NO. 42752-4-II

COURT OF APPEALS, DIVISION II
STATE OF WASHINGTON

STATE OF WASHINGTON, RESPONDENT

v.

JOHNNIE GERARD BROWN, APPELLANT

Appeal from the Superior Court of Pierce County
The Honorable James Orlando

No. 01-1-03585-3

Brief of Respondent

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A. ISSUES PERTAINING TO APPELLANT'S ASSIGNMENTS OF ERROR.

1. Was defendant properly tried in absentia where he was present for the commencement of the trial and willfully absented himself from the proceedings?

2. Was the court's failure to order a presentence report harmless where defendant's sentence was based on facts proven at trial and sentencing?

B. STATEMENT OF THE CASE.

1. Procedure

On July 5, 2001, the State charged JOHNNIE GERARD BROWN, hereinafter "defendant," with two counts of rape of a child in the second degree and one count of incest. CP[1] 1-2. On March 5, 2002, the charges were amended to include child molestation in the second degree as alternative crimes of rape of a child. CP 4-8.

On April 17, 2002, the parties appeared before the Honorable James R. Orlando for trial. RP 1. The court was concerned with the length of the trial as the current jury pool was on its second of two weeks

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[1] Citations to Clerk's Papers will be to "CP." Citations to the verbatim report of proceedings for the trial will be to "RP." The two sentencing hearing transcripts were not sequentially numbered, therefore citations to the sentencing hearings will be to "RP" followed by the date of the hearing.

of service. *See* RP 9-11. Based on both parties' representations that the trial would be short, the court agreed to swear in a jury panel and begin voir dire with a questionnaire that day, rather than wait for a new jury pool. RP 10-12. The court called for a jury, the panel was sworn in and given a questionnaire to be filled out by the following day. RP 12-17. On March 5, 2002, the State filed an amended information presenting an alternative of child molestation in the second degree for counts I and II. CP 4-8.

On April 18, 2002, defendant was again present in the courtroom, but arrived late. RP 18. During an admonishment to defendant to be on time in the future, the court noted that it had 50 jurors waiting on defendant to begin. RP 18.

The court expressed concern over the results of the juror questionnaires. *See* RP 18. The State also indicated that, because the victim was receiving pressure from family members, the length of the trial may exceed the parties' original estimate. RP 19. The prosecutor suggested that the court strike the current jury panel based on the concerns the court noted as well as the parties needing additional time for pretrial motions. RP 19-20. The defense agreed with striking the panel, as half the jury had hardships or had some connection to victims of rape crimes. RP 20-21. The defense was also concerned as a majority of the remainder of the panel was anti-defendant. RP 21. The court adopted the parties'

suggestion, but noted that they would not be able to resume jury selection until May 6th. RP 28, 31-32.

After releasing the jury panel, the parties started a CrR 3.5 hearing to determine of defendant's statements to Detective Zaro were admissible. RP 34-86. The court found that defendant had been properly advised of his rights and that he voluntarily spoke to the officers. RP 86-87. The court recessed the trial until the following Monday. RP 92.

On April 22, 2002, the trial reconvened with ER 404(b) and child competency hearings with defendant present. RP 93; 296-98. The 404(b) hearing involved the testimony of defendant's adult step-daughters who had been raped and molested by defendant when they were children. *See* RP 103-121, 150-60. The court ruled that the children were competent, but the parties had not completed the 404(b) hearing by the end of the day. RP 322-24. Prior to recessing for the day, the court noted that a new jury panel would be called on Tuesday, May 7. RP 324-25. The court recessed until the following day, but acknowledged that the hearing would be cancelled if a witness was unavailable. RP 325. The judge noted that if the witness was unavailable, the trial would reconvene the following Monday, May 6. RP 324-25.

On May 6, 2002, defendant did not appear. RP 326. Defendant's attorney was unable to reach him, but had contacted defendant's sister. RP 326. Defendant's sister had informed him that she last spoke to defendant on the previous Friday and that they had discussed having to be

in court on Monday. RP 326. Neither the attorney nor defendant's sister had an explanation as to why defendant was not present. RP 326.

