

STATE OF MICHIGAN
COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

JOHN HOUSTON,

Defendant-Appellant.

UNPUBLISHED

May 22, 2003

No. 239682

Wayne Circuit Court

LC No. 01-000582

Before: Talbot, P.J., and White and Murray, JJ.

PER CURIAM.

Following a jury trial, defendant was convicted of felonious assault, MCL 750.82, and sentenced to prison for nine months to four years. He appeals as of right. We reverse. We are deciding this case without oral argument pursuant to MCR 7.214(E).

Defendant's conviction arose from an incident that occurred in the early morning hours of November 7, 1999, in the vicinity of Michigan Avenue and Livernois Avenue. The complainant, Detroit Police Officer Hassan Chehab, and defendant were the only witnesses to the incident. In their testimony, they both indicated that they had a verbal confrontation while waiting at a traffic light, that their vehicles subsequently collided, and that Chehab pursued defendant and ultimately shot him. The critical dispute was whether defendant drove his car at Chehab at the time of the shooting.

According to Chehab, at the time of the incident, he was off duty, not in uniform, and driving his personal vehicle. He encountered defendant at a traffic light on Michigan Avenue at the intersection of Cecil at approximately 2:45 a.m. Defendant's car pulled up along the passenger side of Chehab's car. Defendant lowered the driver's door window, and Chehab, thinking defendant was seeking directions, lowered his passenger side window. Defendant asked Chehab, "What the f***'s your problem?" Chehab responded that he had no problem. The traffic signal turned green, and Chehab's car proceeded ahead of defendant's car. Chehab felt an impact on the right rear quarter panel of his car, and his car spun out of control. He saw the car defendant was driving and followed it to get a license plate number to make a report for a hit and run. Chehab followed defendant's car as it turned on streets and alleys in the neighborhood, but eventually Chehab lost sight of it. He continued to look for defendant's car. As he drove in an alley on the north side of Michigan Avenue, Chehab saw defendant's car on the other side of a short wall, in the parking lot of a funeral home south of the alley, with the car's headlights off. The rear of the car was against the building so the license plate was not visible. Chehab drove

into the alley and got out of his car to see the license plate on defendant's car. Chehab was uncertain if he yelled that he was a police officer and that he had a badge as he left his car. His car was in the middle of the alley, barely far enough from the wall for a vehicle to get through. He turned away from the car and walked one or two steps up the alley to go around the wall to the left. Defendant turned on his headlights, left the parking lot using the only available exit and made an "abrupt" left turn to drive around the wall. According to Chehab, there was nothing preventing defendant from going to the right side. Defendant's car came at Chehab at a speed between twenty and thirty miles an hour. As defendant rounded the wall, Chehab, fearing for his life, drew his weapon and shouted, "Police." The car continued coming toward Chehab. He fired three rounds. According to Chehab, he shot from in front of defendant's vehicle and fired as it was coming toward Chehab. Defendant was approximately six feet away. To the best of Chehab's knowledge, he did not fire at the rear of the vehicle. Chehab then jumped over the wall. When he got to the other side, he stopped firing. Defendant's car hit the wall and Chehab's driver's side door and proceeded down the alley. Chehab jumped back over the wall and followed. Chehab found defendant's car, which had collided with a light pole.

Defendant, who had been shot in the left arm, went to a bar approximately less than a hundred yards from where his vehicle was found, received assistance from an acquaintance and was transported to the hospital.

Officer Weiss testified that he talked to defendant at the hospital in the emergency room. Without advising defendant of his rights, he asked defendant how he received his wound and recorded the information from defendant in his preliminary complaint report. Defendant indicated that Chehab accused defendant of cutting him off. Defendant stated that Chehab swerved into defendant's lane, the vehicles collided and Chehab's vehicle "spun out." Defendant reported that he fled on various side streets, parked his vehicle behind a funeral home and turned off his lights. Defendant said Chehab drove westbound in the alley, got out of his car and shot at defendant. Defendant said that he then fled the funeral home parking lot toward Chehab, who jumped over the brick wall and started shooting at him. Defendant said that he fled westbound in the alley, striking Chehab's vehicle and then colliding with a light pole.

