

SUPREME COURT NO. 91220-3

IN THE SUPREME COURT OF THE STATE OF WASHINGTON

STATE OF WASHINGTON,

Respondent,

v.

TAMMERA THURLBY,

Petitioner.

FILED
JAN 21 2015
CLERK OF THE SUPREME COURT
STATE OF WASHINGTON
E
CRF

ON DISCRETIONARY REVIEW FROM THE COURT OF APPEALS,
DIVISION TWO

Court of Appeals No. 44774-6-II
Cowlitz County No. 12-1-00966-7

PETITION FOR REVIEW

CATHERINE E. GLINSKI
Attorney for Petitioner

GLINSKI LAW FIRM PLLC
P.O. Box 761
Manchester, WA 98353
(360) 876-2736

TABLE OF CONTENTS

TABLE OF CONTENTS I

TABLE OF AUTHORITIES II

A. IDENTITY OF PETITIONER..... 1

B. COURT OF APPEALS DECISION 1

C. ISSUES PRESENTED FOR REVIEW 1

D. STATEMENT OF THE CASE 2

E. ARGUMENT WHY REVIEW SHOULD BE GRANTED..... 6

 1. THE CASE INVOLVES A SIGNIFICANT QUESTION OF
 CONSTITUTIONAL LAW WHICH SHOULD BE REVIEWED BY
 THIS COURT. 6

 2. THE COURT OF APPEALS’ DECISION CONFLICTS WITH
 ANOTHER DECISION OF THE COURT OF APPEALS. 10

F. CONCLUSION 12

TABLE OF AUTHORITIES

Washington Cases

<u>State v. Atherton</u> , 106 Wn. App. 783, 24 P.3d 1123 (2001).....	9
<u>State v. Cobarruvias</u> , 179 Wn. App. 523, 318 P.3d 784 (2014)	10
<u>State v. Garza</u> , 150 Wn.2d 360, 77 P.3d 347 (2003)	7, 8, 10
<u>State v. Rice</u> , 110 Wn.2d 577, 757 P.2d 889 (1988), <u>cert. denied</u> , 491 U.S. 910 (1989).....	7
<u>State v. Thomson</u> , 123 Wn.2d 877, 872 P.2d 1097 (1994).....	6, 7, 8
<u>State v. Washington</u> , 34 Wn. App. 410, 661 P.2d 605 (1983).....	8

Federal Cases

<u>United States v. Gagnon</u> , 470 U.S. 522, 105 S.Ct. 1482, 84 L.Ed.2d 486 (1985).....	6
---	---

Constitutional Provisions

U.S. Const. Amend. V	6
U.S. Const. Amend. VI.....	6
U.S. Const. Amend. XIV	6
Wash. Const. art. 1, § 22 (amend. 10).....	7

Rules

CrR 3.4(b)	7
RAP 13.4(b)(2)	12
RAP 13.4(b)(3)	10

A. IDENTITY OF PETITIONER

Petitioner, TAMMERA THURLBY, by and through her attorney, CATHERINE E. GLINSKI, requests the relief designated in part B.

B. COURT OF APPEALS DECISION

Petitioner seeks review of the December 9, 2014, published decision of Division Two of the Court of Appeals affirming her convictions unlawful delivery of a controlled substance.

C. ISSUES PRESENTED FOR REVIEW

1. Thurlby was present for the first day of trial but absent when court reconvened the next day. The court made a preliminary finding that she was voluntarily absent and proceeded with the trial. Prior to sentencing, Thurlby explained that she had been attending to a medical emergency and that when she called the Clerk's office to ask about a continuance she was informed that felony matters could not be rescheduled. The court maintained its finding that Thurlby was voluntarily absent and imposed sentence. Where the medical emergency which necessitated Thurlby's absence was beyond her control so that she was not voluntarily absent, must her convictions be reversed and the case remanded for a new trial?

2. Where the trial court failed to expressly consider the presumption against voluntary waiver of the right to be present at trial

when assessing Thurlby's explanation for her absence from court, is remand for a new trial required?

D. STATEMENT OF THE CASE

Tammera Thurlby was the target of an investigation during which a police informant conducted three controlled buys of methamphetamine at a location chosen by the police. RP 25, 32. Thurlby was charged with three counts of delivery of a controlled substance within 1000 feet of a school bus route stop. CP 7-8. Trial commenced on December 11, 2012, and Thurlby was present in court. When court recessed for the day, Thurlby was told to return a few minutes before 9:00 the next morning. RP 103.

