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Supreme Court No. 98574-0  
COA No. 36378-3-III

THE SUPREME COURT OF THE STATE OF WASHINGTON

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STATE OF WASHINGTON,

Respondent,

v.

TIM ALLEN LOE,

Petitioner.

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ON APPEAL FROM THE SUPERIOR COURT  
OF STEVENS COUNTY

The Honorable Patrick Monasmith

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PETITION FOR REVIEW

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**A. IDENTITY OF PETITIONER**

Mr. Loe was the appellant in COA No. 36378-3-III (Appx A).

**B. COURT OF APPEALS DECISION**

Mr. Loe seeks review of the decision entered April 28, 2020.

**C. ISSUES PRESENTED ON REVIEW**

1. Did the court violate Mr. Loe’s right to be present, and improperly conduct trial in his absence, when the defendant was absent from the courtroom for medical reasons?

2. Did the court apply the wrong legal standard by holding that the defendant’s absence from the courtroom is assumed to be voluntary?

**D. STATEMENT OF THE CASE**

1. **Trial start.** Timothy Loe was charged with fourth degree assault and disorderly conduct following an incident in which several individuals, including complainant Mr. Carl Gauny, trespassed on the real property occupied by Mr. Loe and Ms. Gina Britton in Stevens County. CP 1-2, 5-6. The case commenced when the Sheriff’s Office was informed of an alleged incident wherein one Carol Taylor and Carl Gauny were on Loe’s property at 4688 Godfree Road - where Mr. Loe to this day legally resides. CP 5-6. Allegedly, Mr. Loe “bumped” Carl Gauny (one of Taylor’s associates), then began “slugging” him in the chest and stomach. According to the sheriff’s deputy’s conversations with Mr. Loe, which the affidavit says occurred by

telephone, Loe only bumped Mr. Gauny because Gauny had raised his fist at Loe. CP 5.

At trial, which commenced with jury selection, and then opening statements and witness presentation on the morning of September 10, Gauny and Taylor said Mr. Loe exited his house with a video camera and began cursing and yelling at them. He then allegedly began butting Mr. Gauny in the chest, and then pushed and hit him. RP 157-60, 167-70. Mr. Loe appeared to be filming the interaction as it occurred, and the video was eventually introduced during Mr. Gauny's testimony. RP 157, 161, 167, 171; see RP 218 *et seq.*; State's exhibit 1).

**2. Departure for heart attack.** At this juncture of trial, on September 10, after a mid-day recess, Mr. Loe left the courtroom while speaking on the telephone about a heart attack. RP 174. This was in the middle of Mr. Gauny's initial direct examination, and before the introduction of the videotape and cross-examination, which occurred the following day (September 11). See RP 170-74, 218. Shortly after Mr. Loe's departure from the courtroom, RP 174, Officer Kowal of the Chewelah Police Department informed the court that "Mr. Loe went to the hospital by ambulance." RP 185.

After some discussion; see Part E, infra, the court ruled that it would make a "preliminary" finding that Mr. Loe's absence was voluntary, and

ruled, “I will continue with trial in Mr. Loe’s absence.” RP 210-11. After Mr. Loe’s departure from court, the parties and the court discussed jury instructions, including the defense proposed instructions as to (a) defense of self and (b) defense of property. RP 180. During this time the parties discussed issues of authentication of the proffered videotape evidence and the testimony of Deputy Erik Middlesworth. RP 175-85, 204-05. The court adjourned for the day. RP 205.

**3. Day two of trial.** On September 11, with Mr. Loe still absent, Mr. Gauny continued on direct examination with his assertions that Mr. Loe “hit me in the chest” twice and hit him in the back. Gauny narrated the video footage that he claimed showed the interaction as favorable to his claims of being unlawfully assaulted. RP 218-223.

Following cross and further examination of Mr. Gauny, RP 223-234, trial continued with State’s witnesses Laurie Thompson (Mr. Gauny’s wife), RP 235-52; the defense’s unsuccessful motion to dismiss after the State rested, RP 252-56, further discussion of jury instructions including defense of property, RP 257-58, and defense counsel’s notation that the only witness the defense could now present in its case was Ms. Gina Britton (Mr. Loe’s girlfriend). RP 258.

*(i. Mistrial denied.* The defense also made clear that it had desired and was now expressly moving for a mistrial based on the court’s ruling

that it would be continuing the trial with Mr. Loe absent. RP 259; see RP 210-11. The court stated that it was denying the motion, and the State's witnesses were formally excused. RP 259-60.

*(ii). Defense case – Mr. Loe still absent and thus unable to testify as to his defense.* Defense witness Gina Britton testified that Taylor and her friends drove onto their property, despite a civil court ruling that she and Mr. Loe held the ownership interest in the property. RP 261-65. Britton went to the adjacent Anderson home where Mr. Loe was acting as a caregiver to an elderly family friend, and told him to get up to their property, because Taylor was there going through their possessions. RP 264-67. Britton was busy caring for Mr. Anderson, and not in the area of the Loe/Britton home when the altercation occurred there. RP 269. The defense, having no defendant to testify as intended, rested its case. RP 270. Following closing argument, RP 295-11, the jury found Mr. Loe guilty of fourth degree assault. RP 317-21; CP 100, 101.

