

FILED
Court of Appeals
Division III
State of Washington
7/15/2019 4:33 PM

COA No. 36378-3-III

THE COURT OF APPEALS OF THE STATE OF WASHINGTON
DIVISION THREE

STATE OF WASHINGTON,

Respondent,

v.

TIM ALLEN LOE,

Appellant.

ON APPEAL FROM THE SUPERIOR COURT
OF STEVENS COUNTY

The Honorable Patrick Monasmith

APPELLANT'S OPENING BRIEF

OLIVER R. DAVIS
Attorney for Appellant

WASHINGTON APPELLATE PROJECT
1511 Third Avenue, Suite 610
Seattle, Washington 98101
(206) 587-2711

TABLE OF CONTENTS

A. ASSIGNMENT OF ERROR..... 1

B. ISSUES PERTAINING TO ASSIGNMENT OF ERROR 1

C. STATEMENT OF THE CASE 1

 1. Trial start and defendant’s departure from court. 1

 2. Day two of trial. 4

 (i). *Mistrial denied.* 5

 (ii). *Defense case – Mr. Loe still absent and thus unable to testify as to his defense.* 5

 (iii). *Instructions and verdict.* 5

 3. Sentencing – defendant’s attempt to explain his absence – filings, including sealed filings – renewed mistrial motion denied. 6

D. ARGUMENT 7

 THE TRIAL COURT VIOLATED MR. LOE'S CONSTITUTIONAL RIGHT TO PRESENCE, AND REVERSAL IS REQUIRED FOR TRIAL *IN ABSENTIA*..... 7

 1. Trial *in absentia* is a violation of the right to be present. 7

 2. Mr. Loe was involuntarily absent for much of the critical portions of trial and the trial court employed the wrong legal standard for waiver. 8

 a. *The defendant was absent for most of trial.* 8

 b. *The court employed the wrong legal standard and erred because Mr. Loe was not shown to be voluntarily absent.* 10

3. The court erroneously found that Mr. Loe had “chosen not to be here this morning or offer any – verification from his physician.” 13

4. The court also failed to properly or correctly address or resolve the matter at the time of sentencing where Mr. Loe attempted to explain his absence, as the case law requires the trial court to allow him to do – therefore, a mistrial was required. 17

5. Reversal is required. 21

E. CONCLUSION 22

TABLE OF CONTENTS

CONSTITUTIONAL PROVISIONS

U.S. Const., amends. VI and XIV 7
Const. art. 1, § 22 7

UNITED STATES SUPREME COURT CASES

United States v. Gagnon, 470 U.S. 522, 105 S.Ct. 1482, 84 L.Ed.2d 486
(1985) 7
Johnson v. Zerbst, 304 U.S. 458, 58 S.Ct. 1019, 82 L.Ed. 1461 (1938)... 8
Snyder v. Commonwealth of Massachusetts, 291 U.S. 97, 54 S.Ct. 330,
78 L.Ed. 674 (1934) 7

WASHINGTON CASES

State v. Garza, 150 Wn.2d 360, 77 P.3d 347 (2003). 14
State v. LaBelle, 18 Wn. App. 380, 568 P.2d 808 (1977) 8,20
In re Pers. Restraint of Lord, 123 Wn.2d 296, 868 P.2d 835 (1994) 21
State v. Rafay, 167 Wn.2d 644, 222 P.3d 86 (2009). 16
State v. Rice, 110 Wn.2d 577 P.2d 889 (1988) 7,21
State v. Rosborough, 62 Wn. App. 341, 814 P.2d 679 (1991). 15
State v. Thurlby, 184 Wn.2d 618, 359 P.3d 793 (2015) 7,8,13
State v. Thomson, 123 Wn.2d 877, 872 P.2d 1097 (1994) 7,8,20
State v. Varga, 151 Wn.2d 179, 86 P.3d 139 (2004). 15
Washington State Physicians Ins. Exch. & Ass'n v. Fisons Corp., 122
Wn.2d 299, 858 P.2d 1054 (1993). 16

COURT RULES

CrR 3.4(b) 20

A. ASSIGNMENT OF ERROR

The trial court violated Mr. Loe's Sixth and Fourteenth Amendment rights to be present at his criminal trial on a charge of fourth degree assault.

