No. 44774-6-II
Cowlitz Co. Cause No. 12-1-00966-7

COURT OF APPEALS, DIVISION II OF THE STATE OF WASHINGTON

STATE OF WASHINGTON,

Respondent,

v.

TAMMERA THURLBY,

Appellant.

SUPPLEMENTAL BRIEF

SUSAN I. BAUR
Prosecuting Attorney
DAVID PHELAN/WSBA #36637
Deputy Prosecuting Attorney
Attorney for Respondent

Office and P. O. Address:
Hall of Justice
312 S. W. First Avenue
Kelso, WA 98626
Telephone: 360/577-3080

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II. STATEMENT OF THE CASE

In light of *Cobarruvias,* there are some additional facts that become relevant. Defense counsel did bring up and argue the presumption against waiver of the right to be present at the jury trial, as the third *Thomson* factor. RP 235. Judge Evans subsequently adopted the three-prong analysis of *Thomson*. RP 239. The court also considered that there was no representation regarding the necessity of Appellant being with her mother at the time of the surgery, noting that no evidence was put forth showing that Appellant was needed to drive her to the hospital, that an ambulance could not have done it, or that she would not receive competent care at the hospital but for the presence of the Appellant. RP 241. The court considered, at length, the facts and circumstances presented by the Appellant. RP 242. The court attempted to determine what actually happened, assessed the reasonableness of the Appellant's actions, and the ultimately found the absence voluntary. RP 242-43.

III. ARGUMENT

A. THE COURT ADEQUATELY INDULGED THE PRESUMPTION AGAINST WAIVER WHEN IT CONSIDERED THE APPELLANT'S EXPLANATION FOR HER ABSENCE

The trial court's ruling was lawful and appropriate under under *Cobarruvias.* That court reversed the trial court because the presumption against waiver was not addressed at the time the court ruled. *State v. Cobarruvias,* COA. NO. 30665-8, Pg. 10-11 (2014). This ruling, based in part on *State v. Garza* and *State v. Thomson,* does not affect the trial court's ruling in this case. 150 Wn.2d 360 (2003); 123 Wn.2d 877 (1994). The trial court here properly considered all the facts and circumstances of the Appellant's absence and was aware of the presumption against waiver of the right to appear.

First, the requirement that the trial court explicitly acknowledge the presumption against waiver is an extension of *Garza* and *Thomson,* not an application of that law. Neither case requires or even discusses the requirement that a trial court explicitly acknowledge in its ruling the presumption against waiver. In fact, *Garza,* when considering the presumption against wavier question, found fault not with the failure to explicitly acknowledge the presumption, but with the "hasty determination" made by the trial court, noting the court could have indulged the presumption by waiting "a more reasonable time than five minutes for Garza to arrive." 150 Wn.2d at 369.

In *Thomson*, the court was satisfied that the trial court did not abuse its discretion where the trial court "sufficiently inquired into the circumstances of the Defendant's absence to make a finding of voluntariness" and gave the defendant "adequate opportunity to explain his absence prior to sentencing." 123 Wn.2d at 884. It made no reference to whether the court explicitly acknowledged the presumption again waiver, instead examining the reasonableness of the trial court's actions to determine if the test had been satisfied.

Nowhere in *Thomson* or *Garza* is there a requirement that the trial court explicitly acknowledge the presumption against waiver. Nor should this court require trial courts to invoke the talismanic incantation of "we acknowledge the presumption against waiver," but rather examine the actual facts and circumstances of the case, in light of the trial court's ruling.

This is not a situation where the Appellant was being apprised of her rights, and thus the presence or absence of "magic words" would determine whether or not the law had been followed. This is a straight-forward determination by the trial court about whether the Appellant was voluntarily absent at the time of her trial, where she had given no explanation at the time and gave no explanation for the month she spent on warrant status before she was arrested.