**4. Sentencing – renewed mistrial motion denied.** At sentencing held on October 9, 2019, Mr. Loe was present with counsel. RP 327. Mr. Loe had not been present for most of the trial day on September 10, or for trial on September 11 including the taking of the verdict or the entry of the order of that setting sentencing for October 9. RP 317-25. However, since



that time he had attempted to explain his absence from trial. CP 102-11 (Declaration of Tim Loe).

The sentencing court stated in response to counsel's inquiry that the court "did" consider Loe's declaration. RP 326. The court then stated, in response to counsel's renewal of the mistrial motion based on involuntary absence, that the court (a) had previously made a finding that the absence was voluntary and that it had not heard anything to the contrary, and (b) that the court did not have "a basis" previously or presently to decide differently and grant the motion. RP 330-31.

## **E. ARGUMENT**

### **REVIEW IS WARRANTED BECAUSE THE TRIAL COURT VIOLATED MR. LOE'S RIGHT TO BE PRESENT.**

**1. Review is warranted.** The right to be present at trial is constitutional and cannot be waived except knowingly, voluntarily, and intelligently. As with all such rights, a court must prove that absence from trial is not voluntary – courts must not presume a waiver of constitutional rights. U.S. Const., amends. VI and XIV; Const. art. 1, § 22; United States v. Gagnon, 470 U.S. 522, 526, 105 S.Ct. 1482, 84 L.Ed.2d 486 (1985); State v. Thurlby, 184 Wn.2d 618, 624, 359 P.3d 793 (2015).

Review is warranted here, where the trial court in this case, first, used the wrong legal standard with regard to waiver of a constitutional right. RAP 13.4(b)(3). The court relied too heavily on an incorrect notion

that a defendant who leaves a trial has impliedly waived the right to be present for the rest of trial. This confuses an initial assessment of the defendant's absence with the important constitutional question the court must ultimately answer – whether the waiver, presumed to not be voluntary, indeed was. That is a high burden. The Court of Appeals makes much of the fact that Mr. Loe made repeated requests for continuances prior to trial, including because of medical reasons related to a heart attack suffered several weeks previously. Decision (Appendix A), at pp. 2-3. Mr. Loe did ask for a continuance the morning of trial, with his counsel stating that Mr. Loe had a medical appointment the next day. Decision, at pp. 2-3. The Court properly recognized that Mr. Loe later left the courtroom early in trial, stating that he had a heart attack, and noted that a police officer soon after that entered the courtroom and reported that “Loe went to the hospital by ambulance.” Decision, at p. 3. The Court appears to go on to reason that Mr. Loe chose to be absent to attend a medical appointment that he spoke of before trial started, upset that he did not receive the continuance. But this makes it all the more apparent that Loe's absence was involuntary, and medical - these circumstances do not overcome the presumption. Mr. Loe's counsel provided further medical information about a “vital” need Mr. Loe had to see his heart doctor. The fact that Mr. Loe was also obstreperous, so much so that he apparently complained about a deputy

before going to the hospital, did not mean that his health-related absence was voluntary. A difficult defendant has the same right to have his right to be present at trial be deemed waived only if he knowingly and voluntarily waives it. The fact that Mr. Loe's medical condition was ongoing, and that he was attempting to obtain continuances in order to seek treatment, does not lower the standard the trial court must apply when assessing whether a defendant's absence is voluntary.

At sentencing, Mr. Loe did provide documents, including documents placed under seal. With regard to his explanation, at sentencing, for his absence during trial, Mr. Loe noted the severity of his ongoing condition several times. The Court of Appeals reasoned that Mr. Loe's written statement to the court did not volunteer adequate information about his medical absence and that his few medical statements were included in what was a document more focused on expressions of anger at other circumstances. Decision, at pp. 8-9.

Nowhere in Loe's detailed 10-page declaration did he explain where he went after the hospital did not admit him the first afternoon of trial or where he went the second day of trial. Nor did he submit any document confirming he was at a cardiology appointment the second day of trial.

Decision, at p. 9. But the trial court did not adequately inquire into Mr. Loe's absence, as it is required to do. The Court of Appeals excused the trial court's abrogation of the three part Thurlby rule, by chastising Mr. Loe

for not volunteering a satisfactory explanation. Errors throughout trial and sentencing resulted in the trial court effectively applying a presumption that Mr. Loe's absence from trial was voluntary, which is the opposite of the constitutional standard. See United States v. Muslim, 944 F.3d 154 (Fourth Cir. 2019) (no waiver of presence if absent with "compelling justification").

**2. Trial in absentia is a violation of the right to be present.**

A defendant has a constitutionally protected right to be present at all stages of trial. U.S. Const., amends. VI and XIV; Const. art. 1, § 22; United States v. Gagnon, supra, 470 U.S. at 526; State v. Thurlby, 184 Wn.2d at 624; State v. Thomson, 123 Wn.2d 877, 880, 872 P.2d 1097 (1994); see State v. Rice, 110 Wn.2d 577, 616, 757 P.2d 889 (1988) (right to be present applies at all critical stages). A waiver must be knowing, intelligent, and voluntary. Johnson v. Zerbst, 304 U.S. 458, 464, 58 S.Ct. 1019, 82 L.Ed. 1461 (1938); Thurlby, 184 Wn.2d at 624. A voluntary absence after trial has begun may constitute an implied waiver of the right to presence. Thurlby, 184 Wn.2d at 624; State v. Rice, 110 Wn.2d 577, 619, 757 P.2d 889 (1988); CrR 3.4(b) (providing that in non-death penalty cases, "[t]he defendant's voluntary absence after the trial has commenced in his or her presence shall not prevent continuing the trial to and including the return of the verdict.").

