STATE OF MICHIGAN

COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN, Plaintiff-Appellee,	UNPUBLISHED April 27, 1999
v	No. 205589 Genesee Circuit Court
ESSEX WAYNE BAILEY, Defendant-Appellant.	LC No. 96-054452 FH

Before: Hood, P.J., and Holbrook, Jr. and Whitbeck, JJ.

PER CURIAM.

A jury convicted defendant of three counts of third-degree criminal sexual conduct, MCL 750.520b(1)(b); MSA 28.788(2)(1)(b), but acquitted him of a fourth count of the same charge. The trial court sentenced defendant as a fourth habitual offender, MCL 769.12; MSA 28.1084, to three concurrent prison terms of fifteen to twenty-five years. Defendant now appeals as of right. We affirm.

I. Basic Facts And Procedural History

Defendant's convictions arose from events which occurred in the late Saturday evening to early Sunday morning hours of July 27 to 28, 1996. The complainant lived in one of two apartments in a duplex in Flint, and, according to her testimony at trial, on the evening in question, she telephoned the Flint police to let them know that her television sets had been stolen. Shortly thereafter, the police called her back and informed her that it would be the following morning before officers would be out to take a report. Sometime after midnight, defendant knocked on complainant's door and indicated that he was locked out of his adjoining apartment, so complainant let him in. Defendant, whom complainant had known only for two weeks, wanted to talk. Defendant told complainant that the reason he was locked out was that he had been drinking and it was customary for the lady of the house to lock him out under these circumstances. It was apparent to complainant that defendant had, in fact, been drinking, although he did not appear to be drunk.

According to complainant, she and defendant went into her bedroom to talk, where defendant sat in a chair and complainant sat on the bed. Defendant rolled a marijuana cigarette, which they shared while discussing televisions, drinking, and dancing. Defendant asked if he could spend the night and

complainant told him "no." Then defendant asked complainant if she would have sex with him. When she declined, defendant jumped on top of her, put his hands around her throat, and threatened to kill her if she screamed. Complainant then assured defendant that she would not scream. According to complainant, defendant then released her throat and removed her shorts, underwear and T-shirt.

Complainant testified that after her clothes were removed, defendant shoved his fingers into her vagina. Although this hurt, complainant did not put up a fight because she did not want to die. Complainant testified that defendant vaginally penetrated her with his penis and thereafter ejaculated. Following that, defendant attempted to engage complainant in anal intercourse; complainant testified that, "He hurt me in my butt." However, complainant's resistance was such that defendant became angry and then completed a second act of vaginal intercourse. Subsequently, defendant dressed, instructed complainant not to tell anybody, informed her that he would buy her a pack of cigarettes, and left.

When a police officer arrived in response to her earlier call concerning her stolen televisions sets, complainant gave him the information regarding that theft. Because she was hurt and angry she considered whether to tell the officer about the rape or not, and ultimately did so. On instructions from the police officer, complainant took her shorts, panties, and bed sheets with her to the hospital where she was examined and the items were turned over to the police.

Flint Police Sergeant Alan Werhli testified that he arrived at complainant's residence around 11:40 on the morning of the incident. According to Sergeant Werhli, complainant informed him that a couple of television sets had been stolen, but before he left, she related that she had also been raped by a neighbor. Sergeant Werhli called for backup, and when Officer Clarence Banks arrived, they went to the adjoining apartment where an adult male let them in. According to Sergeant Werhli, defendant was at the rear of the apartment and, upon seeing the uniformed police officers, he ran up a set of stairs. The police officers caught up with defendant at the top and arrested him.

Flint Police Sergeant Darryl Patterson testified that he interrogated defendant on the afternoon of his arrest with regard to complainant's allegations. According to Sergeant Patterson, defendant denied having sex, consensual or otherwise, with complainant. Flint Police Sergeant Barry Saunders was the detective in charge of the investigation and testified that he interviewed defendant the day after his arrest and that defendant again denied ever having sex with complainant. Sergeant Saunders took complainant's clothes and sheets to the crime lab where semen was recovered from them.

