No. 42752-4-II

COURT OF APPEALS, DIVISION II
STATE OF WASHINGTON

STATE OF WASHINGTON,

Respondent,

vs.

JOHNNIE GERARD BROWN,

Appellant.

On Appeal from the Pierce County Superior Court
Cause No. 01-1-03585-3
The Honorable James Orlando, Judge

OPENING BRIEF OF APPELLANT

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II. ISSUES PERTAINING TO THE ASSIGNMENTS OF ERROR

1. Was Johnny Brown improperly tried in absentia, and did the trial court err when it found that Brown was present when trial commenced, where Brown was not present when the pool from which his jury was chosen was empaneled and sworn in? (Assignment of Error 1)

2. Should Johnny Brown's sentence be vacated because the trial court did not order the statutorily required presentence investigation report and did not consider such a report before imposing the sentence? (Assignment of Error 2)

III. STATEMENT OF THE CASE

A. PROCEDURAL HISTORY

On July 5, 2001, the State filed an Information charging Johnnie Gerard Brown with two counts of rape of a child in the second degree (RCW 9A.44.076) and one count of incest in the

first degree (RCW 9A.64.020(1)). (CP 1-2)

On April 17, 2002, the case was called for trial and the parties, including an out-of-custody Brown, appeared in court. (TRP 1)[1] The parties first discussed various procedural and scheduling issues. (TRP 1-6) Then a group of potential jurors were summoned, and the judge gave the jurors preliminary instructions and swore them in. (TRP 12-13) The juror's were given questionnaires, and the judge excused the jurors until the following day. (TRP 12-17)

On April 18, 2002, court reconvened with Brown present and still out-of-custody. (TRP 18) The parties discussed whether to delay voir dire because there were still several lengthy pretrial matters to resolve, the current pool of potential jurors were at the end of their service, and an unusually large number of potential jurors appeared to have issues with the subject matter of the case. (TRP 18, 20-21, 30) The court and parties agreed to dismiss the current pool of potential jurors, and recess trial until May 6, 2002, when a new jury pool would be available. (TRP 30, 31-33) After formally dismissing and excusing the jurors, the court proceeded to

[1] The transcripts of trial, labeled Volumes 1 through 7, will be referred to as "TRP." The transcript of sentencing on 10/07/11 will be referred to as "SRP." The remaining volume will be referred to by the date of the proceeding.

hold a CrR 3.5 hearing. (TRP 34-92)

On April 22, 2002, Brown was present for pretrial hearings about whether to admit the State's proposed ER 404(b) evidence and whether potential minor witnesses were competent to testify. (CP 96-323) The court ruled that the minor witnesses were competent, but did not rule on the ER 404(b) issue because additional witnesses still needed to be called and examined. (TRP 322-23) At the end of the day, the court noted that proceedings would resume on Monday, May 6, 2002, and that jurors would be called for Brown's case on Tuesday, May 7, 2002. (TRP 323-24)

Brown did not appear in court on May 6, 2002. (TRP 326) Neither defense counsel nor the prosecutor knew where he was, so the court issued a warrant for his arrest. (TRP 328, 330)

When court reconvened on May 15, 2002, Brown's whereabouts were still unknown. (TRP 332-33) Once again, neither the prosecutor nor defense counsel had information about his location or the reason for his absence. The trial court also noted that Brown had made no effort to contact the court to explain his absence. (TRP 332-33, 339; CP 12-13)

Over defense counsel's objection, the trial court determined that Brown's absence was voluntary, that trial had commenced, and

that compelling reasons supported going forward with trial in absentia. (TRP 333-34, 335-36, 337, 338-39, 340-41)

On May 20, 2002, with Brown still absent and unaccounted for, the court had a fresh pool of potential jurors brought to the courtroom, and when they arrived the judge swore them in, gave preliminary instructions, distributed the questionnaires, and excused them for the remainder of the day. (TRP 355-56, 359-65)

The court then resumed the ER 404(b) hearing. (TRP 368-417) The court found that the proffered testimony, indicating that Brown had committed similar acts of sexual contact with other minor girls, would be admissible at trial. (TRP 421-25; CP 20-39)

Voir dire was conducted and a jury selected on the morning of May 21, 2002, and opening statements and witness testimony began that afternoon, all in Brown's absence. (TRP 432, 442) On May 24, 2002, the jury reached a verdict and found Brown guilty of all three charges. (TRP 803-04; CP 56, 81-84)