Nonetheless, courts must indulge every reasonable presumption *against* finding waiver. State v. LaBelle, 18 Wn. App. 380, 389, 568 P.2d

808 (1977). The Washington Supreme Court has “adopted a three pronged analysis that the trial court must follow in order to find that the defendant has waived his or her right to be present.” Thurlby, 184 Wn.2d at 625-26 (emphasis added) (citing Thomson, 123 Wn.2d at 881). The trial court must: (1) make a sufficient inquiry into the circumstances of a defendant’s disappearance to justify a finding whether the absence was voluntary; (2) make a preliminary finding of voluntariness, when justified; and (3) afford the defendant an adequate opportunity to explain his absence when he is returned to custody and before sentence is imposed. Thurlby, 184 Wn.2d at 625-26; Thomson, 123 Wn.2d at 881.

**3. Mr. Loe was involuntarily absent for much of the critical portions of trial and the trial court employed the wrong legal standard for waiver.**

*a. The defendant was absent for most of trial.* As noted, on September 10, 2018, Ms. Taylor had testified for the State during the court’s morning session, and the complainant, Gauny, had commenced his testimony. See RP 153-70, as discussed supra. At the beginning of the court’s afternoon session, Mr. Loe was speaking on his cellular telephone and was heard, according to the transcript, saying, “having a heart attack.” RP 174. He left the courtroom after the court’s suggestion that he do so, or stay if he wished, but to not disturb the proceedings. RP 174. An officer noted “Mr. Loe went to the hospital by ambulance,” RP 185, see RP 186,

and the court made a “preliminary” finding that Mr. Loe’s absence was voluntary, and ruled, “I will continue with trial in Mr. Loe’s absence.” RP 210-11. Thereafter, the court discussed jury instructions, including self-defense instruction as to which the defendant planned to testify, RP 180; see CP 73-79; this instruction was not ultimately given.

After suspending the remainder of the September 10 trial day, on September 11, with Mr. Loe still absent, Mr. Gauny continued on direct and cross examination with his accusations of assault, RP 218-234, trial continued with testimony from Mr. Gauny’s wife, RP 252-56, and there were further discussion of jury instructions and defense counsel’s lament that the only witness the defense had was Ms. Britton. RP 258.

***b. The court employed the wrong legal standard and erred because Mr. Loe was not shown to be voluntarily absent.*** The court denied the mistrial motion brought by the defense based on Mr. Loe’s absence. RP 259; see RP 210-11, 259-60. Later, the defense, having no defendant to testify as intended, rested its case. RP 270. Jury instructions were further discussed, and the court did not give the jury an instruction on defense of self; the jury then convicted. RP 272-84, 290-91; see CP 92-93, RP 317-21; CP 100, 101.

However, certainly, Mr. Loe desired to be at trial and had always so desired. Prior to trial, on December 12, 2017, during pre-trial motions,

when the prosecutor sought pretrial release conditions, the court noted that Mr. Loe had “showed up [in court] on his own steam” and questioned what the State could possibly be desiring as conditions. RP 20 (the State was inquiring about no-contact orders). Mr. Loe volunteered that he would show up at all future court hearings. RP 23. The court would later note that Mr. Loe need only appear at the pre-trial status hearing, not the omnibus hearing, and accepted his then and current telephone number of (509) 732-8810. RP 33-34.

On the 10<sup>th</sup>, after Mr. Loe had left the courtroom while speaking on the telephone about a heart attack, but before suspending trial until the following day, the court heard arguments from the State. The prosecutor argued that Mr. Loe had, in the past, been complaining about general non-medical issues during pre-trial hearings, and the prosecutor asserted that he anticipated “that he would have some kind of episode.” RP 191. The State also said that Mr. Loe must provide “medical proof that he is in fact suffering from a legitimate medical episode.” RP 191.

Later on the 10<sup>th</sup>, defense counsel reported that he had just received a letter from the defendant that had been written by his health care provider, asking that Mr. Loe be “excuse[d] from court due to a medical issue that is requiring further evaluation by a specialist,” and that “the appointment is vital for [the] patient’s health.” RP 195. Counsel also informed the court

that Ms. Britton had indicated that Mr. Loe had suffered a “heart attack, some sort of (inaudible) fibrillation earlier.” RP 195. Ms. Britton had indicated to counsel that Mr. Loe did proceed to the hospital, was admitted, and was presently undergoing tests. RP 195.

Although the court did suspend trial until the next day, September 10, to allow counsel to inquire about Mr. Loe’s circumstances, RP 198-200, the court stated that the case had been pending for an extraordinary measure of time, and that Mr. Loe had demonstrated an inability to work with prior court-appointed counsel. RP 198. The court stated,

[I]n the main I think there would be an assumption that a person who’s not at court is voluntarily absenting himself.

RP 198-99 (emphasis added). Then, the following day, September 11, defense counsel reported to the court with “an additional letter” from Mr. Loe’s primary care provider, “stating a medical necessity for Tim Loe to be present at his cardiology appointment – which I understand is this morning.” RP 206-07. Counsel continued,

He was seen in the emergency room on 8/20 for a several-hour history of chest pain, dizziness and extreme – paresthesia [sic] – I’m not sure I am pronouncing that right. He was found to be in atrial fibrillation with RVR [rapid ventricular rate]. This was responsive to – diltiazem, which placed him on a regular rhythm, he was discharged on metoprolol [1] for rate control and set up for an appointment – cardiology. He was officially diagnosed with paroxysmal atrial fibrillation which does have some increased risk of stroke, deep vein thrombosis and heart attack. Increased



stress may increase his risk for return of his irregular rhythm. Ultimately he needs to be evaluated by – cardiology to determine the cause of the irregular rhythm as well as the risk for future arrhythmia.