B. ISSUES PERTAINING TO ASSIGNMENT OF ERROR

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

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

3. Was the error of conducting trial *in absentia* not harmless beyond a reasonable doubt?

C. STATEMENT OF THE CASE

1. Trial start and defendant's departure from court.

Timothy Loe was charged with fourth degree assault and disorderly conduct following an incident in which several individuals, including complainant Mr. Carl Gauny, trespassed on the real property occupied by Mr. Loe and Ms. Gina Britton in Stevens County. CP 1-2, 5-6. The case commenced when the Sheriff's Office was informed of

an alleged incident wherein one Carol Taylor and two unknown individuals were on Loe's property at 4688 Godfree Road - where Mr. Loe to this day legally resides. The affidavit of probable cause recites that Mr. Loe had an altercation with Taylor and her friends, initially consisting of angry words regarding ongoing litigation as to who the proper owner or resident of the property was. CP 5-6.

Allegedly, Mr. Loe "bumped" Carl Gauny (one of Taylor's associates), then began "slugging" him in the chest and stomach. According to the sheriff's deputy's conversations with Mr. Loe, which the affidavit says occurred by telephone, Loe only bumped Mr. Gauny because Gauny had raised his fist at Loe. CP 5.

At trial, which commenced with jury selection, and then opening statements and witness presentation on the morning of September 10, Deputy Coltin Schumacher confirmed that Mr. Loe had said that he acted in response to Mr. Gauny's conduct. "[Mr. Loe] told me the male subject there raised a fist to him, and so he sort of chest – chest – bumped him or shoved him with his chest to get him to leave, and they – after a short altercation they left the property." RP 146.

Mr. Gauny testified that he accompanied Ms. Taylor to the Godfree Road address to help her take photographs and determine what

repairs or other work needed to be done, under the impression that Mr. Loe and Ms. Britton had left the property. RP 166. Ms. Taylor testified similarly. RP 153-54. According to these witnesses, Mr. Loe exited his house with a video camera and began cursing and yelling at them. He then allegedly began butting Mr. Gauny in the chest, and then pushed and hit him. RP 157-60, 167-70. Mr. Loe appeared to be filming the interaction as it occurred, and the video was eventually introduced during Mr. Gauny's testimony. RP 157, 161, 167, 171; see RP 218 *et seq.*, and Supp. CP ____, Sub # 83 (Exhibit list, State's exhibit 1 - DVD).

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

After some discussion; see Part D, infra, the court ruled that it would make a “preliminary” finding that Mr. Loe’s absence was voluntary, and ruled, “I will continue with trial in Mr. Loe’s absence.” RP 210-11. After Mr. Loe’s departure from court, the parties and the court discussed jury instructions, including the defense proposed instructions as to (a) defense of self and (b) defense of property. RP 180. During this time the parties and court also discussed issues of authentication of the proffered videotape evidence and the testimony of Deputy Erik Middlesworth. RP 175-85, 204-05. The court then adjourned for the day. RP 205.

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

Following cross and further examination of Mr. Gauny, RP 223-234, trial continued with State’s witnesses Laurie Thompson (Mr. Gauny’s wife), RP 235-52; the defense’s unsuccessful motion to dismiss after the State rested, RP 252-56, further discussion of jury instructions including defense of property, RP 257-58, and defense

counsel's notation that the only witness the defense could now present in its case was Ms. Gina Britton (Mr. Loe's girlfriend). RP 258.

(i). Mistrial denied. The defense also made clear that it had desired and was now expressly moving for a mistrial based on the court's ruling that it would be continuing the trial with Mr. Loe absent. RP 259; see RP 210-11. The court stated that it was denying the motion, and the State's witnesses were formally excused. RP 259-60.

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

(iii). Instructions and verdict. Jury instructions were further discussed, and the court gave the jury an instruction on defense against

trespass as to real and personal property, but not as to defense of self. RP 272-84, 290-91; see CP 92-93. Following closing argument, RP 295-11, the jury found Mr. Loe guilty of fourth degree assault. RP 317-21; CP 100, 101.

3. Sentencing – defendant’s attempt to explain his absence – filings, including sealed filings – renewed mistrial motion denied.