Brown was eventually apprehended and brought to court for sentencing on October 7, 2011. (09/02/11 RP 1; SRP 1; CP 87) Brown moved for a new trial, arguing that trial in absentia was improper because the jury pool from which his jury was selected was empaneled in his absence, and therefore trial had not

commenced in his presence. (TRP 2-8; CP 85-86, 87-91) The trial court denied the motion and upheld the verdicts. (TRP 7)

The trial court sentenced Brown to a standard range sentence totaling 280 months. (SRP 10, 13; CP 104, 107) This appeal timely follows. (CP 115)

B. SUBSTANTIVE FACTS

P.B. is the biological daughter of Johnnie Brown and his partner, Ethlyne Magalei. (TRP 532, 533, 724) According to P.B., one night in the Fall of 2000, while she and her father were watching a movie on the couch, she felt her father's hand move under her pajama top and rub her chest. (TRP 536, 542, 548-49) Then she felt his hand move under her pajama shorts and rub her "privates." (TRP 549-50) P.B. was not clear about whether or not Brown's finger entered her vaginal canal, but she was sure that his finger rubbed between and under her labia. (TRP 551, 559-60, 571, 576, 578, 580, 581, 584-85, 587) P.B. testified that this occurred on more than one occasion. (TRP 555, 559-60) She was 12 years old at the time. (TRP 541) P.B. eventually told her sister about the incidents, and her sister reported the allegation to the authorities. (TRP 560-61)

Ethlyne's sister, Rebecca Magalei, testified that she stayed

with Ethlyne and Brown during her eighth grade year, and that Brown also came into her bed while she slept, put his hand inside her underpants, and placed his finger inside her vagina. (TRP 603, 604, 623, 626, 628) Brown's stepdaughter, Rose Talerico, testified that Brown touched her breasts and vagina when she was five and six years old. (TRP 636-37, 638-39, 641) Another of Brown's stepdaughters, Gina Borruso, testified that Brown touched her vagina when she was about sixteen years old. (TRP 636, 649, 650-51, 653-55)

When questioned by investigators about P.B.'s allegation, Brown denied ever having consciously touched her in that way. (TRP 505, 506, 508) He theorized that he may have mistakenly touched her in bed while he was sleeping, thinking that she was his wife. (TRP 506)

IV. ARGUMENT & AUTHORITIES

A. THE TRIAL COURT ERRED WHEN IT FOUND THAT THE TRIAL COMMENCED IN BROWN'S PRESENCE, AND WHEN IT CONDUCTED BROWN'S TRIAL IN ABSENTIA, BECAUSE BROWN WAS ABSENT WHEN THE COURT EMPANELED AND SWORE IN THE POOL FROM WHICH HIS JURY WAS CHOSEN.

Every defendant has a fundamental constitutional right to be present at trial. U.S. Const. amd. VI, amd. XIV; Wash. Const. art I, § 3, § 22; State v. Thompson, 123 Wn.2d 877, 880, 872 P.2d 1097

(1994); see also Rushen v. Spain, 464 U.S. 114, 117, 104 S. Ct. 453, 78 L. Ed. 2d 267 (1983).

In Crosby v. United States, the defendant had attended preliminary proceedings and was advised in person of the trial date, but did not appear for the first day of trial. 506 U.S. 255, 256-57, 113 S. Ct. 748, 122 L. Ed. 2d 25 (1992). Over defense counsel's objection, the district court conducted trial in absentia and the defendant was convicted. 506 U.S. at 257. On appeal, the United States Supreme Court, construed Federal Rule of Criminal Procedure 43, which at that time stated:

> **(a) Presence Required**. The defendant shall be present at the arraignment, at the time of the plea, at every stage of the trial including the impaneling of the jury and the return of the verdict, and at the imposition of sentence, except as otherwise provided by this rule.
> **(b) Continued Presence Not Required**. The further progress of the trial to and including the return of the verdict shall not be prevented and the defendant shall be considered to have waived the right to be present whenever a defendant, initially present,
> **(1)** is voluntarily absent after the trial has commenced[.]

The Court interpreted the absence of an explicit statutory reference to beginning the trial in the defendant's absence to mean the Federal Rule "prohibits the trial in absentia of a defendant who is not present at the beginning of trial." 506 U.S. at 262.

The Crosby Court further suggested that Federal Rule 43's distinction between commencement of trial (where the defendant's presence is necessary) and later phases of trial (where the defendant's presence can be waived) is supportable: The cost of suspending trial after it has begun will generally be greater than postponing trial before it starts; and the defendant's initial presence "serves to assure that any waiver is indeed knowing." 506 U.S. at 261.