David Stephens, a laboratory scientist with the Michigan State Police, testified that he tested semen stains found on complainant's bed sheets against a known sample of defendant's blood and determined that defendant was a possible source of the recovered semen. Based on this preliminary finding, the samples were transferred to the DNA testing unit in East Lansing. Dr. Stephen Milligan, an expert in DNA analysis, testified that he analyzed the samples. According to Dr. Milligan, the statistical probability that the semen recovered from complainant's sheets came from someone other than defendant was "1 in 3.1 billion."

Prior to jury selection, defense counsel noted for the record that defendant had raised the subject of his desire to leave the state "for the noble purpose of giving a kidney to his brother, who is dying in Texas." The trial court stated:

> Well, I didn't say that he never would be allowed to do that, but there is no showing to me that he needs to go today, and I assume this trial will be concluded by tomorrow or Friday, at the latest. And if that issue raises itself again, and there's a sufficient showing, I'll consider a request.

Thereafter, defendant rejected a plea offer on the record, acknowledged that his counsel could waive the chain of evidence with regard to DNA test results, and sat through voir dire and the subsequent swearing in of the jury.

The next morning however, defendant did not appear in court. Defense counsel indicated that his efforts to locate defendant had not been successful, and the prosecutor stated that defendant had not been located by the police who checked: (1) his house; (2) his neighborhood; (3) the area hospital emergency rooms; (4) 911 records; and, (5) the jail. In response, the trial court canceled defendant's bond, authorized a bench warrant for his arrest, and entertained suggestions as to how to proceed in his absence.

Defense counsel noted that defendant's testimony comprised the entirety of their evidence. Defense counsel argued that, because the right to be present at all critical stages of a trial is fundamental to due process and because there was no showing that defendant had voluntarily absented himself from trial, an adjournment was necessary. The prosecutor pointed out that defendant had been told to be in court at 8:30 a.m., and in the hours since then, having not contacted his attorney, shown up, or been found, it was reasonable to conclude that defendant had voluntarily absented himself from trial. The prosecutor therefore argued that, given the fact that the jury had already been chosen and the witnesses as well as the jurors were present, the trial should go forward. The trial court made the following ruling:

> Let me indicate, for the record, that [defendant] was present in court yesterday when we did select the Jury, and swear the Jury, and impanel the Jury; and he was present in court when I informed everyone as to the starting times for today's trial. Also indicate that he did request an adjournment, which was denied. It is now 11:15, and [defendant] is not to be found. [The prosecutor] has related the efforts that have been made by the prosecution and the police to locate [defendant] this morning, all without success. [Defense counsel] has indicated that [defendant] has not contacted his office for any directions or further instructions, and that, apparently, the most telling thing to me is that the address where [defendant] claims to be living, the individuals there do not know where [defendant] is located.
>
> I am aware of the importance of an individual's constitutional right to be present at trial as set down in [*Illinois v Allen*, 397 US 337; 90 S Ct 1057; 25 L Ed 2d 353, reh den 398 US 915 (1970)]. But I also am aware of a line of cases in Michigan that indicate, that if a defendant voluntarily absents himself from the courtroom after the trial

has begun, that he has waived his right to be present and the trial may proceed to a conclusion. In [*People v Swan*, 394 Mich 451; 231 NW2d 651 (1975),] [the] Supreme Court reversed a Court of Appeals decision that had set aside a conviction where the trial judge directed that the trial be completed in the defendant's absence and the jury found the defendant guilty of armed robbery. Court reinstated the conviction and sentence.

And also, the case of [*People v Gross*, 118 Mich App 161; 324 NW2d 557 (1982)], which as Counsel indicated, did arise out of this Circuit, and that appears to be the one that is very close to our factual situation. Indicates on September 25, 1980, the trial commenced and the jury was impaneled and sworn. I don't [know if] testimony was taken that day. There's no indication that it was. A trial commences. The jury was impaneled and sworn. Defendant, who was on bond, was present on that day. However, when the court resumed the next day, the defendant failed to appear. Court waited approximately two hours. There were indications made on the record from defense counsel that the defendant knew he was to appear the next morning. There's [sic] indications that the police officers had dispatched a car to the address given by the defendant, and following that presentation, the trial court came to the conclusion that the defendant had voluntarily absented himself from the trial, and came to the conclusion that the trial would proceed without him. In that case, the defense counsel did request an adjournment due to the defendant's absence. On appeal, the Court of Appeals upheld the decisions of the lower court, and affirmed the defendant's conviction and sentence.