The State advised against continuing the hearing without defendant's presence, but did not want to note a failure to appear, because he did not want to delay the trial due to the impact on the child victim. RP 327-28. The court issued a warrant for defendant's arrest, but required the attorneys to keep their schedules open so trial could continue as soon as defendant appeared. RP 328.

The court recessed until May 15, 2002. RP 331-32. At that time, the prosecutor asked the court to find that defendant voluntarily absented himself from the proceedings after trial was commenced. RP 332-33. The prosecutor noted that for speedy trial concerns, trial commences when the case is called and preliminary motions are heard. RP 335. Jury questionnaires were sent out and the venire was sworn in, but based on their answers and other time constraints, the court could not proceed with that panel. RP 335. Defendant was present for discussions about the jury panel and during pretrial motion testimony. RP 335-36. Based on these facts, the prosecutor argued that trial had commenced with defendant present. RP 336. Further, the prosecutor argued that there were compelling reasons to go forward without defendant, primarily because the child victim was in protective custody and would remain so until the case was resolved. RP 337.

Defendant's trial counsel objected, believing that trial had not yet commenced because the new jury panel had not been sworn in. RP 338-39. He also objected to a finding that defendant voluntarily absented himself, because there was no showing that defendant was still alive. RP 339.

The trial court found that defendant's absence was voluntary in light of the fact that he had been present for several days of proceedings and was out of custody on bond. RP 340-41. The court asked the State to provide proof that defendant was not incarcerated outside of Pierce County. RP 341.

On May 20, 2002, court reconvened. RP 355. The prosecutor informed the court that defendant had contacted the victim in the case and the caller identification indicated that he was still within the 253 area code. RP 355. Defendant did not disclose where he was and the victim hung up on him. RP 355. The court swore in a new venire, gave out a new questionnaire, and the parties continued with the 404(b) hearing. RP 358-66.

At the conclusion of the hearing, the trial court found by a preponderance of the evidence that the incidents of misconduct did occur with each of the witnesses. RP 421. The court allowed evidence of touching as a common scheme or plan, but excluded evidence of intercourse. RP 423-24. The court found the evidence of touching to be probative, but the evidence of intercourse was overly prejudicial. RP 424.

The court allowed only one of the witnesses to testify in rebuttal of defendant's claim of claim of accident or mistake. RP 424-25.

On May 21, 2002, the attorneys conducted voir dire. RP 432. Trial testimony commenced on the same day. RP 442.

On May 23, 2002, the State filed a second amended information with the same charges but correcting the dates of the allegations from July 2000 to a range from June 26, 2000 to December 1, 2000. CP 50-52; RP 668. Defendant's counsel objected, as defendant had been incarcerated during a portion of the range. RP 669, 670. The prosecutor agreed to file another amended information with a date range of July 7 to October 11. RP 670. The trial court granted the amendment with a date range of June 26 to October 11 as being consistent with the testimony provided. CP 53-55; RP 671, 680-81.

The State's final witness, E.M., who is defendant's girlfriend and the victim's mother, did not appear as scheduled. RP 657. Officers went to E.M.'s house, heard the television on and saw children present, but no one would answer the door. RP 662. The court authorized a material witness warrant. RP 662-63. After securing the warrant, law enforcement officers were able to convince E.M. to answer the door. RP 687. The officers secured E.M.'s promise to be in court the following day and admonished her that if she did not appear, they would return and arrest her. RP 688.

The following morning when E.M. again failed to appear, the officers returned to her house. RP 689. A neighbor told the officers that there had been a moving truck at E.M.'s house that morning which had left shortly before the officers arrived. RP 689. One of the officers entered the house through a window and noticed that televisions and clothing were missing and several household items were in boxes. RP 690-91. Later that afternoon, E.M. was apprehended at a storage facility and brought to court to testify. RP 708-10.

The State rested after E.M.'s testimony. RP 752. Defendant's counsel filed a motion to dismiss. CP 40-47; RP 752. The court denied the motion, finding sufficient evidence of penetration for the matter to go forward. RP 753.