Like FRCrP 43, Washington's Criminal Rule 3.4(a) governs the extent to which the defendant must be personally present at arraignment, during trial, and during other proceedings:

> **(a) When Necessary**. The defendant shall be present at the arraignment, at every stage of the trial including the empaneling of the jury and the return of the verdict, and at the imposition of sentence, except as otherwise provided by these rules, or as excused or excluded by the court for good cause shown.
> **(b) Effect of Voluntary 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. A corporation may appear by its lawyer for all purposes. In prosecutions for offenses punishable by fine only, the court, with the written consent of the defendant, may permit arraignment, plea, trial and imposition of sentence in the defendant's absence.

In State v. Hammond, 121 Wn.2d 787, 854 P.2d 637 (1993), the Washington State Supreme Court applied the Crosby Court's

analysis to CrR 3.4(a).

As in Crosby, the defendant in Hammond did not appear in court on the day his jury was selected, the trial court proceeded with trial in absentia over defense counsel's objection, and the defendant was convicted. 121 Wn.2d at 789-90. On appeal, the Court reversed the conviction, stating that CrR 3.4, like FRCrP 43, does not permit trial in absentia when the accused is not present at the beginning of trial. 121 Wn.2d at 793.

In State v. Thomson, the defendant was present when jury selection started, but left before it finished. Trial was completed in the defendant's absence, and he was convicted. 70 Wn. App. 200, 202-03, 852 P.2d 1104 (1993). Division One affirmed, reasoning:

> The wording of [CrR 3.4(a)] establishes that the court considered trials as events which begin when the jury is impaneled and end when the verdict is returned. Arraignment and entering a plea precede trial, while sentencing follows trial. That demarcation is logical because, when the jury panel is sworn for voir dire, the defendant is given an unambiguous and readily discernible sign that trial is beginning and he or she will have the opportunity to participate in jury selection. . . . Thus, we hold that for purposes of CrR 3.4 the beginning of trial occurs, at the latest, when the jury panel is sworn for voir dire and before any questioning begins.

70 Wn. App. at 210-11.

In State v. Crafton, the defendant was present for pretrial

motions but not when the jury panel was sworn for voir dire. He was subsequently convicted after a trial in absentia. 72 Wn. App. 98, 99-100, 863 P.2d 620 (1993). The Crafton court agreed with Thomson that trial commences when the jury panel is sworn for voir dire, and reversed the conviction. 72 Wn. App. at 103. The Court went on to state:

> In contrast to Thomson, however, the facts of this case require us to consider whether trial starts earlier than when the jury panel is sworn for voir dire.
>
> We hold it does not. The wording of CrR 3.4 shows that for purposes of an accused's presence, the first stage of a trial is the empanelling of the jury, and the last stage is the return of the verdict. Additionally, an accused's right to be present at trial should not turn on the fortuity of whether pretrial motions are scheduled for the day of trial; it is incongruous to say that the accused can be tried in absentia when he or she is present at pretrial motions held on the day of trial, but not when he or she is present at pretrial motions held the day before trial. Finally, we think that a bright-line rule is needed, and we agree with Division One that such a rule is provided if trial commences when the jury is sworn for voir dire[.]

72 Wn. App. at 103.

In this case, Brown was present on April 17, 2002 when the first pool of potential jurors was sworn in, but those jurors were dismissed. (TRP 1, 12-13, 18, 32-33) Then, in Brown's presence, the parties agreed that they would continue with pretrial motions,

and that a new jury pool would be called and sworn in 18 days in the future. (TRP 18, 20-21, 30, 31-33, 323-24)

Because of the dismissal of this first jury pool and the planned 18-day delay before a new jury would be called, Brown was not given "an unambiguous and readily discernible sign" that his trial had begun. Thomson, 70 Wn. App. at 211. Rather, the clear message to Brown was that trial would not commence for at least 18 days.

Under the bright line rule announced by the Cosby court, and subsequently adopted by Washington's appellate courts, trial did not commence in Brown's presence because the jury that actually decided his guilt was empaneled in his absence. It was therefore improper to conduct trial in absentia, and Brown's convictions must be reversed.

B. THE TRIAL COURT ERRED WHEN IT FAILED TO ORDER AND CONSIDER A PRESENTENCE REPORT AS REQUIRED BY THE SENTENCING REFORM ACT.