At trial, defendant testified that he noticed the car Chehab was driving when it approached quickly and changed lanes as both cars were traveling on Michigan Avenue. Both cars stopped at the traffic light at Michigan Avenue and Cecil. Defendant was "baffled" about Chehab's driving and believed Chehab was being aggressive. Defendant lowered his window and asked, "What's up?" Chehab accused defendant of cutting him off, defendant accused Chehab of cutting him off. The two exchanged vulgarities. When the light changed, both cars accelerated. Chehab's car came alongside defendant's car and then abruptly came into the lane in which defendant was driving. The right rear quarter panel hit defendant's front bumper, and Chehab's car spun. According to defendant, he attempted to get away from the incident because he was scared. He admitted that he did not want to wait for the police, but denied that he left the scene because he had been drinking. He turned on several side streets before parking behind a funeral home. He backed in, turned off his lights, rolled down his window and listened. He saw Chehab's vehicle coming through the alley. The car passed the exit, stopped suddenly and reversed. The car stopped, Chehab got out, jumped the wall and ran toward defendant's car. Defendant did not see a badge, and Chehab did not say anything. Defendant was concerned that if Chehab reached defendant's car, there would be a physical altercation. Defendant put his car

in drive and proceeded to the exit at a speed of no more than twenty miles an hour. He had to make a sweeping turn to avoid hitting Chehab. He turned left or westbound out of the parking lot. Defendant claimed that he could not have turned right out of the parking lot because he would have hit the wall. When he rounded the wall, he heard shots coming from his left from the parking lot where Chehab was standing. Defendant put his head down and tried to navigate through the open door and the wall. He was shot in the left arm. He denied that Chehab identified himself as a police officer and that he was in front of defendant's vehicle as he shot. Defendant denied attempting to scare Chehab and claimed that Chehab was never in front of defendant's car as he went forward. He claimed that he believed that Chehab was trying to kill him.

Defendant acknowledged that he had given a statement to the police when he was in the hospital and that the statement was accurate to the best of his knowledge at the time. Defendant believed that he had been advised of constitutional rights, that they gave him the statement afterward, that he read and signed it. He testified that there were some differences between the statement and his testimony concerning the position of the police officer in the parking lot. He denied stating that he fled the parking lot toward the officer and that was when the officer jumped over the wall and started shooting.

Three shell casings were recovered from the scene, two on one side of the wall, next to the driver's side door of Chehab's car, and one that was two feet south of the wall. The evidence technician could not tell where the person firing the weapon was standing from the location of the casings. The prosecution's firearm expert agreed that with regard to the weapon involved, the cartridge normally ejects the cartridge casings "some distance from where they're fired." Chehab's vehicle had damage consistent with the collisions with defendant's vehicle. Damage to defendant's vehicle was consistent with hitting Chehab's vehicle and to contact with a utility pole. In addition, the rear window was shattered and there was bullet impact to the top ridge of the tailgate. There was no bullet damage to the front of the vehicle. The evidence technician agreed that in all likelihood the bullet impact to the rear tailgate was caused by a bullet fired from the rear rather than the front.

Defendant first argues that the trial court infringed on his constitutional right to testify on his own behalf when the court imposed time limits on his testimony as a sanction for his tardiness in appearing for the third day of trial.

The court expressed its concern about the length of the trial on several occasions in the first two days of trial. On the third day of trial, defendant arrived at the courtroom three hours late. Although the trial proceeded in his absence, as discussed *infra*, the court determined that defendant's conduct warranted a penalty. The court stated, "Due to defendant's failure to appear this morning, I'm placing time constraints at this point pursuant to MRE 611. You have a half hour to do your direct, half hour to do cross, 15 minutes for redirect."

Throughout defendant's testimony, the court reminded counsel of the restrictions. During the direct examination, the court interrupted defense counsel's questioning to remind him of the time limitation:

THE COURT: Ten minutes or actually five minutes.

[DEFENSE COUNSEL]: Judge, I need – okay.

THE COURT: You had – but your client wasn't here for three hours.

[DEFENSE COUNSEL]: Well, if you don't want to hear why he was late, Judge.