At sentencing held on October 9, 2019, Mr. Loe was present with counsel. RP 327. Mr. Loe had not been present for most of the trial day on September 10, or for trial on September 11 including the taking of the verdict or the entry of the order of that setting sentencing for October 9. RP 317-25. However, since that time he had attempted to explain his absence from trial. CP 102-11 (Declaration of Tim Loe).

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

D. ARGUMENT

THE TRIAL COURT VIOLATED MR. LOE'S CONSTITUTIONAL RIGHT TO PRESENCE, AND REVERSAL IS REQUIRED FOR TRIAL *IN ABSENTIA*.

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

A defendant has a constitutionally protected right to be present at all stages of trial. U.S. Const., amends. VI and XIV; Const. art. 1, § 22; United States v. Gagnon, 470 U.S. 522, 526, 105 S.Ct. 1482, 84 L.Ed.2d 486 (1985); State v. Thurlby, 184 Wn.2d 618, 624, 359 P.3d 793 (2015); State v. Thomson, 123 Wn.2d 877, 880, 872 P.2d 1097 (1994); see State v. Rice, 110 Wn.2d 577, 616, 757 P.2d 889 (1988) (right to be present applies at all critical stages) (citing Snyder v. Commonwealth of Massachusetts, 291 U.S. 97, 105-06, 54 S.Ct. 330, 78 L.Ed. 674 (1934)).

This right may never be waived unless a claimed waiver is knowing, intelligent, and voluntary. Johnson v. Zerbst, 304 U.S. 458, 464, 58 S.Ct. 1019, 82 L.Ed. 1461 (1938); Thurlby, 184 Wn.2d at 624. A voluntary absence after trial has begun may constitute an implied waiver of the right to presence. Thurlby, 184 Wn.2d at 624; State v. Rice, 110 Wn.2d 577, 619, 757 P.2d 889 (1988). And CrR 3.4(b) provides that in non-death penalty cases, “[t]he defendant’s voluntary

absence after the trial has commenced in his or her presence shall not prevent continuing the trial to and including the return of the verdict.”

However, because the right to be present at trial is a fundamental constitutional right, courts must indulge every reasonable presumption *against* finding waiver. State v. LaBelle, 18 Wn. App. 380, 389, 568 P.2d 808 (1977). The Washington Supreme Court has “adopted a three pronged analysis that the trial court must follow in order to find that the defendant has waived his or her right to be present.” Thurlby, 184 Wn.2d at 625-26 (emphasis added) (citing Thomson, 123 Wn.2d at 881). The trial court must: (1) make a sufficient inquiry into the circumstances of a defendant’s disappearance to justify a finding whether the absence was voluntary; (2) make a preliminary finding of voluntariness, when justified; and (3) afford the defendant an adequate opportunity to explain his absence when he is returned to custody and before sentence is imposed. Thurlby, 184 Wn.2d at 625-26; Thomson, 123 Wn.2d at 881.

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

a. The defendant was absent for most of trial. As noted, on September 10, 2018, Ms. Taylor had testified for the State during the

court's morning session, and the assault complainant, Mr. Gauny, had commenced his direct testimony. See RP 153-70, as discussed supra. At the beginning of the court's afternoon session, Mr. Loe was speaking on his cellular telephone and was heard, according to the transcript, saying, "having a heart attack." RP 174. He left the courtroom after the court's suggestion that he do so, or stay if he wished, but to not disturb the proceedings. RP 174.

After Officer Kowal reported that "Mr. Loe went to the hospital by ambulance," RP 185, see RP 186, the court made a "preliminary" finding that Mr. Loe's absence was voluntary, and ruled, "I will continue with trial in Mr. Loe's absence." RP 210-11. Thereafter, the court discussed jury instructions, including a self-defense instruction as to which the defendant had been expected to testify, RP 180; see CP 73-79; this instruction was not ultimately given.

After suspending the remainder of the September 10 trial day, on September 11, with Mr. Loe still absent, Mr. Gauny continued on direct and cross examination with his accusations of assault, RP 218-234, trial continued with testimony from Mr. Gauny's wife, RP 252-56, and there were further discussion of jury instructions and defense

counsel's lament that the only witness the defense had was Ms. Britton. RP 258.