Thurlby was not present when court reconvened the following day. RP 104. Defense counsel informed the court that he did not have a telephone number for Thurlby and had no way to contact her. RP 104. He explained that she did not have good transportation and usually rode a bicycle to court, and he suggested that inclement weather that morning could be responsible for her delay. RP 104-05. Counsel asked the court to wait a few more minutes before issuing a bench warrant, and the court agreed. RP 105-06. When Thurlby had not shown up by 9:36, however, the court issued a warrant for her arrest. RP 108.

At 10:00, the court noted that it had called the local medical centers and did not find Thurlby listed as a patient. It had checked with court administration and the Clerk's office and found that no one had received a call from Thurlby. It also found that she had not been booked into the Cowlitz County Jail. RP 110.

The State argued that the court should adjourn until 1:30 and then proceed with trial whether Thurlby was present or not. RP 111. Defense counsel agreed that, if the court found Thurlby was voluntarily absent, it had discretion to proceed without her. He noted, however, that the court was required to indulge a presumption against the waiver of Thurlby's right to be present, and he argued that there was not a sufficient showing that her absence was voluntary. RP 112. Counsel objected to proceeding without Thurlby. RP 113.

The court recessed until 1:30, to allow time to gather more information. RP 113. When court reconvened, the prosecutor reported that law enforcement had not located Thurlby. Defense counsel reported that he had had no contact from her. RP 114. The judge reported that he had again checked with the medical centers and did not find Thurlby on a patient list, and he had checked with court administration and the Clerk's office and found that she had not left any messages. RP 114.

The State moved to proceed in Thurlby's absence. RP 115. Defense counsel moved for a mistrial, or if the court was inclined to proceed, to grant a continuance, arguing that the State would not be prejudiced by a further delay. RP 116-17. The court noted that Thurlby had been present at all pretrial hearings and for the first day of trial. She had notice that she was to return the next day, but she had not appeared and no one had heard from her. RP 118. The court made a preliminary finding that her absence was voluntary, because there was no showing of good cause for her absence. RP 120. The court then considered the burden on the State if a mistrial were granted, noting that the majority of the evidence had been presented and a new trial would require witnesses to return to court. RP 120-21. The court denied the motion for mistrial or continuance and granted the State's motion to proceed in Thurlby's absence. RP 121.

The trial continued, and the jury returned guilty verdicts. RP 217-18. Prior to sentencing on March 21, 2013, Thurlby was given the opportunity to explain her absence. She apologized for not showing up for the second day of trial and explained that her mother had needed emergency surgery for a serious medical condition, and she was at the hospital with her mother. RP 227-28. She had called the Clerk's office to see if a new trial date could be set, but she was told that felony matters

could not be rescheduled. She was not able to explain her situation to anyone. RP 228. By the time she was able to speak with defense counsel, trial had already proceeded in her absence. RP 228. Knowing her mother was in poor health, Thurlby had asked defense counsel prior to the trial whether it was possible to postpone the proceedings. RP 228. But the surgery for which she missed court was an emergency procedure, not one that was planned beforehand. RP 241-42. Thurlby's mother informed the court that Thurlby is her only child and was there to help during her surgery. RP 231-33.

Defense counsel argued that Thurlby's mother's failing health and emergency surgery during trial facilitated Thurlby's absence. Counsel noted that under case law, the court makes a preliminary determination whether an absence is voluntary and then subsequently affords the defendant an opportunity to explain the absence. It is then up to the court to determine if the absence was voluntary, and cases make generalized statements that the court is to indulge a presumption against waiver of the constitutional right. RP 235. Indulging in the presumption against waiver of her constitutional right, the court should find the absence was not voluntary, set aside the verdicts, and order a new trial. RP 235.

The prosecutor responded that the defendant's explanation prior to sentencing could not serve as a basis for the court to reconsider its mid-

trial voluntariness determination. It was merely an opportunity for the defendant to offer allocution. RP 236.