In this case, based upon the record before me, I have to conclude that the defendant's absence is voluntary. There is no other indication before me that his absence is anything but voluntary, and I so find. As such, the trial will continue and proceed to conclusion with or without [defendant], since he's voluntarily absented himself from the court, he can voluntarily appear at any portion in the trial that he so-chooses. And I do intend to go forward today with the trial, and bring it to a conclusion tomorrow.

The trial court instructed the jury that they were to draw no inference from defendant's absence, and for the balance of the trial, defendant never reappeared. At the conclusion of the prosecution's case, the defense also rested. The jury found defendant not guilty on the charge relating to digital penetration of complainant's vagina but found him guilty on the counts relating to penile penetrations of her vagina and anus.

Subsequent to the trial, defendant was picked up on the outstanding bench warrant, and arraigned before the trial court. The trial court dismissed the bench warrant and remanded defendant to custody pending sentencing. At sentencing, defendant stated:

I made a bad choice by not comin' back to trial, it is somethin' I know I have to live with for the rest of my life, but I feel that I only did what any person would have did

concernin' a loved one in they family. I asked the Court at the time for a continuance. Maybe I didn't give all the details I should have gave at the particular moment – at the time concernin' my brother's state, the condition he was in at the time. Tha's my mistake . . . . [1]

At a subsequent hearing addressed to defendant's motion for a new trial, the trial court ruled:

> Well, at the time that we tried this case we selected a jury the first day. We recessed for the day, everyone was instructed to return the next morning. [Defendant] did not return. If I recall correctly, we spent about three hours trying to locate [defendant]. There was some indication that he may have gone to Texas, and, in fact, [defendant] did make a motion prior to trial that the matter be adjourned so that he could go to Texas.
>
> The fact of the matter is, it's my understanding he did not go to Texas and just made a decision, apparently, I can't speak for [defendant] on what his motivations were and he's not put anything before this Court in terms of an affidavit or sworn testimony to describe what his state of mind was and what his intentions were at the time, but the fact of the matter is he did not appear.
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> We waited. We sent the police out, we tried to contact his family. He did not appear. We proceeded to trial. He did not appear the next day as well, we proceeded to trial and I recall that we made a record at the time he did not appear and I don't have that transcript before me, but I certainly recall that argument was made and there were several cases that were cited for the authority that this Court had the ability to continue its trial with or without [defendant] which we chose to do.
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> Approximately two weeks after the – or, probably – I think less than two weeks after the trial, [defendant] was arrested on a bench warrant and he was sentenced, I believe, on July 30, 1997.
>
> I'm not persuaded that an injustice was done. The factual support for the convictions was there, the testimony was there. To say that had [defendant] appeared at trial and not chosen to absent himself would have resulted in a different verdict is sheer speculation and I'm going to deny the motion for a new trial.

II. Standard Of Review

A. Right To Be Present At Trial

Whether defendant was denied his constitutional or statutory rights to be present at all critical stages of his trial, or whether he validly waived those rights, are mixed questions of law and fact. We review the trial court's factual findings only for clear error. MCR 2.613(C). However, we review the trial court's application of the legal and constitutional standards de novo. *People v Gilmore*, 222 Mich App 442, 459; 564 NW2d 158 (1997). To the extent that the decision not to grant a continuance or

adjournment was within the trial court's discretion (i.e., absent a constitutional or statutory requirement), we review that decision only for an abuse of discretion. See *People v Peña*, 224 Mich App 650, 660-661; 569 NW2d 871 (1997), modified on other grounds 457 Mich 883 (1998); *People v Paquette*, 214 Mich App 336, 344; 543 NW2d 342 (1995).

