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State of Washington  
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No. 36059-8-III

COURT OF APPEALS, DIVISION III  
OF THE STATE OF WASHINGTON

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THE STATE OF WASHINGTON,

Respondent

v.

WILLIAM GEORGE NICOL,

Appellant

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ON APPEAL FROM THE SUPERIOR COURT OF THE  
STATE OF WASHINGTON FOR BENTON COUNTY

NO. 15-1-01275-8

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BRIEF OF RESPONDENT

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## I. RESPONSE TO ASSIGNMENTS OF ERROR

- A. The trial court did not err in taking the jury's verdict in the absence of the defendant, since the jury had a verdict and there was evidence the defendant fled the courthouse after learning he would probably be found guilty.

## II. STATEMENT OF FACTS

- A. The defendant's step-grandson testifies about anal and oral sex with the defendant from ages 6-10.**

The defendant does not contest that there was sufficient evidence to convict him. But, it may be helpful to restate that evidence.

J.V.N. and his mother lived with the defendant in Kennewick, WA, when he was in the first, second, third, and half of the fourth grades. RP at 608. The defendant is J.V.N.'s step-grandfather. RP at 438-40. J.V.N.'s date of birth is October 7, 2004 and he was in the sixth grade when he testified on October 19, 2016 and October 20, 2016. RP at 606.

J.V.N. stated that while he lived with the defendant, the defendant repeatedly touched J.V.N.'s penis and engaged in oral and anal sex with him. RP at 610, 622-23, 632, 645. The oral and anal sex occurred frequently in the garage, perhaps 12-13 times. RP at 643. It also happened in the front room when J.V.N.'s mother was away a couple of times. RP at 623, 625. The defendant also put his penis in J.V.N.'s mouth in an outer room and had anal sex with J.V.N. in this room. RP at 626-28. J.V.N.

estimated that the anal sex also occurred in his room about five times and the oral sex occurred there once. RP at 646.

**B. The jury asks, “Does each count of rape need to be in a different location?”, the defendant runs from the courthouse before the verdict is announced and is not seen for over a year.**

The case was given to the jury at 11:49 A.M. on Friday, October 21, 2016. Jury Trial filed 10/21/2016<sup>1</sup>; RP at 842. At 4:11 P.M., court resumed in the absence of the jury. With the defendant present, the judge announced the jury had the following question: “Does each count of rape need to be in a different location or just that the victim was raped multiple times?” CP 77; RP at 842, 856. There is not a time listed for the question on CP 77. The trial judge answered the question with, “Please re-read your instructions and continue your deliberations” and dated the response 10/21/2016 at 4:13 P.M. CP 77.

The defense attorney told the defendant that he thought the defendant was going to be found guilty. RP at 845. The defendant told his attorney that he was going to the bathroom. The defense attorney went in a different direction. *Id.*

Sometime later Terry Wetmore, who works for the courthouse security, saw a man leave the courthouse and begin running when he got

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<sup>1</sup> Clerk’s subnumber 73, designated on 06/11/2019.

outside. RP at 849, 853. The man had come for court that week and had always headed toward the Superior Court side of the courthouse. RP at 852-53. Mr. Wetmore described the man as in his late sixties. RP at 850. The defendant was 79 at this time, but otherwise provided a description of the defendant which the trial court could determine was accurate: slight build, about 5'10", graying hair. CP 4; RP at 849.

The jury had a verdict by 4:43 P.M. and the defendant could not be found. Jury Trial, subnumber 73. The trial court asked the defense attorney if he knew the defendant's whereabouts. RP at 845. The defense attorney related his end of the conversation to the defendant after receiving the jury's question. *Id.* He stated that he had twice attempted to call the defendant without success. RP at 855.

The trial court found that the defendant had been present and on time every day of the trial, and that he was present in Court when the Judge signed the answer to the jury's question at 4:13 P.M. RP at 856. The Court found that the individual seen by Mr. Wetmore running out of the building was probably the defendant. RP at 857. Given that, the trial court found that the defendant voluntarily absented himself. *Id.*

The jury was allowed to read their verdicts, which was guilty of two counts of Rape of a Child in the First Degree and one count of Child

Molestation in the First Degree, with the aggravating factor of position of trust. RP at 858-59.

The jury was polled. RP at 860-63. After the jury was escorted from the courtroom, the trial court issued a warrant for the defendant. RP at 863-64. The proceedings in court concluded at 5:25 P.M. RP at 865.

