PM**

**Transmittal Information**

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**Appellate Court Case Title:** State of Washington v. William George Nicol  
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