B. Prosecutorial Misconduct

We review claims of prosecutorial misconduct "case by case, examining the pertinent portion of the record to evaluate the remarks in the context they were made." *People v Fisher*, 220 Mich App 133, 156; 559 NW2d 318 (1996). The inquiry is to whether the defendant received a fair and impartial trial. *Paquette*, *supra* at 342.

C. Limitation On Cross-examination

We review a trial court's decision to admit or exclude evidence for an abuse of discretion. *People v Crawford*, 458 Mich 376, 383; 582 NW2d 785 (1998).

D. Jury Instructions

We review jury instructions in their entirety to determine if there is an error requiring reversal. *People v Perez-Deleon*, 224 Mich App 43, 53; 568 NW2d 324 (1997). The instructions must not exclude material issues if there is evidence to support them. *Id.*

III. Right To Be Present At Trial

Defendant claims that he was denied his statutory and constitutional rights to be present at every critical stage of his trial because the trial court refused a defense request for an adjournment or a continuance after defendant, who was free on bond, failed to appear in court on the second day of trial and thereafter. The right of an accused individual in this state to be present during his or her trial is rooted in statute[2], in the confrontation clauses of the federal[3] and state[4] constitutions, and in due process considerations independent from the right of confrontation. US Const, Am VI; Const 1963, art 1, § 20; MCL 768.3; MSA 28.1026. See, also *Allen*, *supra*; *People v Mallory*, 421 Mich 229, 247; 365 NW2d 673 (1984). A defendant's voluntary absence from the courtroom after a trial has begun waives his constitutional rights to be present and the relevant statute does not preclude the trial from proceeding. *Swan*, *supra* at 451-452.

Although "[a] valid waiver of a defendant's presence at trial consists of a specific knowledge of the constitutional right and an intentional decision to abandon the protection of the constitutional right," *People v Woods*, 172 Mich App 476, 479; 432 NW2d 736 (1988), this simply means that a valid waiver of a defendant's presence at trial exists when (1) the defendant is aware of his right to be present, and (2) he voluntarily does the act which is inconsistent with preserving that right. It does *not* mean that a defendant has the right to be warned that he has no right to interrupt his trial by voluntarily absenting himself, nor does it mean that a defendant is entitled to one free continuance. *Taylor v United States*, 414 US 17, 19-20; 94 S Ct 194; 38 L Ed 2d 174 (1973); *Mallory*, *supra* at 248 (waiver may be by affirmative consent, failure to appear, or by disruptive conduct); *People v Staffney*,

187 Mich App 660, 663-665; 468 NW2d 238 (1990). A defendant's presence at the beginning of trial, along with his being informed of the time at which he was expected to return, is sufficient, in the face of his voluntary absence, to establish a valid waiver of his right to be present.

Therefore, we hold that the trial court, in proceeding with trial under the circumstances of this case, violated neither defendant's constitutional nor his statutory rights. Accordingly, because there is no indication that defendant was unfairly prejudiced by the trial court's refusal to grant a continuance, the trial court did not abuse its discretion. See *People v Lawton*, 196 Mich App 341, 348; 492 NW2d 810 (1992).

IV. Prosecutorial Misconduct

Defendant argues that he was denied a fair trial by remarks made during the prosecutor's closing arguments, which he claims were inappropriate comments on his failure to testify. Our review of the challenged remarks reveals that what appears, out of context, to be a most egregious example of comment on defendant's failure to testify (i.e., "If there's consent, why didn't he say it?"), was, in context, a comment on the fact that defendant denied having sex with the complainant in statements he gave to the police.[5] The remaining remarks challenged by defendant on appeal were proper in that, in light of the theory advanced by defense counsel in opening statement, it was legally relevant and permissible for the prosecutor to point out that the prosecution's theory of the case was supported by evidence and that the defense's theory was not. *People v Fields*, 450 Mich 94, 115-116; 538 NW2d 356 (1995). To the extent that the lack of evidentiary support for the defense's theory was inextricably intertwined with defendant's failure to testify, it is enough that the jury was repeatedly instructed that it was to draw no inference from the latter. *People v Stanaway*, 446 Mich 643, 687; 521 NW2d 557 (1994); *People v Green*, 228 Mich App 684, 693; 580 NW2d 444 (1998). We hold that the prosecutor's remarks, when reviewed in context, were not improper.