THE COURT: Seven minutes, daylight's burning.

Subsequently, the court responded to an objection by the prosecution by stating, "Let's wind it up." Later, after defense counsel asked defendant a question, the court interposed, "Time's up. You can finish this last question." Defense counsel asked four questions, and the court ended the questioning by stating, "Thank you." Defense counsel indicated that he wanted to admit a photograph into evidence before defendant left the stand and attempted to continue questioning. However, the court asked the prosecutor to stipulate to the contents of the photographs and their admissibility. At the beginning of cross-examination, the court reminded the prosecution of its time limit. Time limits were mentioned again during re-direct examination of defendant. After the court repeatedly sustained objections to defense counsel leading the witness, defense counsel apologized and stated, "I'll try to slow down but I've been put on time constraints. I'm moving and it may be a mistake on my part." The prosecutor noted, and the court agreed, that both sides had been put on time constraints. The court then stated, "The more you talk, the less time you have for questions."

The court's authority to impose restrictions on the presentation of evidence is recognized in MCL 768.29, which states, in part:

It shall be the duty of the judge to control all proceedings during the trial, and to limit the introduction of evidence and the argument of counsel to relevant and material matters, with a view to the expeditious and effective ascertainment of the truth regarding the matters involved.

Furthermore, MCR 6.414(A) states in part:

The trial court must control the proceedings during trial, limit the evidence and arguments to relevant and proper matters

In addition, MRE 611(a) states:

The court shall exercise reasonable control over the mode and order of interrogating witnesses and presenting evidence so as to (1) make the interrogation and presentation effective for the ascertainment of the truth, (2) avoid needless consumption of time, and (3) protect witnesses from harassment or undue embarrassment.

In *Hartland Twp v Kucykowicz*, 189 Mich App 591, 595-596; 474 NW2d 306 (1991), a condemnation action, this Court concluded that the court's imposition of time on the examination of witnesses was within the court's discretion under MRE 611(a).

Although a trial court is entitled to control the proceedings in its courtroom, the court is not entitled to do so at the expense of a defendant's constitutional rights. *People v Arquette*, 202 Mich App 227, 232; 507 NW2d 824 (1993).

A criminal defendant's constitutional right to testify is grounded in the Fifth, Sixth and Fourteenth Amendments, as discussed in *Rock v Arkansas*, 483 US 44; 107 S Ct 2704; 97 L Ed 2d 37 (1987) and *People v Solomon (Amended Opinion)*, 220 Mich App 527, 533-534; 560 NW2d 651 (1996). The right is implicated not only where the court precludes a defendant from testifying, but also where the court restricts the scope of a defendant's testimony. See *Alicea v Gagnon*, 675 F2d 913 (CA 7, 1982) (alibi testimony precluded). The right to testify is not without limitation and may "bow to accommodate other legitimate interests in the criminal trial process." *Id.*, p 55, quoting *Chambers v Mississippi*, 410 US 284, 295; 93 S Ct 1038; 35 L Ed 2d 297 (1973); *Solomon, supra*, p 534. However, "restrictions of a defendant's right to testify may not be arbitrary or disproportionate to the purposes they are designed to serve." *Rock, supra*, pp 55-56.

In this case, the court's imposition of time limits on defendant's testimony was arbitrary and contrary to the aims of MCL 768.29, MCR 6.414(A), and MRE 611(a). The restrictions on defendant's testimony were designed to make the trial "expeditious" regardless of the impact on "ascertainment of the truth." MCL 768.29. The restrictions limited evidence regardless of its relevance and materiality. MCR 6.414(A). The restrictions were focused on avoiding the "consumption of time," regardless of whether it was "needless" or necessary for "mak[ing] the interrogation and presentation effective for the ascertainment of truth . . ." MRE 611(a). The court's arbitrary and unwarranted restrictions of defendant's testimony violated his constitutional right to testify.