RP 207. Counsel noted that the physician, Kelly Whitty of PAC, had provided her telephone number and stated that she welcomed a call from the court. RP 207. Counsel emphasized that Mr. Loe was at that “[cardiology] appointment . . . at 9:30 this morning[.]”

**4. The court erroneously found Mr. Loe had “chosen not to be here this morning or offer any – verification from his physician.”**

The court stated that “our administrator checked with Mt. Carmel Hospital, was advised that Mr. Loe was seen in the ER department yesterday but was not admitted, and is not admitted to the hospital today. So I’m not sure where he is, why he is, why he’s – not here.” RP 208. The court summarized Mr. Loe’s departure from court the previous day, and noted, “a heart or arrhythmia condition isn’t in the nature of a hangnail” or akin to the defendant’s need to care for a relative as presented in State v. Thurlby, 184 Wn.2d 618, 624, 359 P.3d 793 (2015). RP 209. However, the court stated that Mr. Loe’s medical assertions were not a basis to stop the trial in the circumstances where he had been complaining of medical conditions for some time:

And he did request a continuance on the morning of trial, indicating that he had this appointment on Tuesday. And I denied it, with the belief that, you know, that’s – that’s not only a choice but also – I figure if there was an emergency he

would have been immediately in the hospital, number one; and number two, there was no documentation from a provider that there was a – an emergent medical condition. The fact that Mr. Loe is not in the hospital this morning, not admitted to the hospital, chose to go to the ER yesterday, and has also chosen not to be here this morning or offer any – verification from his physician, is sufficient for me on a preliminary basis to find that his – non-appearance today is a voluntary absence, just as it was yesterday afternoon, that the circumstances point to that. I will therefore make that finding of – that he has chose to waive his presence here today. . . . I will continue with trial in Mr. Loe's absence.

RP 208-10. The court's legal analysis and factual rulings were in error. A court looks to the totality of the circumstances to determine whether voluntary waiver has occurred. State v. Garza, 150 Wn.2d 360, 367, 77 P.3d 347 (2003). Here, Mr. Loe's statements and conduct when he left the courtroom on September 10 plainly indicated that he was suffering or felt at risk of a heart attack. RP 174. On that day, and the succeeding court day, the evidence – from Officer Kowal, defense counsel and from the court itself – indeed mounted that Mr. Loe had experienced an episode involving a serious heart condition, that he had been taken by ambulance to the emergency room, and that treatment was administered or his condition evaluated. RP 185-86, 206-07, 208-09.

The fact that Mr. Loe's condition was apparently pre-existing hardly disqualifies him from its involuntary effects, as the court appeared to reason. The fact that Mr. Loe had complained of other conditions, or that he asserted at times that his conditions were exacerbated by his

circumstances, is also not evidence pointing toward voluntary absence. And, Mr. Loe had a right to effective assistance of trial counsel, which included a right to seek new appointed counsel before trial. See generally State v. Varga, 151 Wn.2d 179, 200, 86 P.3d 139 (2004). The granting of these requests for a new lawyer were orders that the court deemed required, considering the reasons Mr. Loe gave for his dissatisfaction, together with the trial court's own evaluation of the competence of existing counsel; in particular, the effect of substitution upon the scheduled proceedings was deemed fully acceptable. See State v. Rosborough, 62 Wn. App. 341, 346, 814 P.2d 679 (1991). The right to presence is not diminished by his proper exercise of other rights at earlier junctures in the criminal proceeding.

Further, a court also abuses its discretion when its ruling rests on facts that are unsupported by the record. State v. Rafay, 167 Wn.2d 644, 655, 222 P.3d 86 (2009). Here, Mr. Loe was plainly receiving treatment that an identified medical professional deemed vital. The court's assessment that Mr. Loe, upon learning from his physician that he must not attend trial but instead must receive medical attention, might coincidentally feel some relief at being unburdened from the pressures of the trial and the courtroom, does not create constitutional voluntary absence. The court abused its discretion.

Finally, the defendant had a right to expect that the trial court would state and apply the correct law. The abuse of discretion standard broadly recognizes that deference is owed to a judicial actor who is better positioned than another to decide the issue in question, but “[a] trial court . . . would necessarily abuse its discretion if it based its ruling on an erroneous view of the law.” Washington State Physicians Ins. Exch. & Ass’n v. Fisons Corp., 122 Wn.2d 299, 339, 858 P.2d 1054 (1993). Here, nothing indicates that the court diverged from its incorrect statement of the law – that there would be “an assumption that a person who’s not at court is voluntarily absenting himself.” RP 198-99.

**5. The court also failed to properly or correctly address or resolve the matter at the time of sentencing where Mr. Loe attempted to explain his absence, as the case law requires the trial court to allow him to do – therefore, a mistrial was required.**

Before sentencing, Mr. Loe had filed documents under seal including further statements from his physician regarding his heart problems. Supp. CP 128-30, Sub # 85 and 85.99 (Sealed medical and health info CRRSP from Physician”) (dated September 12, 2018) (these documents were entered by the Superior Court in conjunction with the order to seal which appears on the docket as September 12, 2018).