The court appeared to agree with defense counsel that its mid-trial determination was a preliminary finding as to voluntariness, and it considered Thurlby's explanation for her absence. The court maintained its voluntariness determination, saying that Thurlby's absence from trial was a choice, albeit an understandable one. The court made no mention of the presumption against waiver, however. RP 239-43.

Thurlby appealed, arguing that her constitutional right to be present at trial was violated and the court's failure to expressly consider the presumption against waiver required remand for a new trial. On December 9, 2014, the Court of Appeals issued a published opinion affirming Thurlby's convictions.

E. ARGUMENT WHY REVIEW SHOULD BE GRANTED

1. THE CASE INVOLVES A SIGNIFICANT QUESTION OF CONSTITUTIONAL LAW WHICH SHOULD BE REVIEWED BY THIS COURT.

A criminal defendant has a right to be present at trial, derived from the confrontation clause of the Sixth Amendment and the due process clauses of the Fifth and Fourteenth Amendments. State v. Thomson, 123 Wn.2d 877, 880, 872 P.2d 1097 (1994) (citing United States v. Gagnon, 470 U.S. 522, 526, 105 S.Ct. 1482, 1484, 84 L.Ed.2d 486 (1985)). The

Washington constitution also guarantees a defendant the right to appear and defend in person. Wash. Const. art. 1, § 22 (amend. 10). A constitutional right may be waived only by a knowing and voluntary act of the defendant. Thomson, 123 Wn.2d at 880. Courts have interpreted a voluntary absence after trial has begun as a waiver of the right to be present. Thomson, 123 Wn.2d at 880; State v. Rice, 110 Wn.2d 577, 619, 757 P.2d 889 (1988), cert. denied, 491 U.S. 910 (1989).

If the court finds a waiver of the right to be present after trial has begun, the court has discretion to continue the trial in the defendant's absence. State v. Garza, 150 Wn.2d 360, 367, 77 P.3d 347 (2003); CrR 3.4(b) (a defendant's voluntary absence after trial has commenced in his or her presence does not prevent the court from continuing the trial). The court is not required to proceed without the defendant, but when the totality of the circumstances suggests the defendant is voluntarily absent, the court may exercise its discretion to proceed. Thomson, 123 Wn.2d at 881, 883.

In determining whether a voluntary waiver has occurred, the 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.

Thomson, 123 Wn.2d at 881 (quoting State v. Washington, 34 Wn. App. 410, 414, 661 P.2d 605 (1983)). In making this determination, the court must indulge every reasonable presumption against a waiver of the right to be present. Garza, 150 Wn.2d at 367; Thomson, 123 Wn.2d at 881. “The presumption against waiver must be the overarching principle throughout the inquiry. Otherwise, the right to be present is not safeguarded....” Garza, 150 Wn.2d at 368.

In Garza, the defendant had called his attorney to say he was on his way but would be late. The trial court reasonably could have presumed that something out of the defendant’s control was delaying him and waited a reasonable time for the defendant to arrive. Instead, the court allowed five minutes and then proceeded in the defendant’s absence. This Court held that the trial court abused its discretion in making a determination of voluntary absence without reference to the presumption against waiver. Garza, 150 Wn.2d at 369.

Unlike the court in Garza, the trial court recessed and attempted to locate Thurlby or gather information about her absence, to no avail. Even

if the court's preliminary finding of voluntariness was supportable, once Thurlby provided an explanation, that finding was no longer reasonable. As the court noted, Thurlby had been present at all pretrial hearings and for the first day of trial, despite her lack of reliable transportation. These circumstances supported a reasonable presumption that something out of Thurlby's control was preventing her from being present on the second day of trial. Her explanation prior to sentencing confirmed that belief.

During the middle of trial Thurlby's mother, who suffered from a serious medical condition, required emergency surgery. As the only available family member, Thurlby was at the hospital with her mother during the procedure. She had made an effort to inform the court about the situation and request a continuance, but she was told by the Clerk's office that felony matters could not be rescheduled. See Garza 150 Wn.2d at 371 (where defendant is prevented from returning to court due to incarceration, evidence that defendant made reasonable efforts to contact the court to explain absence requires court to retract preliminary finding of voluntariness) (citing State v. Atherton, 106 Wn. App. 783, 24 P.3d 1123 (2001)). Circumstances beyond Thurlby's control resulted in her absence during trial, and therefore she did not voluntarily waive her right to be present. The judgment and sentence should be set aside and the case remanded for a new trial.