V. Limitation On Cross-Examination

Defendant agues that the trial court impermissibly limited the scope of cross-examination with regard to the complainant, and thereby denied him his constitutional rights under the state and federal confrontation clauses. "A limitation on cross-examination that prevents a defendant from placing before the jury facts from which bias, prejudice, or lack of credibility of a prosecution witness might be inferred constitutes denial of the constitutional right of confrontation." *People v Kelly*, 231 Mich App 627, 644; 588 NW2d 480 (1998). However, a defendant's right to cross-examine a witness is subject to reasonable limitation in that defendant is only guaranteed the "right for a *reasonable* opportunity to test the truthfulness of a witness' testimony." *People v Ho*, 231 Mich App 178, 189-190; 585 NW2d 357 (1998) (emphasis in original). Cross-examination may be denied, without violating a defendant's constitutional rights of confrontation, on a collateral matter which bears only on general credibility. *People v Hackett*, 421 Mich 338, 348; 365 NW2d 120 (1984).

Here, the trial court found irrelevant any inquiry into complainant's past history of institutionalization, which occurred more than twelve years prior and, as far as the record revealed, was the result of complainant's self-destructive behavior. The trial court explicitly held that any inquiry

regarding the complainant's ability to remember was a fair subject of cross-examination. In the absence of an offer of proof demonstrating how the excluded evidence was anything other than irrelevant or immaterial, we "decline to speculate to that end." *People v Emanuel*, 98 Mich App 163, 187; 295 NW2d 875 (1980). See, also, *Ho, supra* at 190. Accordingly, we hold the trial court's decision not to allow defense counsel to inquire into the collateral issue of complainant's institutionalization, which had only an attenuated and undemonstrated nexus to complainant's general credibility, did not deny defendant his constitutional rights to confront witnesses.

Moreover, "violations of the right to adequate cross-examination are subject to harmless-error analysis." *Kelly, supra* at 644. See also *Chapman v California*, 386 US 18, 24; 87 S Ct 824, 17 L Ed 2d 705 (1967); *People v Bushard*, 444 Mich 384, 391-392, n 7; 508 NW2d 745 (1993) (Boyle, J.). Whether such an error is harmless can depend on many factors, but an important one in the instant case is "the extent of cross-examination otherwise permitted." *Kelly, supra* at 644-645. See, also, *People v Lalone*, 432 Mich 103, 132; 437 NW2d 611 (1989), citing *Delaware v Van Arsdall*, 475 US 673, 684; 106 S Ct 1431; 89 L Ed 2d 674 (1986). Here, defense counsel was able to directly inquire into complainant's memory difficulties and elicited substantial concessions in that regard. Complainant's below normal intelligence was not even contested by the prosecution. To the extent that complainant's credibility was called into question by her cognitive capacity, the jury was well informed. Clearly, if there was any error in denying defendant full cross-examination of the complainant, such error was harmless beyond a reasonable doubt.

VI. Jury Instructions

Defendant contends that the trial court erred when, over objection by defense counsel, it read to the jury the standard instructions regarding the inapplicability of voluntary intoxication as a defense to a general intent crime and the permissible inference that may be drawn from evidence of a defendant's flight. Defendant does not challenge the accuracy of the instructions, merely the fact that they were given, under the circumstances.

There was testimony that defendant had been drinking and had smoked marijuana just prior to the rape. There was also testimony from two police officers that when defendant saw them coming to arrest him, he ran up a flight of stairs and was apprehended at the top. While defendant objects to the instructions because he did not raise intoxication as a defense and because one of the officers did not characterize defendant's rapid ascension of the stairs as flight, the threshold for giving a jury instruction is whether there is evidence to support it. *People v Mills*, 450 Mich 61, 81; 537 NW2d 909 (1995), modified 450 Mich 1212 (1995). Because the jury instructions "'fairly presented the issues to be tried and sufficiently protected the defendant's rights'" there was no error requiring reversal. *Perez-Deleon, supra* at 53 (citation omitted).