On May 24, 2002, the jury found defendant guilty as charged. CP 81, 82, 84; RP 803-04.

On August 3, 2011, defendant was returned to court in custody and conditions of release were set. CP 120-22. The conditions indicated that defendant's residence was in St. Louis, Missouri. CP 120-22. A sentencing hearing was set for September 2, 2011. CP 123-24. Department of assigned counsel was present with defendant at the sentencing hearing, but the matter was set over as defendant had retained new counsel. RP (9/2/11) 2-10.

On October 7, 2011, the parties argued defendant's motion for a new trial. CP 85-86; RP (10/7/11) 2-3. Defendant argued that a trial does

not commence until the jury is empanelled. RP (10/7/11) 2-3. Defendant claimed to have no recollection of the first venire sworn in by the court. RP(10/7/11) 3-5. The court denied the motion, ruling that a jury panel had been sworn in and defendant knew jurors were called and that he was expected to be in court. RP (10/7/11) 7. The court found that defendant's absence was voluntary and willful as evidenced by the difficulties in having him return to court over the last nine years. RP (10/7/11) 7.

Defendant asked for additional time to order transcripts of the date the first jury panel was sworn and indicated that he was not ready for sentencing because a mandatory presentence investigation had not been conducted. RP (10/7/11) 8. The prosecutor objected, noting that sentencing had been pending for nine years. RP (10/7/11) 9. The court declined to continue sentencing, finding that the presentence investigation was not necessary in this particular case and that defendant's actions had delayed the victim's rights long enough. RP (10/7/11) 9.

The court sentenced defendant to a high-end, standard-range sentence[2] on all counts, concurrent, resulting in a total sentence of 280 months in custody. RP (10/7/11) 13.

Defendant filed a timely notice of appeal. CP 115.

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[2] Defendant's offender score was 9+, giving him a standard range of 210-280 months on Counts I and II and 77-102 months on count III. CP 100-114; RP (10/7/11) 13.

2. Facts

P.B. was born on June 25, 1988. RP 529. She is the biological daughter of defendant and his girlfriend, E.M. RP 532-33. One night, when P.B. was in the seventh grade in 2000, she and defendant were in the living room watching movies when defendant began rubbing her chest under her shirt and bra. RP 536, 541, 548-49. Defendant rubbed her "private part" underneath her shorts and underwear and inserted his fingers inside her vagina. RP 549-52. Defendant stopped after approximately ten minutes when P.B. stated that she wanted to go to bed. RP 552-53. Defendant touched P.B.'s vagina on four occasions, including placing his fingers inside her vagina. RP 559-60. It hurt P.B. when defendant penetrated her vagina. RP 560.

P.B. told her younger sister about the contact a few months later. RP 560. Her sister made her tell her mother. RP 561. P.B. told her mother that defendant had touched her chest, but did not continue because her mother started crying. RP 561.

On July 5, 2001, a police officer came to her house and took her to the Child Advocacy Center to conduct an interview. RP 564; *see also* RP 499. When she returned home, her mother was upset that she had been taken to another location for the interview. RP 567. Her mother took off P.B.'s pants and underwear made her expose her genitals in order to show her what was meant by "penetration" because, she claimed, P.B. said the child interviewer repeated that word and she did not know what it meant.

RP 568-69. Her mother told her that penetration was supposed to be "really painful" like "it breaks or something breaks." RP 570. Her mother also told P.B. that if defendant had penetrated her, he was facing more prison time. RP 571. P.B. called the police detective and told her that defendant did not penetrate her. RP 571. The term "penetration" was never mentioned in P.B.'s interview. RP 594.

Once the trial started, P.B. was afraid to go back home with her mother and was staying at her aunt's house. RP 572. In the month she was away, she visited her mother and sisters twice, and noticed that her mother had given her room to one of her sisters. RP 573-74.

E.M.'s younger sister and two of defendant's step-daughters all testified that defendant had touched their breasts and vaginas while they were minors living with defendant. RP 603-04, 623-28, 636-39, 649-55.