Following entry of the verdicts on May 24, 2002, the trial court concluded the proceedings until such time as Brown could be located and made to appear in court for sentencing. (TRP 809-11) On October 7, 2011, after the trial court denied Brown's motion for a new trial, defense counsel informed the court that sentencing

could not take place that day because the required presentence investigation report (PSI) had not yet been ordered or completed. (SRP 8) The prosecutor asserted that a PSI was not required under the terms of the Sentencing Reform Act (SRA) in effect in 2000, and was therefore unnecessary in Brown's case. (SRP 9) The trial court agreed that no PSI was necessary, and went on to impose a standard range sentence. (SRP 9-10, 13)

Generally, a standard range sentence is not reviewable. RCW 9.94A.585(1); Former RCW 9.94A.210(1) (2000). But a defendant may challenge the procedure by which a standard range sentence is imposed, provided that a defendant can show that the sentencing court had a duty to follow some specific procedure required by the SRA, and that the court failed to do so. State v. Ammons, 105 Wn.2d 175, 183, 713 P.2d 719, 718 P.2d 796 (1986); State v. Mail, 121 Wn.2d 707, 712, 854 P.2d 1042 (1993); State v. Watson, 120 Wn. App. 521, 527, 86 P.3d 158 (2004).

Both the current version of the SRA and the version in effect in 2000 (when Brown committed his offenses) mandate that "the court shall, at the time of plea or conviction, order the department to complete a presentence report before imposing a sentence upon a defendant who has been convicted of a felony sexual offense."

RCW 9.94A.500(1); Former RCW 9.94A.110(1) (2000) (copy attached in Appendix).[2] The statutes also provide that "[t]he court shall consider the risk assessment report and presentence reports[.]" RCW 9.94A.500(1); Former RCW 9.94A.110(1) (2000). This statute "forms a baseline--a minimum amount of information which. . . must be considered in sentencing." Mail, 121 Wn.2d at 711 (emphasis in original).

The clear and unambiguous language of the SRA, both as it reads currently and as it read in 2000, requires the sentencing court to order and consider a PSI before imposing a sentence on a defendant who, like Brown, has been convicted of a felony sex offense. The sentencing court therefore had a duty to follow this specific procedure, and failed to do so.

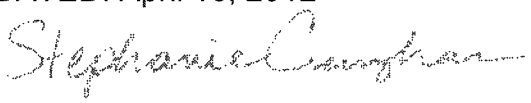
Because the trial court did not order the statutorily required PSI and did not consider such a report before imposing the sentence, Brown's sentence must be vacated and his case remanded for resentencing.

[2] Any sentence imposed under the SRA "shall be determined in accordance with the law in effect when the current offense was committed." RCW 9.94A.345.

V. CONCLUSION

Brown was not present when the jurors who actually determined his guilt were empaneled. (TRP 355, 359-65) Therefore, trial did not "commence" in Brown's presence, and trying him in absentia was improper. Brown's conviction should be reversed and his case remanded for a new trial. In the alternative, the court failed to follow the statutory requirement that it order and consider a presentence investigation report before pronouncing sentence, and his case should be remanded for resentencing.

DATED: April 16, 2012



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CERTIFICATE OF MAILING

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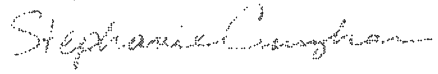

STEPHANIE C. CUNNINGHAM, WSBA #26436

APPENDIX

FORMER RCW 9.94A.110 (2000)

section is not sent to the sentencing guidelines commission as required in subsection (2) of this section, the sentencing guidelines commission shall have the authority and shall undertake reasonable and necessary steps to assure that all past, current, and future sentencing documents as defined in subsection (1) of this section are received by the sentencing guidelines commission. [1997 c 338 § 49; 1995 c 129 § 5 (Initiative Measure No. 159).]

Comment

Initiative Measure No. 159 added this section, requiring that every felony Judgment and Sentence document includes all recommended plea or sentencing agreements, the printed name of the sentencing judge and space for the judge's reasons to impose an exceptional sentence. Records of sentences above or below the standard range must reveal whether the prosecuting attorney recommended a similar sentence.

The Sentencing Guidelines Commission is required to compile annual and cumulative records of each judge's sentencing practices involving violent offenses, most serious offenses and felonies involving deadly weapons. The Commission is to compare each judge's sentencing practices to the standard range for each of these offenses, and to publish these comparative records.

RCW 9.94A.110 Sentencing hearing--Presentencing procedures--Disclosure of mental health services information. (1) Before imposing a sentence upon a defendant, the court shall conduct a sentencing hearing. The sentencing hearing shall be held within forty court days following conviction. Upon the motion of either party for good cause shown, or on its own motion, the court may extend the time period for conducting the sentencing hearing.