Whether the trial court properly safeguards the defendant's constitutional right to be present at trial when it fails to grant a new trial under these circumstances is significant question of constitutional law which this Court should review. RAP 13.4(b)(3).

2. THE COURT OF APPEALS' DECISION CONFLICTS WITH ANOTHER DECISION OF THE COURT OF APPEALS.

In determining whether a voluntary waiver of the constitutional right to be present at trial has occurred, the court must indulge every reasonable presumption against a waiver of the right to be present. Garza, 150 Wn.2d at 367; Thomson, 123 Wn.2d at 881. "The presumption against waiver must be the overarching principle throughout the inquiry. Otherwise, the right to be present is not safeguarded...." Garza, 150 Wn.2d at 368.

In State v. Cobarruvias, 179 Wn. App. 523, 318 P.3d 784 (2014), the defendant failed to appear on the final day of trial, and, after inquiry into the circumstances of his failure to appear, the court made a preliminary finding that the absence was voluntary. The defendant then provided an explanation for his absence prior to sentencing, moving for a new trial. The court denied the motion after careful consideration, concluding that the absence was voluntary. Division Three of the Court of Appeals reversed, finding "the trial court erred in not expressly

considering the defendant's showing in light of the 'overarching' presumption against waiver." Cobarruvias, 318 P.3d at 788. The Court of Appeals explained,

Here the court needed, but failed, to consider the presumption in its assessment. The presumption requires more than that the court simply listen to the defendant's explanation. It then must consider the absence question anew starting with the presumption against voluntary waiver.

Id. at 789. While the trial court considered the totality of the circumstances, the Court of Appeals could not determine whether it started that analysis with the presumption against voluntary waiver or with its original determination of voluntariness. Because it was unclear whether the trial court applied the appropriate test, it abused its discretion in denying the motion for a new trial. Id. The Court of Appeals reversed the judgment and remanded for trial. Id.

In this case, the Court of Appeals rejected Division Three's reasoning in Covarrubias, holding that the trial court need not explicitly consider the presumption against waiver or begin the voluntariness determination anew. State v. Thurlby, Slip Op. at 7. Thus, while under Covarrubias, the trial court's failure to expressly consider Thurlby's explanation for her absence in light of the presumption against waiver requires reversal and remand, the Court below held that the trial court's determination of voluntariness was sufficient. See Slip Op. at 8. This

Court should grant review to resolve the conflict between published decisions of the Court of Appeals. RAP 13.4(b)(2).

F. CONCLUSION

For the reasons discussed above, this Court should grant review and reverse the Court of Appeals' decision.

DATED this 8th day of January, 2015.

Respectfully submitted,



CATHERINE E. GLINSKI
WSBA No. 20260
Attorney for Petitioner

Certification of Service by Mail

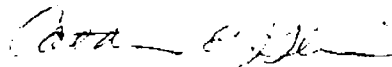
Today I deposited in the mails of the United States of America, postage prepaid, a properly stamped and addressed envelope containing a copy of this Petition for Review directed to:

Tammera Thurlby, DOC#364978
Washington Corrections Center for Women
9601 Bujacich Rd. NW
Gig Harbor, WA 98332-8300

And via email to:

Cowlitz County Prosecutor's Office
sasserm@co.cowlitz.wa.us

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



Catherine E. Glinski
Done in Port Orchard, WA
January 8, 2015

GLINSKI LAW FIRM PLLC

January 08, 2015 - 11:19 AM

Transmittal Letter

Document Uploaded: 1-447746-Petition for Review.pdf

Case Name:

Court of Appeals Case Number: 44774-6

Is this a Personal Restraint Petition? Yes No

The document being Filed is:

Designation of Clerk's Papers Supplemental Designation of Clerk's Papers

Statement of Arrangements

Motion: ____

Answer/Reply to Motion: ____

Brief: ____

Statement of Additional Authorities

Cost Bill

Objection to Cost Bill

Affidavit

Letter

Copy of Verbatim Report of Proceedings - No. of Volumes: ____

Hearing Date(s): _____

Personal Restraint Petition (PRP)

Response to Personal Restraint Petition

Reply to Response to Personal Restraint Petition

Petition for Review (PRV)

Other: _____

Comments:

No Comments were entered.