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

However, certainly, Mr. Loe desired to be at trial and had always so desired. Prior to trial, on December 12, 2017, during pre-trial motions, when the prosecutor sought pretrial release conditions, the court noted that Mr. Loe had "showed up [in court] on his own steam" and questioned what the State could possibly be desiring as conditions. RP 20 (the State was inquiring about no-contact orders). Mr. Loe volunteered that he would show up at all future court hearings. RP 23. The court would later note that Mr. Loe need only appear at the pre-trial status hearing, not the omnibus hearing, and accepted his then and current telephone number of (509) 732-8810. RP 33-34.

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

Later on the 10th, defense counsel reported that he had just received a letter from the defendant that had been written by his health care provider, asking that Mr. Loe be “excuse[d] from court due to a medical issue that is requiring further evaluation by a specialist,” and that “the appointment is vital for [the] patient’s health.” RP 195. Counsel also informed the court that Ms. Britton had indicated that Mr. Loe had suffered a “heart attack, some sort of (inaudible) fibrillation earlier.” RP 195. Ms. Britton had indicated to counsel that Mr. Loe did proceed to the hospital, was admitted, and was presently undergoing tests. RP 195.

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

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

RP 198-99 (emphasis added).

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

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

be evaluated by – cardiology to determine the cause of the irregular rhythm as well as the risk for future arrhythmia.

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

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

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

[T]hroughout the case there at least have been occasions where – I think back in February of this year, Mr. Loe had – Well, -- well, he filed numerous declarations within the court file, but filed a declaration he had Grave – Grave’s Disease, ulcerative colitis and autoimmune disorder, low blood sugar, complaining that if he was in court for too long that his low blood sugar could cause mental fatigue, and evidence itself with confusion. And, it was just within the last week or so, as I understand, that there was a complaint about this medical condition. I hear now or read here that it was August 20 of 2018. And, you know, we started trial – couple weeks later. And he did request a continuance on the morning of trial, indicating that he had this appointment on Tuesday. And I denied it, with the belief that, you know, that’s – that’s not only a choice but also – I figure if there was an emergency he would have been immediately in the hospital, number one; and number two, there was no documentation from a provider that there was a – an emergent medical condition. The fact that Mr. Loe is not in the hospital this morning, not admitted to the hospital, chose to go to the ER yesterday, and has also chosen not to be here this morning or offer any – verification from his physician, is sufficient for me on a preliminary basis to find that his – non-appearance today is a voluntary absence, just as it was yesterday afternoon, that the circumstances point to that. I will therefore make that finding of – that he has chose to waive his presence here today.. . . I will continue with trial in Mr. Loe’s absence.

RP 208-10.

The court’s legal analysis and factual rulings were in error. A court looks to the totality of the circumstances to determine whether voluntary waiver has occurred. State v. Garza, 150 Wn.2d 360, 367, 77 P.3d 347 (2003).

Here, Mr. Loe’s statements and conduct when he left the courtroom on September 10 plainly indicated that he was suffering or

felt at risk of a heart attack. RP 174. On that day, and the succeeding court day, the evidence – from Officer Kowal, defense counsel and from the court itself – indeed mounted that Mr. Loe had experienced an episode involving a serious heart condition, that he had been taken by ambulance to the emergency room, and that treatment was administered or his condition evaluated. RP 185-86, 206-07, 208-09.

The fact that Mr. Loe’s condition was apparently pre-existing hardly disqualifies him from its involuntary effects, as the court appeared to reason. The fact that Mr. Loe had complained of other conditions, or that he asserted at times that his conditions were exacerbated by his circumstances, is also not evidence pointing toward voluntary absence. And, Mr. Loe had a right to effective assistance of trial counsel, which included a right to seek new appointed counsel before trial. See generally State v. Varga, 151 Wn.2d 179, 200, 86 P.3d 139 (2004). The granting of these requests for a new lawyer were orders that the court deemed required, considering the reasons Mr. Loe gave for his dissatisfaction, together with the trial court’s own evaluation of the competence of existing counsel; in particular, the effect of substitution upon the scheduled proceedings was deemed fully acceptable. See State v. Rosborough, 62 Wn. App. 341, 346, 814 P.2d

679 (1991). The defendant's right to presence is not diminished by his proper exercise of other rights at earlier junctures in the criminal proceeding.