At sentencing on October 9, at which Mr. Loe was present, Mr. Loe had also filed a declaration regarding his case. RP 326; see CP 102-11 (Declaration of Tim Loe) (filed October 9, 2018). Counsel made clear at

the sentencing held that the defense was renewing the mistrial motion based on involuntary absence. RP 331. In the declaration, Mr. Loe begins with general concerns about the case and his counsel and other matters, but he also states that Deputy Middlesworth, who sat with the prosecutor during trial, “was allowed to read my personal medical records when they were handed to the prosecutor by my attorney.” CP 108. Mr. Loe also stated in court that his heart problems were related to the court case and stress in the courtroom, which he had informed his lawyer about. RP 335.

Ms. Britton also spoke, and told the court that the case had been pushed through despite the documents from Mr. Loe’s doctors and the hospital records. RP 338. However, the court stated that it had previously made a finding that the defendant’s absence was not voluntary, and that it had not heard anything to the contrary at sentencing. RP 330-31.

The court later noted that it had suspended the trial after the first morning of trial in order to determine Mr. Loe’s whereabouts, after he left the courtroom speaking on the telephone about a heart attack, and that it had not issued a warrant for his arrest. RP 340. However, the court then erroneously found that Mr. Loe had not been treated – seemingly asserting that Mr. Loe had “went to the emergency room but was released and was never admitted.” RP 340-41. The court also incorrectly stated, “nor was there any contact reference from his attorney to indicate why he would be

unable to appear the next day.” RP 341. The court deemed a mistrial unwarranted on ground that no medical

documents were ever provided to the court [and the] only thing that was provided was a statement that Mr. Loe would need to see his cardiologist in Spokane, and – on the next day, and - looked to me like we were going to be able to finish the case in one day so I didn’t perceive that to be a problem. Nor was there anything in that note which indicated that Mr. Loe would be unable to participate in the proceedings.

RP 340. These findings and rulings were in error. The State’s arguments that Mr. Loe had not shown medical reasons for his absence were inaccurate, and the court had misstated the standard required for establishing waiver of a constitutional right. RP 191. In fact, Mr. Loe’s demonstrated circumstances precluded any finding of voluntary absence, where the court must presume presence was not waived. Mr. Loe had left the courtroom to proceed to the hospital by ambulance. RP 174, RP 185-86 (court’s notation of Officer Kowal’s report to the court). He had shown that he was treated for the heart condition, regardless of whether he was or was not admitted to stay the night at that facility. RP 195, RP 206-07. The court’s own inquiry into the matter discovered the same essential facts – that Mr. Loe was treated medically for a serious condition. RP 208-10.

The court incorrectly concluded that these facts meant that Mr. Loe had chosen to be absent, and established the legal requirements of waiver. RP 208-10. Crucially, waiver is not established unless the defendant’s

action or omission was clearly intended to result in his absence. State v. Atherton, 106 Wn. App. 783, 789, 24 P.3d 1123 (2001).

The court held to its same erroneous view of the facts and the law at sentencing – finding that Mr. Loe was not treated since he was never “admitted,” and rejecting the undisputed assertions by his physician Kelly Whitty that Mr. Loe’s heart condition required his absence. RP 340-41. The court’s reasoning must be viewed in light of its incorrect statement of the law – that “there would be an assumption that a person who’s not at court is voluntarily absenting himself.” RP 198-99; see State v. LaBelle, supra, 18 Wn. App. at 389 (as with all waivers of fundamental constitutional trial rights, there is a presumption that absence is *not* voluntary). This was not a voluntary absence.

**5. Reversal is required.** The court’s error in resuming trial in Mr. Loe’s absence, and in taking the verdict, requires reversal. Both the presentation of evidence and return of verdict are critical stages. Rice, supra, at 617; In re Pers. Restraint of Lord, 123 Wn.2d 296, 306, 868 P.2d 835 (1994) (“The core of the constitutional right to be present is the right to be present when evidence is being presented.”).

It is the State’s burden to demonstrate that a violation of the right to be present at trial was harmless beyond a reasonable doubt. Rice, 110 Wn.2d at 613-14. Here, Mr. Loe was unable to be present for the full

examination and cross-examination of the State's crucial witnesses, Gauny, and Thompson. RP 174, RP 223-34. The defense was only able to present the testimony of Ms. Britton, who was not at the scene of the alleged incident. RP 258. And, the record amply shows that Mr. Loe was unable to testify regarding his initial claim of self-defense, as his lawyer made abundantly clear that he intended to do, noting during discussion of jury instructions, "I intended to have Mr. Loe testify[.]" RP 180; see also CP 73-79 (defense proposed instructions on defense of self and defense of property and brief in support thereof). Reversal is required because the error of conducting trial in Mr. Loe's absence was not harmless.

#### **E. CONCLUSION**

Based on the foregoing Mr. Loe respectfully requests that this Supreme Court accept review, and reverse the trial court's entry of judgment of conviction.

DATED this 19th day of May, 2020.

Respectfully submitted,

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# Appendix A

**FILED**  
**APRIL 28, 2020**  
In the Office of the Clerk of Court  
WA State Court of Appeals, Division III

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

STATE OF WASHINGTON,	)	No. 36378-3-III
	)	
Respondent,	)	
	)	
v.	)	UNPUBLISHED OPINION
	)	
TIM ALLEN LOE,	)	
	)	
Appellant.	)	

LAWRENCE-BERREY, J. — Tim Loe appeals after a jury found him guilty of fourth degree assault. He argues the trial court violated his state and federal constitutional right to be present at all critical stages of trial when it resumed the trial in his absence.