Sender Name: Catherine E Glinski - Email: glinskilaw@wavecable.com

A copy of this document has been emailed to the following addresses:

sasserm@co.cowlitz.wa.us

FILED
COURT OF APPEALS
DIVISION II

2014 DEC -9 AM 10:31

COURT OF WASHINGTON
BY
BEPUTY

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

STATE OF WASHINGTON,

Respondent,

v.

TAMMERA MICHELLE THURLBY,

Appellant.

No. 44774-6-II

PUBLISHED OPINION

SUTTON, J. — Tammera Michelle Thurlby appeals her three convictions for unlawful delivery of a controlled substance. She argues that the trial court (1) violated her constitutional right to be present when it resumed the second day of trial in her absence, and (2) failed to adequately consider on the record the presumption against waiver of her right to be present at trial. We hold that the trial court did not abuse its discretion in continuing the trial in Thurlby's absence and that the trial court adequately considered on the record the presumption against waiver. Therefore, we affirm.

FACTS

On August 31, 2012¹, the State charged Tammera Michelle Thurlby with three counts of unlawful delivery of a controlled substance (methamphetamines) within 1000 feet of a school bus route stop.² Thurlby was present in the courtroom when her trial began on December 11, 2012. On that day, the trial court empaneled a jury and the State presented six of nine witnesses. Before

¹ The State later amended the information on December 11, 2012 and again on March 21, 2013.

² Uniform Controlled Substances Act (VUCSA), ch. 69.50 RCW.

No. 44774-6-II

the court recessed for the day, Thurlby's counsel instructed her to arrive at court before 9:00 AM the next day; Thurlby replied, "Okay." 1 Verbatim Report of Proceedings (VRP) at 103.

When the trial court reconvened shortly after 9:00 AM the next morning, Thurlby was not present in the courtroom. Thurlby's counsel stated that he did not have a telephone number to contact her. The trial court agreed to wait a few minutes before issuing a bench warrant, but almost 15 minutes later Thurlby still had not appeared. The trial court then issued a bench warrant; officers searched for Thurlby that morning, but could not find her. During the recess, the trial court also inquired with the St. John's Medical Center's patient intake department and the emergency room department, the court administration office, the clerk's office, and the jail but was unable to locate Thurlby and confirmed that none of these facilities had received a phone call from Thurlby. The trial court then took another recess until 1:30 PM to allow more time for officers to find Thurlby.

Following that recess, defense counsel made a motion for a mistrial or continuance, which the trial court denied. The trial court made a preliminary finding that (1) Thurlby was voluntarily absent because the trial court had not heard any good cause for her absence, (2) noted that rescheduling the trial would be difficult given the number of people involved in presenting the State's case, and (3) ruled that the trial would proceed without Thurlby in attendance. The trial resumed, and the jury returned guilty verdicts and special verdicts on each of the three charges against Thurlby.

On March 21, 2013, the trial court reconvened for sentencing after Thurlby was taken into custody on February 13, 2013. Before sentencing, the trial court provided Thurlby an opportunity to explain her absence on the second day of trial; under oath Thurlby explained that her mother

No. 44774-6-II

had serious health issues and had to have emergency surgery on December 12, 2012. Thurlby said that she had tried to call “the Clerk” to reschedule, but was told that because the charges were for a felony matter she could not reschedule. 2 VRP at 228. Thurlby apologized and explained that she did not attend trial because her mother was “everything” to her. 2 VRP at 229. The trial court also allowed Thurlby’s mother to speak; she informed the trial court of her health problems leading up to the surgery and explained that Thurlby, her only child, had been present at the hospital that day to help her.

The trial court acknowledged Thurlby’s decision to be with her mother instead of attending her trial, but noted that she had been “ordered” to be in court while her absence was a “choice.” 2 VRP at 242. The trial court found that Thurlby’s absence was a “willing voluntary waiver of her right to be present during the trial” and proceeded with the sentencing hearing. 2 VRP at 243. Thurlby timely appealed.