In support of its argument that the limitation was permissible, the prosecution notes that the court imposed time limitations on both the prosecution and the defense and cites *People v Thompson*, 193 Mich App 58, 62; 483 NW2d 428 (1992). That case is distinguishable. There, the court indicated that the time limits would be extended where necessary. Here, the court did not indicate that the limits were flexible. Rather, the court's repeated interruptions of defense counsel suggested that the court insisted on compliance with the limitations. In addition, in *Thompson*, the Court held that the court's limitation of the defense cross-examination of an unidentified witness only precluded "repetitive questions on topics that the trial court had previously ruled irrelevant." *Id.* Here, the impact of the court's restriction was not confined solely to irrelevant and unnecessary matters. Finally, unlike in the present case, there is no indication that the limits imposed in *Thompson* implicated the defendant's constitutional right to testify. Therefore, *Thompson* does not persuade us that the limitations imposed in the present case were within the court's discretion.

A violation of the right to testify does not automatically entitle defendant to relief. Reversal is required unless the prosecution demonstrates that the error was harmless beyond a reasonable doubt. *Solomon, supra*, p 538. The prosecution's burden in this regard is considered "heavy" because of the "uncertain effect of the defendant's testimony on the jury." *Id.*

The prosecution has not established that the error was harmless beyond a reasonable doubt. Unlike in *Solomon*, the evidence against defendant was not overwhelming. Defendant's guilt essentially depended on the jury's resolution of a credibility contest between defendant and

the complainant. There were no other witnesses to the incident. The physical evidence did not overwhelmingly establish defendant's guilt. The location of the shell casings did not strongly support either Chehab's or defendant's version of the events. The bullet damage to the rear of defendant's vehicle supported his claim that Chehab fired at the rear of defendant's vehicle. Although according to Weiss, defendant stated at the hospital that he fled the parking lot toward the complainant, defendant denied this at trial and attempted to address differences between his statements to the police and his testimony. His ability to explain the differences and to effectively present his version of the events was impeded by the time limits imposed by the court. Moreover, the court's interruptions of defendant's testimony to emphasize the time being used may have diminished defendant's credibility in the eyes of the jury because the court's actions implied that his testimony was unimportant and a waste of time. Under the circumstances, we are not persuaded that the error was harmless beyond a reasonable doubt.

Although our resolution of the preceding issue makes it unnecessary to address defendant's remaining issues, we also conclude that the court's resumption of trial in defendant's absence without allowing defense counsel an adequate opportunity to locate defendant and without an adequate basis to determine whether defendant's absence was voluntary provides a second basis for reversing defendant's conviction.

An accused has a right to be present at his trial. The right is conferred by statute, MCL 768.3, impliedly guaranteed by the federal and state constitutions and grounded in common law. *People v Mallory*, 421 Mich 229, 246, n 10; 365 NW2d 673 (1984). A defendant may waive the right to be present by his voluntary absence from the courtroom after trial has begun. *People v Swan*, 394 Mich 451, 452; 231 NW2d 651 (1975). A court "must indulge every reasonable presumption against the loss of the right to be present at trial." *Mallory, supra*, p 248 n 13. Where the record is silent concerning whether defendant's absence was voluntary, a valid waiver of the right cannot be presumed. *People v Armstrong*, 212 Mich App 121, 129; 536 NW2d 789 (1995); *People v Williams*, 196 Mich App 404, 407; 493 NW2d 277 (1992); *People v Palmerton*, 200 Mich App 302, 303-304; 503 NW2d 663 (1993).

At the close of the second day of trial, the court instructed everyone to return between 8:30 and 9:00 a.m. the following day. When trial resumed the following day at 9:25 a.m., defendant was not present. The court indicated that the case was scheduled to begin at 9:00 a.m. and that the trial would "proceed in absentia [sic]" until he arrived. Defense counsel stated that defendant had said he would be present at 9:00 a.m., and defense counsel believed there was "something wrong." Following the testimony of the first witness, defense counsel asked for two minutes to make a call, which the court apparently refused. During a recess that followed the completion of the second witness' testimony, the court indicated that, at 9:30 a.m., defense counsel's son called and indicated that defendant would be present in ten or fifteen minutes, that it was then 10:45 a.m., and defendant was still not present. Defense counsel asked the court to allow him to make a phone call to try to find his client. The court agreed to allow the phone call. Defendant arrived at 11:50 a.m. The court did not inquire about the reason for defendant's tardiness. When defense counsel offered to explain the reason, the court asked him to proceed with his examination. Following his conviction, in an effort to persuade the court to allow defendant to continue his bond pending sentencing, defendant and defense counsel indicated that he was delayed because of "a personal issue in the morning with my daughter and my

girlfriend,” that he had arranged for three people to pick him up, that none of them came, and that he was finally transported to court in a tow truck.