Defendant was interviewed by Detective Zaro. RP 504-05. He denied touching P.B.. RP 505-06. When asked if P.B. was lying about the allegations, defendant stated that he would not call her a liar, but it might have happened when P.B. had gotten into his and E.M.'s bed and he thought she was E.M.. RP 506. Defendant repeated that he would never consciously do anything to hurt P.B.. RP 506, 508.

E.M. testified that she was aware of her sister's allegations that defendant touched her when she was a minor. RP 727. She claimed she confronted defendant at that time, but he denied the allegations so she continued living with him. RP 726. She initially denied that P.B. ever

told her about defendant's behavior, but when confronted about her statements to other parties, she changed her testimony to say that P.B. was unsure if defendant had been "playing." RP 726-27. She did not take any steps to protect P.B. because she did not think defendant was serious or that it was an accident. RP 728.

Defense counsel called two of the victim's sisters, D.B. and J.B., to testify on defendant's behalf. Each testified that P.B. told them that she had fabricated the allegations. *See* RP 756, 767.

C. ARGUMENT.

1. DEFENDANT TRIAL IN ABSENTIA WAS PROPER WHERE DEFENDANT WAS PRESENT AT THE TIME THE JURY PANEL WAS SWORN IN FOR VIOR DIRE AND WILLFULLY ABSENTED HIMSELF FROM THE PROCEEDINGS.

As a matter of constitutional law, "[a] defendant has a constitutional right to be present in the courtroom at every critical stage of the proceedings against him." ***Illinois v. Allen***, 397 U.S. 337, 90 S. Ct. 1057, 25 L. Ed. 2d 353, 90 S. Ct. 1057 (1970); ***State v. Ahlquist***, 67 Wn. App. 442, 445, 837 P.2d 628 (1992). But this right is not absolute and can be waived if the defendant voluntarily absents himself. ***Ahlquist***, 67 Wn. App. at 445.

> The question is one of broad public policy, whether an accused person, placed upon trial for crime, and protected by all the safeguards with which the humanity of our present criminal law sedulously surrounds him, can with

> impunity defy the processes of that law, paralyze the proceedings of courts and juries, and turn them into a solemn farce, and ultimately compel society, for its own safety, to restrict the operation of the principle of personal liberty. Neither in criminal nor in civil cases will the law allow a person to take advantage of his own wrong. And yet this would be precisely what it would do if it permitted an escape from prison, or an absconding from the jurisdiction while at large on bail, during the pendency of a trial before a jury, to operate as a shield.

Diaz v. United States, 223 U.S. 442, 458, 32 S. Ct. 250, 56 L. Ed. 500 (1912) (internal citations omitted). The court rules also speak to this issue. CrR 3.4(b) states: "In prosecutions for offenses not punishable by death, the defendant's voluntary absence after the trial has commenced in his presence shall not prevent continuing the trial to and including the return of the verdict."

The defendant's initial presence "serves to assure that any waiver is indeed knowing." ***State v. Hammond***, 121 Wn.2d 787, 792, 854 P.2d 637 (1993) *quoting* ***Crosby v. United States***, 506 U.S. 255, 258, 113 S. Ct. 748, 122 L. Ed. 2d 25 (1993). 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. ***State v. Crafton***, 72 Wn. App. 98, 103-04, 863 P.2d 620 P.2d 620 (1993); ***State v. Thomson***, 70 Wn. App. 200, 211, 852 P.2d 1104 (1993), *aff'd*, 123 Wn.2d 877, 872 P.2d 1097 (1994). When a jury panel is sworn in for voir dire, the defendant is given an unambiguous and readily discernible sign that the trial is beginning and he

will have the opportunity to participate in jury selection. ***Crafton***, 72 Wn. App. at 103.

Here, the court reviewed several cases, including ***Hammond*** and ***Thomson***, and determined that defendant had been present when trial commenced. RP 334-44. Defendant was present when the jury panel was sworn for voir dire and given a questionnaire. *See* RP 10-17. As a jury panel had been sworn in and voir dire had begun with the jury questionnaire, trial had commenced per CrR 3.4. Defendant was given an unambiguous and readily discernible sign that the trial had begun and he participated in jury selection by reviewing the questionnaires and agreeing that the original panel was unsatisfactory due time constraints and bias against child sex cases. The fact that a new panel was sworn in at a later date does not negate defendant's participation in jury selection nor does it reset the commencement of trial.