ANALYSIS

I. RIGHT TO BE PRESENT: ABSENCE AFTER TRIAL HAS BEGUN

The Sixth Amendment of the United States Constitution guarantees the right to be present at one’s trial. *State v. Irby*, 170 Wn.2d 874, 880-81, 246 P.3d 796 (2011). The Washington State Constitution also grants every accused person the “right to appear” at trial. CONST. art. I, § 22 (amend. 10). A defendant may waive the right to be present, however, through voluntary absence if the waiver is voluntary, knowing, and intelligent. *State v. Frawley*, ___ Wn.2d ___, 334 P.3d 1022, 1027 (2014). A defendant’s absence is voluntary if the trial court can infer that the defendant’s absence was intentional, rather than beyond his or her control. *State v. Atherton*, 106 Wn. App. 783, 789-90, 24 P.3d 1123 (2001). When a defendant’s voluntary absence occurs after

No. 44774-6-II

trial has begun, the trial court may, in its discretion, continue the trial to its conclusion, including entering a verdict. CrR 3.4(a), (b). We review the trial court's decision to proceed with trial despite the defendant's absence for abuse of discretion. *State v. Garza*, 150 Wn.2d 360, 365-66, 77 P.3d 347 (2003). The trial court has abused its discretion if the decision was "manifestly unreasonable, or [was] exercised on untenable grounds, or for untenable reasons." *State v. Woods*, 143 Wn.2d 561, 626, 23 P.3d 1046 (2001) (emphasis omitted).

To determine whether the defendant is voluntarily absent from trial, the trial court, under a totality of the circumstances standard, follows a three step process: It must (1) inquire sufficiently into the circumstances of the defendant's disappearance to justify a finding of voluntary absence, (2) make a preliminary finding of voluntariness if the circumstances in step one so allow, and (3) provide the defendant an opportunity to explain his or her absence before the trial court imposes a sentence. *State v. Thomson*, 123 Wn.2d 877, 881, 872 P.2d 1097 (1994). The trial court is required to indulge "every reasonable presumption against waiver" when performing each step. *Garza*, 150 Wn.2d at 367.

Thurlby acknowledges that even if the trial court was correct in making a preliminary finding of voluntary absence after its attempts to locate her for several hours before proceeding without her, once the trial court heard her explanation for her absence, its ruling was no longer reasonable. Additionally, Thurlby relies on *Garza's* holding that an incarcerated defendant who makes reasonable efforts to inform the court that he or she cannot attend trial due to incarceration requires retraction of a preliminary finding of voluntariness. *Garza*, 150 Wn.2d at 370. She argues that *Garza* requires the same result here because she called the "Clerk's office" on December 12. Br. of Appellant at 9. We disagree.

In *Garza*, our Supreme Court held that the trial court abused its discretion when, after the defendant informed his counsel he would be late, the trial court waited only five minutes before proceeding with trial. *Garza*, 150 Wn.2d at 363-64. Rather than presume that “something *outside of Garza’s control*” delayed him, the trial court did not indulge the presumption against waiver when it waited an unreasonably short amount of time and immediately concluding that the defendant’s absence was voluntary. *Garza*, 150 Wn.2d at 369 (emphasis added). The Supreme Court held that the decision to proceed was manifestly unreasonable and that the trial court’s preliminary determination of voluntary absence without employing the presumption against waiver was an abuse of discretion. *Garza*, 150 Wn.2d at 369. *Garza’s* efforts to alert the trial court to his incarceration were irrelevant to the *Garza* holding. *See Garza*, 150 Wn.2d at 371.

This case is analogous to *Thomson*, which held that the trial court did not abuse its discretion in making a preliminary finding of voluntary absence where (1) Thomson informed his attorney that a medical emergency prevented him from being in court, but he did not provide a way to reach him again, and (2) the trial court issued a bench warrant in the morning after defendant’s absence but did not reconvene the trial until 1:30 PM without any further contact from Thomson. *Thomson*, 123 Wn.2d at 879, 884. Similar to *Thomson*, the trial court here did not abuse its discretion when it made a preliminary finding of Thurlby’s voluntary absence on December 12. Before it made its preliminary finding, the trial court sought information from multiple sources about any contact with Thurlby. The trial court waited over three hours for Thurlby to return to trial before making its ruling. Based on the information available that day, the trial court had no evidence that Thurlby’s absence was due to an event outside of her control.

No. 44774-6-II

The trial court's decision to proceed with Thurlby's trial was not manifestly unreasonable nor based on untenable grounds.