Because the trial court adhered to procedural requirements and because substantial evidence supports its finding that Loe was voluntarily absent from trial, we affirm.

## FACTS

In October 2017, Tim Loe called the police because Carol Taylor, Carl Gauny, and Laurie Thompson were on the property he was occupying. Loe has an ongoing civil

dispute with Ms. Taylor about ownership of the property. Ms. Taylor has been the record owner of the property since 2011.

Loe confronted the three individuals and video recorded the confrontation. Ms. Thompson attempted to take pictures with her tablet, but Loe knocked it out of her hand. Loe then started aggressively chest bumping Ms. Thompson and yelling at her to get off his property. Mr. Gauny, Ms. Thompson's husband, stepped between them and Loe started bumping Mr. Gauny. The three began to leave, yet Loe continued to bump and strike Mr. Gauny on the back. They also called the police.

On November 2, 2017, the State charged Loe with fourth degree assault and disorderly conduct. Loe requested a jury trial. For the next several months, Loe had repeated conflicts with the attorneys appointed to represent him. Eventually, the court set a trial date of September 10, 2018.

Both parties were present the morning of trial. Almost immediately, Loe requested a continuance. Defense counsel explained that Loe had a heart attack on August 20, three weeks earlier, and he had a doctor's note asking that Loe be excused from court. Defense counsel advised the court that Loe told him he had a doctor's appointment the next day.

The State opposed the request. The State argued the prospective jurors were waiting, the trial should only take one day, and the matter had been delayed for too long. The trial court agreed with the State and expressed optimism the trial could be completed that day, which would allow Loe to attend his appointment.

That morning, the parties selected a jury, and the State began quickly proceeding with its case. Before recessing for lunch, the court told the parties it wanted to review jury instructions with them immediately after the break.

As soon as court reconvened, Loe made a call on his cellular phone. The trial court asked Loe to talk outside the courtroom. Loe exclaimed, “having a heart attack.” Report of Proceedings (RP) at 181. The court remarked, “You don’t want to disturb what we’re doing here. You’re welcome to stay if you wish, but—.” RP at 181. Loe replied, “I’m leaving the superior courtroom.” RP at 181. Loe left the courtroom.

The trial court asked defense counsel how he wished to proceed. Defense counsel responded he was comfortable proceeding forward discussing the jury instructions. For the next several minutes, the parties discussed jury instructions. As they concluded their discussions, a police officer entered the courtroom and handed the clerk a note. The court read the note aloud: “Loe went to the hospital by ambulance.” RP at 192. The parties agreed they needed to research the proper procedural steps, and the jury needed to be

informed there was a delay. The court brought the jury in, told them there was a delay, and released them for one hour.

Once court reconvened, the trial judge asked counsel what the options were. The State reviewed applicable authorities and concluded the trial could continue if the court made a preliminary finding that Loe's absence was voluntary.

Defense counsel responded:

Mr. Loe indicated to me that—from his health care provider that he was—he provided a kind of vague letter that says, “Please excuse Tim Loe from court due to a medical issue that is requiring further evaluation by a specialist,” and there's—scheduling conflict—the appointment is vital for his patient's health.

RP at 201-02. Defense counsel added that Loe's live-in partner confirmed he had been admitted to the hospital. Defense counsel asked the court to find Loe's absence involuntary.

The State replied that Loe's antics were a ruse because before he got into the ambulance, he filed a complaint against one of the deputies testifying against him.

The trial court, unable to make a finding of voluntary or involuntary absence, adjourned court until the following morning so the parties could discover what happened with Loe. The court recommended to defense counsel that he find out and, preferably

with written confirmation, whether Loe had been admitted to the local hospital, his condition, and whether he could proceed with trial later that week.

The following morning, Loe did not appear for court. Defense counsel reported he had a letter from Loe's primary care provider. He read the note out loud:

[T]his is this an additional letter stating a medical necessity for Tim Loe to be present at his cardiology appointment . . . . He was seen in the emergency room [three weeks ago] for a several-hour history of chest pain, dizziness and extreme-paresthesias . . . . He was found to be in atrial fibrillation with RVR. This was responsive to-diltiazem, which placed him into a regular rhythm, he was discharged on metoprolol for rate control and set up for an appointment [with] cardiology. He was officially diagnosed with paroxysmal atrial fibrillation which does have some increased risk of stroke, deep vein thrombosis and heart attack. Increased stress may increase his risk for the return of his irregular rhythm. Ultimately he needs to be evaluated by-cardiology to determine the cause of the irregular rhythm as well as the risk for future arrhythmia.

RP at 214.

The trial court asked defense counsel where Loe was. Defense counsel responded, "[M]y understanding is that he's—appointment was at 9:30 this morning, that cardiology appointment referenced. I've not spoken with him this morning but that's—that's my understanding." RP at 214-15.

The trial court reviewed controlling authority—*Thomson*,<sup>1</sup> *Thurlby*,<sup>2</sup> and *Garza*.<sup>3</sup> The court explained, consistent with *Thurlby*, it had directed a court administrator to call the local hospital to inquire about Loe. The administrator reported that although Loe had been seen at the hospital, he was not admitted.