Moreover, defendant's absence was clearly willful as evidenced by his telephone call to E.M.'s house and refusal to disclose his location to P.B. RP 355. Defendant had seen from the first jury panel that many people had issues against child sex cases, he knew his statements to Detective Zaro were admissible, he listened to most of the ER 404(b) evidence of prior child rapes and molestations which would be offered against him, and he was present to hear evidence which suggested that E.M. attempted to influence P.B.'s perceptions of the event in his favor (RP 277-78). Defendant was well aware that trial had commenced, he had

reason to believe that he would be found guilty, and he chose to abscond rather than risk conviction.

2. THE TRIAL COURT FAILED TO ORDER A PRESENTENCING REPORT AS REQUIRED UNDER FORMER RCW 9.94A.110, YET SUCH ERROR WAS HARMLESS.

"[S]o long as the sentence falls within the proper presumptive sentencing ranges set by the legislature, there can be no abuse of discretion as a matter of law as to the sentence's length." ***State v. Williams***, 149 Wn.2d 143, 146–47, 65 P.3d 1214 (2003). But the rule prohibiting appeals from standard range sentences "does not bar a party's right to challenge the underlying legal conclusions and determinations by which a court comes to apply a particular sentencing provision." ***Williams***, 149 Wn.2d at 147. Accordingly, standard range sentences may be reviewed "for the correction of legal errors or abuses of discretion in the determination of what sentence applies." ***Williams***, 149 Wn.2d at 147.

A defendant is sentenced under the law in effect at the time which the offense was committed. RCW 9.94A.345. Under former 9.94A.110(1) (2000) (recodified as RCW 9.94A.500(1)) 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. In sentencing, the trial court shall consider the presentence report along with other documents, such as

victim impact statements. *Id, see also,* ***State v. Weaver***, 140 Wn. App. 349, 355-56, 166 P.3d 761 (2007), *overruled on other grounds by,* ***State v. Mendoza***, 165 Wn.2d 913, 205 P.3d 113 (2009). "In determining any sentence, the trial court may rely on no more information than is admitted by the plea agreement, or admitted, acknowledged, or proved in a trial or at the time of sentencing. Acknowledgement includes not objecting to information stated in the presentence reports." Former RCW 9.94A.370 (2000).

Here, the trial court was required to order the department to complete a presentence report prior to sentencing defendant for a felony sexual offense. The trial court could not order the report at the time of conviction, as defendant had absconded. Nor did he order a report when defendant was returned for sentencing, nine years later. RP (10/07/11) 9. However, such error was harmless as the trial court's high-end, standard-range sentence was based on defendant's willful absence from the trial. *See* RP (10/7/11) 13.

Defendant's nine-year absence was proven at the time of sentencing. The court believed at a low-end sentence would "subvert the entire process" by rewarding defendant for fleeing. *See* RP (10/7/11) 13. The court's ruling makes it clear that defendant's willful absence outweighed any possible mitigating information that would be contained within a presentence report. The trial court did not consider any improper information when determining defendant's sentence and it is extremely

unlikely that the court's sentence would have been influenced by a presentence report. The court's failure to order a presentence report in this case was harmless.

D. CONCLUSION.

For the reasons stated above, the State respectfully requests this court to affirm defendant's convictions and sentence.

DATED: July 30, 2012

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Certificate of Service:
The undersigned certifies that on this day she delivered by U.S. mail or ABC-LMI delivery to the attorney of record for the appellant and appellant c/o his attorney true and correct copies of the document to which this certificate is attached. This statement is certified to be true and correct under penalty of perjury of the laws of the State of Washington. Signed at Tacoma, Washington, on the date below.

7/30/12 Monica Schneider
Date Signature

PIERCE COUNTY PROSECUTOR

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