The trial court also did not abuse its discretion when it found that Thurlby was voluntarily absent after hearing her explanation before sentencing. Thurlby and her mother addressed the trial court at length, but the trial court recognized that Thurlby's attention to her mother's needs was a voluntary choice while her attendance at court was mandatory. No circumstance "outside [of Thurlby's] control" prevented her from attending trial. *Garza*, 150 Wn.2d at 369.

We hold that the trial court did not abuse its discretion when it made a preliminary finding that Thurlby was voluntarily absent or when it found that her mother's emergency surgery did not prevent her from attending her trial.

II. ADEQUATE CONSIDERATION OF PRESUMPTION AGAINST WAIVER

Thurlby argues that the trial court abused its discretion when it failed to expressly consider the presumption against waiver during its voluntary absence ruling at sentencing because the trial court never said the words "presumption against waiver." Suppl. Br. of Appellant at 5. She relies on *State v. Cobarruvias*³ to support this argument. Because we decline to adopt the reasoning of *Cobarruvias*, we disagree.

Division Three of our court recently held that the trial court in *Cobarruvias* was required to expressly consider on the record the defendant's explanation for his trial absence in light of the presumption against waiver. *Cobarruvias*, 179 Wn. App. at 532. Under *Cobarruvias*, the trial court must do more than "simply listen" when the defendant offers an explanation for his or her

³ *State v. Cobarruvias*, 179 Wn. App. 523, 532, 318 P.3d 784 (2014).

absence. *Cobarruvas*, 179 Wn. App. at 533. *Cobarruvas* requires the trial court, on the record, to (1) determine “what actually happened” that prevented the defendant from coming to trial, (2) “assess the reasonableness” of the defendant’s absence in light of what happened, and (3) decide whether that absence was voluntary. *Cobarruvas*, 179 Wn. App. at 533. Division Three stated that it could not determine whether the trial court in that case, when it ruled that the defendant had been voluntarily absent after the defendant’s explanation, began its analysis “anew” or if it began “with its (well supported) original determination of voluntariness and weigh[ed] that against the reasonableness of the defendant’s actions.” *Cobarruvas*, 179 Wn. App. at 533. Because it could not make this determination, Division Three held that the trial court abused its discretion, reversed the trial court and remanded for a new trial. *Cobarruvas*, 179 Wn. App. at 533.

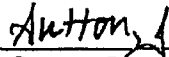
Cobarruvas is an unwarranted extension of *Garza* and *Thomson*: Neither *Thomson* nor *Garza*, two earlier Washington Supreme Court cases, require an explicit mention of the presumption against waiver during a subsequent determination of voluntary absence or require the trial court to begin “anew” as the *Cobarruvas* decision instructs. *Cobarruvas*, 179 Wn. App. at 533. The *Cobarruvas* court recognized its extension into new legal territory, saying that even though the trial court’s determination of voluntary absence after the defendant’s explanation was reasonable, “we believe the trial court erred in not *expressly* considering the defendant’s showing in light of the ‘overarching’ presumption against waiver. Neither *Thomson* nor *Garza* dealt with the application of the presumption to the third prong of the *Thomson* test.” *Cobarruvas*, 179 Wn. App. 532 (emphasis added).

We respectfully disagree with *Cobarruvas*’ legal extension. Neither existing case law nor the Washington or federal constitutions require the trial court to use precise language or begin

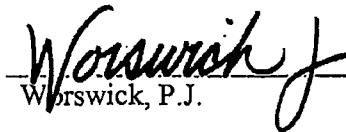
No. 44774-6-II

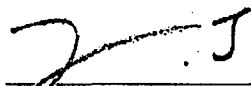
anew when considering the defendant's explanation for his or her absence from trial. Here, the colloquy between Thurlby and the trial court demonstrates that the trial court considered the presumption against waiver even though it did not use that specific phrase. The trial court carefully questioned Thurlby and her mother to determine what had happened; the court acknowledged Thurlby's decision to be with her mother but noted that Thurlby *chose* to be with her mother while she was *ordered* to attend trial, and found that Thurlby voluntarily waived her right to be present at trial. Therefore, we hold that the trial court did not abuse its discretion when it found that Thurlby was voluntarily absent.

We affirm.


Sutton, J.

We concur:


Worswick, P.J.


Lee, J.