The court carefully explained its reasons for finding Loe was voluntarily absent:

[W]hen we resumed court [yesterday] . . . I observed that Mr. Loe was standing next to his attorney at counsel table, talking on the phone, loudly talking on the phone, and I had directed him to have his conversation outside the courtroom. And—he made a comment—I don’t remember exactly what, but something like, “Well, I’m having a health issue,” something about his health, and off he went. It was only a few minutes later that the—we were advised that an ambulance had been summoned. I do not know whether that ambulance was summoned by Mr. Loe or someone else. But—we’ve had to chase down information for Mr. Loe. It hasn’t been Mr. Loe offering information about his condition or offering verification of the medical necessity for being absent from court.

It’s difficult because unquestionably a heart or arrhythmia condition isn’t in the nature of a hangnail, or as in *Thurlby*, perhaps a choice to accompany one’s mother [to surgery]. But this is a preliminary determination.

And I observe also that throughout the case there at least have been occasions where—I think back in February of this year, Mr. Loe had— Well,—well, he filed numerous declarations within the court file, but filed a declaration he had Grave—Grave’s Disease, ulcerative colitis and autoimmune disorder, low blood sugar, complaining that if he was in court

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<sup>1</sup> *State v. Thomson*, 123 Wn.2d 877, 872 P.2d 1097 (1994).

<sup>2</sup> *State v. Thurlby*, 184 Wn.2d 618, 359 P.3d 793 (2015).

<sup>3</sup> *State v. Garza*, 150 Wn.2d 360, 77 P.3d 347 (2003).

for too long that his low blood sugar could cause mental fatigue, and evidence itself with confusion.

And, it was just within the last week or so, as I understand, that there was a complaint about this medical condition. I hear now or read here that it was August 20 of 2018. And, you know, we started trial—couple weeks later.

And he did request a continuance the morning of trial, indicating that he had this appointment on Tuesday. And I denied it, with the belief that, you know, that's—that's not only a choice but also—I figure if there was an emergency he would have been immediately in the hospital, number one; and number two, there was no documentation from a provider that there was a—an emergent medical condition.

The fact that Mr. Loe is not in the hospital this morning, not admitted to the hospital, chose to go to the ER yesterday, and has also chosen not to be here this morning or offer any—verification from his physician, is sufficient for me on a preliminary basis to find that his—non-appearance today is a voluntary absence . . . .

RP at 216-18.

The trial resumed despite Loe's absence. The parties examined and cross-examined the State's last two witnesses. The State rested. The parties then examined and cross-examined Loe's sole witness, his live-in partner. The defense rested. The trial court excused the jury, and the parties discussed final jury instructions. They then took their lunch recess.

Court resumed at 1:30 p.m. Loe still was absent. The parties gave closing arguments. The jury deliberated then returned with its verdicts. Loe still was absent. The jury found Loe guilty of fourth degree assault and not guilty of disorderly conduct. The court set a sentencing date of October 9, 2019.

Prior to sentencing, Loe submitted a detailed, 10-page typed declaration. In the first 5 or 6 pages, Loe discussed his many grievances with several local officials and agencies, many of which date back years. In the next 2 pages, Loe discussed his grievances concerning this case—including his disagreements with Ms. Taylor, the trial judge’s refusals in other cases to grant him anti-harassment protection orders against Ms. Taylor and others, and his dissatisfaction with the various attorneys appointed at public expense to represent him. Loe also noted his displeasure with the deputy sheriff—the State’s representative at counsel table—reading his “personal medical records.”<sup>4</sup> Clerk’s Papers (CP) at 108. In the next 2 pages, Loe discussed his version of the incident, about which he complains he never had a chance to testify. Only toward the very end of

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<sup>4</sup> This probably refers to the initial note defense counsel relied on when Loe requested a trial continuance.



his declaration, did Loe discuss his health.<sup>5</sup> He concluded his declaration by referring to his trial as a “travesty of justice.” CP at 111.

Nowhere in Loe’s detailed 10-page declaration did he explain where he went after the hospital did not admit him the first afternoon of trial or where he went the second day of trial. Nor did he submit any document confirming he was at a cardiology appointment the second day of trial.<sup>6</sup>

At sentencing, the court confirmed it had reviewed Loe’s declaration. The State recommended a sentence of 364 days with all but 90 days suspended. The court then listened to defense counsel’s recommendation. The court then asked Loe if he wanted to say anything. Loe reiterated his version of events and some of his grievances with local officials, but he did not discuss his health or why he was absent from his trial. The court entered a sentence of 364 days, with all but 3 days suspended.

Loe timely appealed to this court.

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<sup>5</sup> “I never had a chance to explain any of these things to a jury because I was not healthy enough to do so. I explained that to my attorney when we started working together. I explained that both Gina and my health had taken a turn for the worse in recent months and explained the hardships that the court appearances were taking on us.” CP at 111.

<sup>6</sup> In Loe’s brief, he refers to additional medical records under seal, dated September 12, 2018. Appellant’s Br. at 17. We find no such records. The only record is the September 11, 2018 typed note quoted above on page 5.

## ANALYSIS

Loe contends the trial court erred by finding his absence voluntary and resuming his trial without him. We disagree.