Affirmed.

/s/ Harold Hood
/s/ Donald E. Holbrook, Jr.
/s/ William C. Whitbeck

[1] There is no competent evidence in the record that defendant had a brother, or that such brother was dying in Texas, or that defendant could save him by donating a kidney, or that such a "noble gesture" would have been precluded by defendant's presence at his trial, or that defendant took advantage of his absence from trial to take steps to donate his kidney. It was the trial court's understanding that defendant never went to Texas.

[2] The relevant statute reads: "No person indicted for a felony shall be tried unless personally present during the trial; persons indicted or complained against for misdemeanors may, at their own request, through an attorney, duly authorized for that purpose, by leave of the court, be put on trial in their absence." MCL 768.3; MSA 28.1026. The plain language of this statute would, at first glance, appear to preclude trying a defendant in his absence, even with his consent, except in misdemeanor cases. However, as early as 1895, this statutory language has been construed to permit a trial in a felony case, once commenced, to continue when a defendant, who is not in custody, waives his right to be present by voluntarily absenting himself. *Frey v Calhoun Circuit Judge*, 107 Mich 130, 133-134; 64 NW 1047 (1895). Since then, the courts of this state have consistently held that when a defendant in a felony case waives his statutory right to be present once a trial has begun, the statute in question does not prohibit a court from continuing a trial. See, e.g., *People v Mallory*, 421 Mich 229, 246, n 10; 365 NW2d 673 (1984); *People v Gant*, 363 Mich 407, 410-412; 109 NW2d 873 (1961); *People v Auerbach*, 176 Mich 23, 46; 141 NW 869 (1913); *People v Woods*, 172 Mich App 476; 478-479; 432 NW2d 736 (1988); *People v Gross*, 118 Mich App 161, 164; 324 NW2d 557 (1982). In fact, *Swan, supra* at 451-452, expressly overruled a Court of Appeals opinion applying the plain language of the statute. See *id.*; *People v Swan*, 59 Mich App 409, 413-414; 229 NW2d 476, rev'd 394 Mich 451 (1975). Hence, despite its language, the statute did not limit the authority of the trial court to proceed under the circumstances of this case. Consequently, the sole issue before this Court is whether defendant's actions constituted a valid waiver of his individual rights to be present during his trial.

[3] "In all criminal prosecutions, the accused shall enjoy the right . . . to be confronted with the witnesses against him . . ." US Const, Am VI. The rights guaranteed by this clause have been incorporated through the Due Process Clause of the Fourteenth Amendment as obligatory upon the states. US Const, Am XIV; *Pointer v Texas*, 380 US 400, 403; 85 S Ct 1065; 13 L Ed 2d 923 (1965). This confrontation clause includes the right to be present in the courtroom at every stage during a trial. *Lewis v United States*, 146 US 370, 374-375; 13 S Ct 136; 36 L Ed 1011 (1892). See also *Allen, supra* at 338.

[4] "In every criminal prosecution, the accused shall have the right . . . to be confronted with the witnesses against him or her. . . ." Const 1963, art 1, § 20.

[5] The context of the comment was as follows. Having already reminded the jury during his initial closing argument that DNA testing had established that the recovered semen was defendant's, in his rebuttal argument the prosecutor first related an incident about his son who would not admit that he ate some cookies until confronted with the crumbs on his face and the preposterousness of his story that his sister had put them there. Then the prosecutor noted that defendant had three times to the police denied

having sex with complainant. Then, the prosecutor said: "The defendant, when he's confronted, tries to run while he's walking away, and he lies. If there's consent, why didn't he say it?" The import of these comments is that the jury should draw an inference of defendant's guilt from the fact that he ran away from the police and lied about having sex with complainant, not that they should consider the fact that defendant failed to testify.