The next significant act was that the defendant's bail was forfeited on December 1, 2016. Order Forfeiting Bail & Judgment filed 12/01/2016<sup>2</sup>. The defendant did not appear again until December 1, 2017.

### **III. ISSUES**

- A. Did the trial court abuse its discretion in proceeding with reading the jury's verdict in the absence of the defendant?
1. What is the standard on review to determine if a trial court has properly found that a defendant voluntarily absented himself from trial?
  2. Did the trial court abuse its discretion in making a finding that the defendant voluntarily absented himself from the trial and the defendant's continued absence for over a year bore this out?

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<sup>2</sup> Clerk's subnumber 82, designated on 06/11/2019.

3. Even if the defendant had some legitimate reason to run out of the courthouse before the verdict was read, would the proper remedy be vacation of the conviction?

#### IV. ARGUMENT

- A. **The trial court did not abuse its discretion in proceeding with reading the jury's verdict in the absence of the defendant.**
  1. **The standard on review for a challenge to the trial court finding that a defendant has voluntarily absented himself from trial is abuse of discretion.**

*State v. Thomson*, 70 Wn. App. 200, 207, 852 P.2d 1104 (1993)

discussed factors to determine if a defendant has voluntarily waived his or her right to be present for the trial, including the return of the verdict.

*Thomson* held that whether the defendant has voluntarily absented himself will be determined by the totality of circumstances and in making that determination the court shall: 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, and 3) afford the defendant an adequate opportunity to explain his absence when he is returned to custody and before sentence is imposed.

Concerning the third prong, *State v. Thurlby*, 184 Wn.2d 618, 624, 359 P.3d 793 (2015) clarified that in evaluating whether the defendant was voluntarily absent, the trial court must consider the totality of the

circumstances surrounding the defendant's failure to appear for trial. The trial court is required to view the circumstances as explained by the defendant in a "generous light, reading every reasonable inference against waiver." *Id.* at 629-30. The third prong of the analysis "provides an opportunity for the defendant to explain his or her disappearance and *rebut* the finding of voluntary absence before the proceedings have been completed." *Id.* at 630.

The standard on review regarding the trial court's decision to proceed with trial in the defendant's absence is abuse of discretion. *Id.* at 624.

**2. The trial court did not abuse its discretion in finding that the defendant voluntarily absented himself from the reading of the verdict and the defendant's continued absence for over a year confirmed the court was correct.**

It should be clear what happened. The defendant faithfully appeared for trial on time the full week of October 17, 2016 through October 21, 2016. He was never late for the start of court on any of these days and was on time after all recesses.

At 4:11 P.M. the court convened, with the defendant present, to discuss a question from the jury, "Does each count of rape need to be in a different location or just that the victim was raped multiple times?" Jury Trial, subnumber 73; RP at 842, 856. The obvious inference is that the

jury was going to find him guilty of at least one rape charge. The defendant probably understood this, but if he did not, his lawyer told him he would probably be found guilty.

The defendant may have known that if he was found guilty of Rape of a Child in the First Degree, he would be taken into custody. RCW 10.64.025. He may have also known that one conviction for that offense would result in an indeterminate sentence of 93-123 months as a minimum and Life as a maximum. RCW 9.94A.507 (3); RCW 9.94A.510. Faced with the knowledge that he may be incarcerated for the rest of his life the defendant fled the courthouse. Even if he did not know that he would be taken into custody immediately upon conviction and possibly held for life, he would have known that his status on bail could change after conviction and that there would be a considerable sentence for First Degree Child Rape.

Of course, subsequent events proved the trial court was right: the defendant voluntarily fled the courthouse to avoid incarceration. The defendant argues, "The Court should have continued the case until the next court day." Br. of Appellant at 12. That would have done no good. He allowed his bail to be forfeited on December 1, 2016. The defendant remained AWOL until he was arrested and appeared in court a year after that date, December 1, 2017. Warrant Identification Hearing, filed

12/01/2017<sup>3</sup>. If the defendant has any explanation for his absence of over one year, he has not provided it in this record.