We review a trial court's decision to proceed with trial in a defendant's absence for an abuse of discretion. *State v. Thurlby*, 184 Wn.2d 618, 624, 359 P.3d 793 (2015). "An abuse of discretion occurs only when the decision of the court is 'manifestly unreasonable, or exercised on untenable grounds, or for untenable reasons.'" *State v. McCormick*, 166 Wn.2d 689, 706, 213 P.3d 32 (2009) (quoting *State ex rel. Carroll v. Junker*, 79 Wn.2d 12, 26, 482 P.2d 775 (1971)).

The right to be present at one's own criminal trial is protected by the Sixth Amendment to the United States Constitution and the due process clauses of the Fifth and Fourteenth Amendments and article I, section 22 of our own state constitution. *Thurlby*, 184 Wn.2d at 624. This right is not absolute—it can be waived. *Id.* "If 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.* CrR 3.4(b) also allows the court to continue in a defendant's absence: "The defendant's voluntary absence after the trial has commenced in his or her presence shall not prevent continuing the trial to and including the return of the verdict."

In *State v. Thomson*, our high court developed a three-pronged analysis that a trial court must conduct in order to find the defendant waived his or her right to be present at trial. 123 Wn.2d 877, 881, 872 P.2d 1097 (1994). The trial court must:

“(1) [make] sufficient inquiry into the circumstances of a defendant’s disappearance to justify a finding whether the absence was voluntary, (2) [make] a preliminary finding of voluntariness (when justified), and (3) [afford] the defendant an adequate opportunity to explain his absence when he is returned to custody and before sentence is imposed.”

*Id.* (alterations in original) (quoting *State v. Washington*, 34 Wn. App. 410, 414, 661 P.2d 605 (1983)). When performing this analysis, the trial court must examine the totality of the circumstances. *State v. Garza*, 150 Wn.2d 360, 367, 77 P.3d 347 (2003).

First, we must determine whether the trial court made a sufficient inquiry into Loe’s disappearance. The trial court first inquired about Loe’s disappearance with both the State and defense counsel. Then, the trial court recessed trial until the next day so the parties could discover more information about Loe’s absence. The next day, the court again heard from both the State and defense counsel. The court even asked a court administrator to contact the hospital to see if Loe had been admitted. The court explained it directed the court administrator to do this because the trial court in *Thurlby* had done this. We conclude the trial court made a sufficient inquiry into Loe’s disappearance.

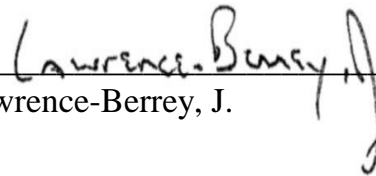
Next, we determine whether substantial evidence supports the trial court's preliminary decision that Loe was voluntarily absent. The court learned that Loe had arrived at the hospital the previous day, but was not admitted. There was no explanation why Loe did not return to court or at least contact his attorney. Nor was there any credible excuse why Loe was absent the second day of trial. Defense counsel said he had not talked to his client, but his "understanding" was Loe was at his 9:30 a.m. cardiology appointment. RP at 214. Defense counsel did not explain the basis of his "understanding," and he did not provide anything in writing to confirm that Loe had a medical appointment. We conclude the trial court's finding that Loe was voluntarily absent from trial is supported by substantial evidence.

Finally, the trial court afforded Loe an opportunity to explain his absence the very next time Loe appeared, which was at his sentencing. The trial court reviewed Loe's lengthy declaration and also gave him an opportunity to speak before imposing sentence. Loe wrote and spoke at length. But neither in his declaration nor during his oral comments did Loe explain where he was during his absences. He had one month between trial and sentencing. Surely if he had a cardiologist or other medical appointment on the second day of trial, he could have obtained something in writing to confirm this. He did not.


We conclude the trial court did not abuse its discretion by resuming trial in Loe's absence. The court did everything right. It made a sufficient inquiry into Loe's whereabouts, it made a justified finding of voluntary absence, and it afforded Loe a timely opportunity to explain himself.

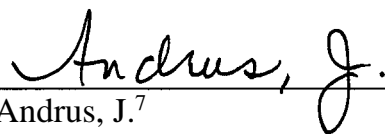
Affirmed.

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.

  
\_\_\_\_\_  
Lawrence-Berrey, J.

WE CONCUR:

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

  
\_\_\_\_\_  
Andrus, J.<sup>7</sup>

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<sup>7</sup> The Honorable Beth Andrus is a Court of Appeals, Division One, judge sitting in Division Three under CAR 21(a).

**IN THE SUPREME COURT OF THE STATE OF WASHINGTON**

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STATE OF WASHINGTON,	)	
	)	
RESPONDENT,	)	
	)	
v.	)	COA NO. 36378-3-III
	)	
TIM LOE,	)	
	)	
PETITIONER.	)	

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**DECLARATION OF DOCUMENT FILING AND SERVICE**

I, MARIA ARRANZA RILEY, STATE THAT ON THE 20<sup>TH</sup> DAY OF MAY, 2020, I CAUSED THE ORIGINAL **PETITION FOR REVIEW TO THE SUPREME COURT** TO BE FILED IN THE **COURT OF APPEALS – DIVISION THREE** AND A TRUE COPY OF THE SAME TO BE SERVED ON THE FOLLOWING IN THE MANNER INDICATED BELOW:

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| COLVILLE, WA 99114-2862                               |     |                      |
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| [will.ferguson208@gmail.com]                          |     |                      |

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# WASHINGTON APPELLATE PROJECT

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**Appellate Court Case Title:** State of Washington v. Tim Allen Loe  
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