In some instances, this Court and the Supreme Court have upheld a determination that a defendant’s absence was voluntary where the trial court provided an opportunity to locate the defendant and later heard testimony concerning those unsuccessful efforts. See, e.g., *Swan, supra*, pp 451-452; *People v Gross*, 118 Mich App 161, 163-164; 324 NW2d 557 (1982); *People v Gant*, 363 Mich 407, 409; 109 NW2d 873 (1961). However, at the time that trial resumed in this case, defendant’s absence was unexplained and the court made no effort to discover whether defendant’s absence was intentional. Rather than cooperating with defense counsel in attempting to locate defendant or determine the reasons for his absence, the court interfered with defense counsel’s efforts by refusing his request to make a phone call to determine the whereabouts of his client. To the extent that defendant’s later statements indicate that his tardiness was attributable to difficulties in transportation, we note that courts have held that an accused’s absence that is due to unanticipated difficulties in transportation is not a voluntary absence for the purpose of waiving the right to be present at trial. See, e.g., *People v Rice*, 156 AD2d 925; 550 NYS2d 768 (1989); *United States v Mackey*, 915 F2d 69 (CA 1, 1990).

In the absence of a valid waiver, a defendant’s absence from part of his trial warrants reversal only if “there was any reasonable possibility that defendant was prejudiced by his absence.” *Armstrong, supra*, p 129. In this case, a reasonable possibility of prejudice exists because defendant was not present during the testimony of two prosecution witnesses and a portion of one witness for the defense. In particular, defendant’s absence during the testimony of Officer Weiss concerning the statements that defendant allegedly made while in the hospital was prejudicial. For reasons not entirely clear from the record, the prosecution did not introduce the substance of defendant’s statement during its case in chief. Defense counsel elicited testimony concerning the contents of the statement when it appeared that defendant would not be present to offer his version of the incident.¹ Although much of defendant’s statement as recounted by the officer comported with defendant’s later trial testimony the two differed in one important aspect. According to Weiss, defendant stated that he “fled the parking lot toward the complainant.” Defendant’s absence during Weiss’ testimony concerning the statement may have affected his ability to explain this damaging testimony when he testified.² In light of the credibility contest that this case presented, we conclude that there is a reasonable possibility of prejudice arising from defendant’s absence during Weiss’ testimony. Thus, defendant is entitled to reversal on this basis, as well as the court’s violation of defendant’s right to testify.

Finally, defendant argues that the court failed to recognize that a sentence of imprisonment was a guideline departure. Because defendant’s sentencing guidelines range was zero to nine months, MCL 769.34(4)(a) required imposition of an intermediate sanction, as defined in MCL 769.31(b), unless the court provides a substantial and compelling reason to

¹ Although the statement was hearsay when offered by the defense, the court noted that it had allowed the defense significant latitude in eliciting the hearsay testimony because of defendant’s absence. The prosecution noted that it had not objected because defendant was absent.

² In addition, had the court not proceeded with trial in defendant’s absence, defense counsel would not have found it necessary to elicit defendant’s version of the incident through Weiss.

sentence defendant to the jurisdiction of the department of corrections. A prison sentence is not an intermediate sanction. MCL 769.31(b); *People v Stauffer*, 465 Mich 633, 635; 640 NW2d 869 (2002). In this case, the court did not recognize that the prison sentence imposed was a departure from the guidelines. The court indicated on the Sentencing Information Report that the sentence was not a guideline departure, and the court's statements at sentencing also suggest that the court was simply unaware that the sentence was a guideline departure. However, the issue is moot in light of our conclusion that defendant's conviction must be reversed.

Reversed and remanded for a new trial. We do not retain jurisdiction.

/s/ Michael J. Talbot

/s/ Christopher M. Murray