Moreover, the trial court here engaged in exactly the sort of analysis contemplated by *Corbarruvias*. The trial court did determine

"what actually happened" and assessed "the reasonableness of the defendant's actions," while also "considering other facts" as they related to the Appellant and "ultimately" decided that it did not believe the Appellant's absence was voluntary. *Id.* 11-12. The trial court's analysis did not begin with its previous determination of voluntariness, but rather was a new assessment based on facts presented at the time of sentencing. The trial court specifically considered the Appellant's testimony and made its decision in light of that information. RP 239-240. Indeed, the trial court's ultimately ruling makes no reference to the preliminary finding, but rests solely on the facts as presented by the Appellant. RP 242.

The trial court appropriately considered the totality of the facts and circumstances surrounding the Appellant's failure to appear for trial. This decision was made with full knowledge of the presumption against waiver. The decision itself was completely reasonable and did not constitute an abuse of discretion. The trial court should be affirmed.

B. IF REVERSED, THE TRIAL COURT SHOULD BE DIRECTED TO RECONSIDER THE TOTALITY OF THE CIRCUMSTANCES IN LIGHT OF THE PRESUMPTION AGAINST WAIVER

If the court is persuaded by the analysis regarding the application of the presumption against waiver in *Cobarruvias*, this court should remand the case to the trial court to reconsider its

decision with an explicit recognition of the presumption against waiver.

Here, unlike in *Garza*, where the court found the initial finding of voluntariness manifestly unreasonable because the court waited on five minutes, any error by the trial court in this case was related to the court's failure to specifically acknowledge the presumption against waiver, even though the record reveals that the court carefully considered all relevant facts and circumstances.

The facts remain the same and this case, should the court reverse, should be sent back to the trial court for determination of the third *Thomsen* prong with specific acknowledgment of the presumption against waiver, rather than for a new trial. Unlike in *Garza*, which was remanded for a new trial, the issue here relates to the finding of voluntariness **after** the trial had been completed. As the *Garza* court acknowledged, the post-trial actions of the defendant were irrelevant since even if his post-trial actions were insufficient to show his voluntary absence, the trial court's error was based on the preliminary determination. Here, where any alleged error under *Cobarruvias* would relate to the subsequent finding of voluntariness, there is no need to remand for a new trial.

The trial court was and is still in the best position to render a judgment based on the facts and circumstances. If this court were to

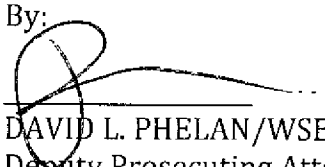
reverse based on *Cobarruvias*, the trial court should be given the opportunity to rule based on the appropriate legal standard.

IV. CONCLUSION

The trial court did not abuse its discretion in finishing the trial of the Appellant without her presence. Appellant was absent after trial began and the court's determination that such absence was voluntary was based in fact and a lawful determination. When Appellant was given the opportunity to address her absence at sentencing, the trial court carefully considered the facts she presented, then found that she had voluntarily absented herself from the proceedings. The actions of the trial court were manifestly reasonable, were careful and considered, and showed that the trial court properly considered the presumption against waiver required by *Thomson*. The trial court should be affirmed.

Respectfully submitted this 27th day of March, 2014.

SUSAN I. BAUR
Prosecuting Attorney

By: 

DAVID L. PHELAN/WSBA # 36637
Deputy Prosecuting Attorney
Representing Respondent

CERTIFICATE OF SERVICE

Michelle Sasser, certifies that opposing counsel was served electronically via the Division II portal:

Ms. Catherine E. Glinski
Attorney at Law
P.O. Box 761
Manchester, WA 98353-0761
cathyglinski@wavecable.com

I CERTIFY UNDER PENALTY OF PERJURY UNDER THE LAWS OF THE STATE OF WASHINGTON THAT THE FOREGOING IS TRUE AND CORRECT.

Signed at Kelso, Washington on March 27th, 2014.

Michelle Sasser

Michelle Sasser

COWLITZ COUNTY PROSECUTOR

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