Except in cases where the defendant shall be sentenced to a term of total confinement for life without the possibility of release or, when authorized by RCW 10.95.030 for the crime of aggravated murder in the first degree, sentenced to death, the court may order the department to complete a risk assessment report. If available before sentencing, the report shall be provided to the court.

Unless specifically waived by the court, the court shall order the department to complete a chemical dependency screening report before imposing a sentence upon a defendant who has been convicted of a violation of the uniform controlled substances act under chapter 69.50 RCW or a criminal solicitation to commit such a violation under chapter 9A.28 RCW where the court finds that the offender has a chemical dependency that has contributed to his or her offense. In addition, the court shall, at the time of plea or conviction, order the department to complete a presentence report before imposing a sentence upon a defendant who has been convicted of a felony sexual offense. The department of corrections shall give priority to presentence investigations for sexual offenders. If the court determines that the defendant may be a mentally ill person as defined in RCW 71.24.025, although the defendant has not established that at the time of the crime he or she lacked the capacity to commit the crime, was incompetent to commit the crime, or was insane at the time of the crime, the court shall order the department to complete a presentence report before imposing a sentence.

The court shall consider the risk assessment report and presentence reports, if any, including any victim impact statement and criminal history, and allow arguments from the prosecutor, the defense counsel, the offender, the victim, the survivor of the victim, or a representative of the victim or survivor, and an investigative law enforcement officer as to the sentence to be imposed.

If the court is satisfied by a preponderance of the evidence that the defendant has a criminal history, the court shall specify the convictions it has found to exist. All of this information shall be part of the record. Copies of all risk assessment reports and presentence reports presented to the sentencing court and all written findings of facts and conclusions of law as to sentencing entered by the court shall

be sent to the department by the clerk of the court at the conclusion of the sentencing and shall accompany the offender if the offender is committed to the custody of the department. Court clerks shall provide, without charge, certified copies of documents relating to criminal convictions requested by prosecuting attorneys.

(2) To prevent wrongful disclosure of information related to mental health services, as defined in RCW 71.05.445 and 71.34.225, a court may take only those steps necessary during a sentencing hearing or any hearing in which the department presents information related to mental health services to the court. The steps may be taken on motion of the defendant, the prosecuting attorney, or on the court's own motion. The court may seal the portion of the record relating to information relating to mental health services, exclude the public from the hearing during presentation or discussion of information relating to mental health services, or grant other relief to achieve the result intended by this subsection, but nothing in this subsection shall be construed to prevent the subsequent release of information related to mental health services as authorized by RCW 71.05.445, 71.34.225, or 72.09.585. Any person who otherwise is permitted to attend any hearing pursuant to chapter 7.69 or 7.69A RCW shall not be excluded from the hearing solely because the department intends to disclose or discloses information related to mental health services. [2000 c 75 § 8. Prior: 1999 c 197 § 3; 1999 c 195 § 4; 1998 c 260 § 2; 1988 c 60 § 2; 1985 c 257 § 34; 1985 c 443 § 6; 1984 c 209 § 5; 1981 c 137 § 12.]

Comment

This section is procedurally implemented through CrR 7.1. Relevant information for purposes of sentencing is to be submitted through written presentence reports. Information set forth in the presentence reports of the prosecuting attorney and the Department of Corrections will be considered admitted, unless specifically controverted by the defendant. State v. Ammons, 105 Wn.2d 175, 184 (1986).

A comprehensive discussion regarding the determination of a defendant's criminal history at the sentencing hearing is contained in State v. Ammons, 105 Wn.2d 175 (1986). See RCW 9.94A.370 for a discussion of other disputed facts that may affect the defendant's sentence.

The 1988 Legislature directed the court to order presentence reports on all offenders convicted of felony sex offenses.

The 1998 Legislature directed the courts to order the Department of Corrections to complete presentence reports before imposing sentences where the court determines the offender may be a mentally ill person as defined in RCW 71.24.025.

The 1999 Legislature authorized courts to order the Department of Corrections to complete presentence risk assessment reports for offenders and directed courts to consider risk assessment reports as part of the determination of what sentence to impose, although sentences may be entered without considering a risk assessment report. The 1999 Legislature also mandated presentence chemical dependency screening reports to be completed for all offenders violating the Uniform Controlled Substances Act (RCW 69.50). A court may specifically waive a chemical dependency screening in such cases. In other cases (non-drug offenses), a court may order a chemical dependency screening where the court finds that a chemical dependency contributed to the crime.

RCW 9.94A.120 Sentences. ***(Revised by 2000 c 28, effective July 1, 2001.)*** When a

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