The defendant's argument that but for his trial attorney's statements, the trial court would have waited another court day for the reading of the verdict is not supported by the record. First, the defendant misquotes his attorney. He writes, "Mr. Egan responded: 'I told him he had been found guilty . . .'" Br. of Appellant at 10. The defense attorney actually stated, "I talked to him after the questioning. I told him that *I thought* that he was going to be found guilty." RP at 845 (emphasis added). It would have been obvious to anyone hearing the jury's question, including the defendant, that he was going to be found guilty of at least one crime of Rape of a Child; the defendant did not need his attorney's comment to understand he was about to be hit with the proverbial ton of bricks. Also, the attorney-client privilege does not protect communications in furtherance of a crime or fraud. *Whetstone v. Olson*, 46 Wn. App. 308, 732 P.2d 159 (1986). By running from the courthouse, the defendant was committing the crime of Bail Jumping.

The trial court did not abuse its discretion. It was no accident that the defendant was on time every day for every court session and that he

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<sup>3</sup> Clerk's subnumber 89, designated on 06/11/2019.

ran out of the courthouse and was nowhere to be found after hearing the jury's question indicating he would be found guilty of Rape of a Child.

**3. Even if there was some emergency requiring the defendant to run out of the courthouse before the verdict was read, vacation of the conviction is not a proper remedy.**

*State v. Rice*, 110 Wn.2d 577, 757 P.2d 889 (1988) is helpful. In that case the defendant attempted suicide. 20 minutes after he was taken to Harborview Medical Center, the jury reached a verdict. The staff at Harborview estimated that it would be at least two hours before he could be brought to the courtroom. The court proceeded with the verdict. *Id.* at 614-15.

The *Rice* court noted CrR 3.4 (a) and the requirement that the defendant be present at the return of the verdict. But the court said under circumstances there was "good cause" that the defendant's right to be present was outweighed by other considerations. In *Rice*, the trial court had no way of knowing exactly when the defendant would be ready to appear in court. The jury deliberations "must have been an arduous deliberative process." *Id.* at 615. The court noted that while "it might have been preferable to delay the proceedings a short time to obtain an update on Rice's condition, we cannot say that the trial court erred in these circumstances, especially given counsel's waiver." *Id.* at 615-16.

The *Rice* court also held that any error was harmless.

The only way in which Rice's absence could have affected the trial outcome would be if one of the jurors, when polled, changed his mind upon seeing Rice once again. This result, although possible, is not "reasonably probable." The jurors were individually polled and they affirmed their verdict in the presence of defense counsel. There is nothing in the record which indicates that the result would have been any different had Rice been present.

*Id.* at 616.

Although the jurisprudence regarding a defendant's right to be present has changed since *Rice* was decided, it should be decided the same way today. The defendant has a right to be present "whenever his presence has a relation, reasonably substantial, to the fulness of his opportunity to defend against the charge," but "does not have a right to be present when his or her 'presence would be useless, or the benefit but a shadow.'" *State v. Irby*, 170 Wn.2d 874, 881, 246 P.3d 796 (2011). Therefore, in *Irby* the conviction was reversed because there was an e-mail exchange between the trial court, the prosecutor, and the defense attorney about which jurors should be removed from the jury panel. The court in *Irby* held that a defendant during jury selection could offer advice or suggestions to his lawyer. *Id.* at 883.

However, in *State v. Bennett*, 168 Wn. App. 197, 275 P.3d 1224 (2012) the conviction was affirmed where the judge and counsel met in

chambers to “finalize” jury instructions. The court held the record showed the in-chambers conference did not give rise to the defendant’s, or the public’s, right to open proceedings. Likewise, because “[n]othing is added to the functioning of the trial by insisting that the defendant or public be present during sidebar or in-chambers conferences”, sidebar conferences without the defendant are not a violation of a defendant’s right to an open hearing. *State v. Smith*, 181 Wn.2d 508, 519, 334 P.3d 1049 (2014).

**V. CONCLUSION**

The conviction should be affirmed.

**RESPECTFULLY SUBMITTED** on June 13, 2019.

**ANDY MILLER**

Prosecutor

A handwritten signature in black ink, appearing to read 'T.J. Bloor', is written over a horizontal line.

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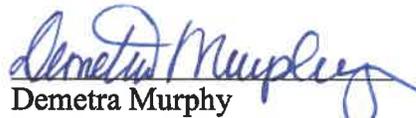
**CERTIFICATE OF SERVICE**

I certify under penalty of perjury under the laws of the State of Washington that on this day I served, in the manner indicated below, a true and correct copy of the foregoing document as follows:

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Signed at Kennewick, Washington on June 13, 2019.

  
Demetra Murphy  
Appellate Secretary