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

Finally, the defendant had a right to expect that the trial court would state and apply the correct law. The abuse of discretion standard broadly recognizes that deference is owed to a judicial actor who is better positioned than another to decide the issue in question, but "[a] trial court . . . would necessarily abuse its discretion if it based its ruling on an erroneous view of the law." Washington State Physicians Ins. Exch. & Ass'n v. Fisons Corp., 122 Wn.2d 299, 339, 858 P.2d 1054 (1993). Here, nothing indicates that the court diverged from its

incorrect statement of the law – that there would be “an assumption that a person who’s not at court is voluntarily absenting himself.” RP 198-99.

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

Before sentencing, Mr. Loe had filed documents under seal including further statements from his physician regarding his heart problems. Supp. CP ___, ___, Sub # 85 and 85.99 (Sealed medical and health info CRRSP from Physician”) (dated September 12, 2018).

At sentencing on October 9, at which Mr. Loe was present, Mr. Loe had also filed a declaration regarding his case. RP 326; see CP 102-11 (Declaration of Tim Loe) (filed October 9, 2018). Counsel made clear at the sentencing held that the defense was renewing the mistrial motion based on involuntary absence. RP 331.

In the declaration, Mr. Loe begins with general concerns about the case and his counsel and other matters, but he also states that Deputy Middlesworth, who sat with the prosecutor during trial, “was allowed to read my personal medical records when they were handed to the prosecutor by my attorney.” CP 108. Mr. Loe also stated in court

that his heart problems were related to the court case and stress in the courtroom, which he had informed his lawyer about. RP 335.

Ms. Britton also spoke, and told the court that the case had been pushed through despite the documents from Mr. Loe's doctors and the hospital records. RP 338.

However, the court stated that it had previously made a finding that the defendant's absence was not voluntary, and that it had not heard anything to the contrary at sentencing. RP 330-31.

The court later made several further remarks. The court noted that it had suspended the trial after the first morning of trial in order to determine Mr. Loe's whereabouts, after he left the courtroom speaking on the telephone about a heart attack, and that it had not issued a warrant for his arrest. RP 340.

However, the court then erroneously found that Mr. Loe had not been treated – seemingly asserting that Mr. Loe had “went to the emergency room but was released and was never admitted.” RP 340-41. The court also incorrectly stated, “nor was there any contact reference from his attorney to indicate why he would be unable to appear the next day.” RP 341. The court deemed a mistrial unwarranted on ground that no medical

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

RP 340.

These findings and rulings were in error. The State's arguments that Mr. Loe had not shown medical reasons for his absence were inaccurate, and the court had misstated the standard required for establishing waiver of a constitutional right. RP 191.

In fact, Mr. Loe's demonstrated circumstances precluded any finding of voluntary absence, where the court must presume presence was not waived. Mr. Loe had left the courtroom to proceed to the hospital by ambulance. RP 174, RP 185-86 (court's notation of Officer Kowal's report to the court). He had shown that he was treated for the heart condition, regardless of whether he was or was not admitted to stay the night at that facility. RP 195, RP 206-07. The court's own inquiry into the matter had discovered the same essential facts – that Mr. Loe was treated medically for a serious condition. RP 208-10.

The court incorrectly concluded that these facts meant that Mr. Loe had chosen to be absent, and established the legal requirements of

waiver. RP 208-10. Crucially, waiver is not established unless the defendant's action or omission was clearly intended to result in his absence. State v. Atherton, 106 Wn. App. 783, 789, 24 P.3d 1123 (2001).

The court held to its same erroneous view of the facts and the law at sentencing – finding that Mr. Loe was not treated since he was never “admitted,” and rejecting the undisputed assertions by his physician Kelly Whitty that Mr. Loe’s heart condition required his absence. RP 340-41. The court’s reasoning must be viewed in light of its incorrect statement of the law – that “there would be an assumption that a person who’s not at court is voluntarily absenting himself.” RP 198-99; see State v. LaBelle, *supra*, 18 Wn. App. at 389 (as with all waivers of fundamental constitutional trial rights, there is a presumption that absence is *not* voluntary). This was not a voluntary absence. Cf. State v. Thomson, 123 Wn.2d 877, 879-82, 872 P.2d 1097 (1994) (defendant’s unexplained claim of a medical emergency, and lack of corroboration of the offered reason for his absence, with no attempted explanation at sentencing, allowed court to find knowing waiver of right to presence despite presumption against the same).

The defendant was not properly found to have voluntarily absented himself from his trial.

5. Reversal is required.

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

It is the State's burden to demonstrate that a violation of the right to be present at trial was harmless beyond a reasonable doubt. Rice, 110 Wn.2d at 613-14. Here, Mr. Loe was unable to be present for the full examination and cross-examination of the State's crucial witnesses, Gauny, and Thompson. RP 174, RP 223-34. The defense was only able to present the testimony of Ms. Britton, who was not at the scene of the alleged incident. RP 258. And, the record amply shows that Mr. Loe was unable to testify regarding his initial claim of self-defense, as his lawyer made abundantly clear that he intended to do, noting during discussion of jury instructions, "I intended to have

Mr. Loe testify[.]” RP 180; see also CP 73-79 (defense proposed instructions on defense of self and defense of property and brief in support thereof). Reversal is required because the error of conducting trial in Mr. Loe’s absence was not harmless.

E. CONCLUSION

Based on the foregoing Mr. Loe respectfully requests that this Court reverse the trial court’s entry of judgment of conviction.

DATED this 15TH day of July, 2019.

Respectfully submitted,

s/OLIVER R. DAVIS
Washington State Bar Number 24560
Washington Appellate Project
1511 Third Avenue, Suite 610
Seattle, WA 98101
Telephone: (206) 587-2711
Fax: (206) 587-2710
e-mail: oliver@washapp.org

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

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

DECLARATION OF DOCUMENT FILING AND SERVICE

I, MARIA ARRANZA RILEY, STATE THAT ON THE 15TH DAY OF JULY, 2019, I CAUSED THE ORIGINAL **OPENING BRIEF OF APPELLANT** TO BE FILED IN THE COURT OF APPEALS – DIVISION THREE AND A TRUE COPY OF THE SAME TO BE SERVED ON THE FOLLOWING IN THE MANNER INDICATED BELOW:

<input checked="" type="checkbox"/> TIMOTHY RASMUSSEN STEVENS COUNTY PROSECUTOR'S OFFICE [prosecutor.appeals@stevenscountywa.gov] [trasmussen@stevenscountywa.gov] 215 S OAK ST COLVILLE, WA 99114-2862	() () (X)	U.S. MAIL HAND DELIVERY E-SERVICE VIA PORTAL
<input checked="" type="checkbox"/> TIM LOE 4688 GODFREE RD NORTHPORT, WA 99157-9722	(X) () ()	U.S. MAIL HAND DELIVERY _____

SIGNED IN SEATTLE, WASHINGTON THIS 15TH DAY OF JULY, 2019.

X _____ 

WASHINGTON APPELLATE PROJECT

July 15, 2019 - 4:33 PM

Transmittal Information

Filed with Court: Court of Appeals Division III
Appellate Court Case Number: 36378-3
Appellate Court Case Title: State of Washington v. Tim Allen Loe
Superior Court Case Number: 17-1-00325-0

The following documents have been uploaded:

- 363783_Briefs_20190715163120D3879018_4349.pdf
This File Contains:
Briefs - Appellants
The Original File Name was washapp.071519-03.pdf
- 363783_Designation_of_Clerks_Papers_20190715163120D3879018_9330.pdf
This File Contains:
Designation of Clerks Papers - Modifier: Supplemental
The Original File Name was washapp.071519-02.pdf

A copy of the uploaded files will be sent to:

- greg@washapp.org
- prosecutor.appeals@stevenscountywa.gov
- tiffinie@washapp.org
- trasmussen@stevenscountywa.gov

Comments:

Sender Name: MARIA RILEY - Email: maria@washapp.org

Filing on Behalf of: Oliver Ross Davis - Email: oliver@washapp.org (Alternate Email: wapofficemail@washapp.org)

Address:
1511 3RD AVE STE 610
SEATTLE, WA, 98101
Phone: (206) 587-2711

Note: The Filing Id is 20190715163120D3879018