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**STATE OF MINNESOTA
IN COURT OF APPEALS
A11-2123**

In the Matter of the Welfare of: M.D.S., Child.

**Filed September 4, 2012
Affirmed
Wright, Judge**

Ramsey County District Court
File No. 62-JV-11-1240

Lori Swanson, Attorney General, St. Paul, Minnesota; and

John J. Choi, Ramsey County Attorney, Peter R. Marker, Assistant Ramsey County Attorney, St. Paul, Minnesota (for respondent)

David W. Merchant, Chief Appellate Public Defender, Susan J. Andrews, Assistant Public Defender, St. Paul, Minnesota (for appellant)

Considered and decided by Wright, Presiding Judge; Schellhas, Judge; and Larkin, Judge.

UNPUBLISHED OPINION

WRIGHT, Judge

Appellant, a juvenile who failed to appear for the second day of a three-day trial and declined the opportunity to reopen the testimony given in his absence, now challenges the district court's decision to proceed with the trial in his absence. We affirm.

FACTS

On March 16, 2011, juvenile-appellant M.D.S. attempted to leave a pawn shop with a cellular telephone without paying for it. When confronted by the assistant manager, M.D.S. threw a television at the assistant manager and fled. A short time later, St. Paul Police Officer Matthew Shohara spotted a person who matched M.D.S.'s description. Officer Shohara exited his police car and ordered M.D.S. to stop. M.D.S. ran. Officer Shohara followed him into the laundry room of a nearby apartment building where Officer Shohara drew his Taser and commanded M.D.S. multiple times to get on the ground. When M.D.S. approached Officer Shohara with clenched fists instead, Officer Shohara activated his Taser. M.D.S. fell to the ground but continued to resist arrest. With the assistance of five additional officers, Officer Shohara handcuffed M.D.S.

M.D.S. was charged with fourth-degree criminal damage to property, a violation of Minn. Stat. § 609.595, subd. 3 (2010); fleeing a peace officer on foot, a violation of Minn. Stat. § 609.487, subd. 6 (2010); obstruction of legal process, a violation of Minn. Stat. § 609.50, subds. 1(2), 2(2) (2010); and attempted theft of property, a violation of Minn. Stat. § 609.52, subd. 2(1), 3(5) (2010).¹ A trial was held in juvenile court on three nonconsecutive days in September and October 2011. On the second day of trial, M.D.S. was not present when court convened at 1:30 p.m. Defense counsel advised the district court that she had received a text message from an unknown sender at 1:16 p.m. The text message said: "I am not going to be able to get [M.D.S.] to court on time. We are in Orr,

¹ Two additional fifth-degree assault charges subsequently were dismissed.

Minnesota, on a job. . . . I am still about three hours away.” Defense counsel attempted to call and text the sender of the message, but she received no response.

Arguing that M.D.S.’s absence was involuntary and impaired the defense of her client, defense counsel sought a continuance. The state opposed the motion. Before ruling on the motion, the district court was notified that M.D.S.’s father left a telephone message at the courthouse at 1:20 p.m. His father explained that he was unable to complete a job in time to transport M.D.S. to the courthouse. After an unsuccessful attempt to contact M.D.S.’s father, the district court concluded that M.D.S. waived his right to be present at trial because his absence was voluntary and without justification. In M.D.S.’s absence, the state presented the testimony of Officer Shohara and three other police officers who were involved in M.D.S.’s arrest.

M.D.S. arrived late on the third day of trial. Before M.D.S. arrived, the district court denied defense counsel’s motion for a mistrial. When he arrived a short time later, M.D.S. directed his counsel to withdraw the motion. His counsel complied. Although one of the arresting officers who had testified on the second day of trial appeared on the third day of trial for cross-examination in M.D.S.’s presence, M.D.S. declined the opportunity. M.D.S. later testified that he blacked out during the altercation with the police and has no memory of what occurred during his arrest. He did not dispute the charges of fourth-degree criminal damage to property or fleeing a peace officer on foot.

Finding that all charges were proved beyond a reasonable doubt, the district court adjudicated M.D.S. delinquent as to the charges of fourth-degree criminal damage to

property and obstructing legal process, and imposed a disposition of 90 days' supervised probation. This appeal followed.

D E C I S I O N

The United States Constitution protects a juvenile's right to be present at every stage of a delinquency trial. U.S. Const. amends. VI, XIV; *State v. Cassidy*, 567 N.W.2d 707, 709 (Minn. 1997) (recognizing that “[t]he right to be present during trial is based on the [C]onfrontation [C]ause of the Sixth Amendment and is applicable to the states through the Fourteenth Amendment”). This right also is codified in Minnesota's court rules. Minn. R. Juv. Del. P. 2.03, subd. 1 (“The child shall have the right to be present at all hearings.”); *see also* Minn. R. Crim. P. 26.03, subd. 1(1) (“The defendant must be present at . . . every stage of the trial . . .”). A juvenile may waive this right expressly or implicitly, and a district court may infer a waiver from a juvenile's conduct. *State v. Finnegan*, 784 N.W.2d 243, 247 (Minn. 2010). A juvenile's “absence without compelling justification . . . constitutes a waiver of the right to be present.” *Cassidy*, 567 N.W.2d at 709 (quotation omitted). The juvenile bears the heavy burden of demonstrating that the absence from trial was involuntary. *Id.* at 710. We review a district court's decision to proceed with trial in the juvenile's absence for an abuse of discretion. *Id.* at 709. The district court's factual findings will not be disturbed on appeal unless they are clearly erroneous. *Id.* at 709-10.

M.D.S. asserts that his absence on the second day of trial was involuntary and the district court erred by proceeding with the trial in his absence. We need not address the asserted error, however, because it is founded on an objection that was withdrawn in the

district court. *See State v. Meadows*, 303 Minn. 76, 78, 226 N.W.2d 303, 305 (Minn. 1975) (concluding that appellant waived right to raise issue on appeal in part because appellant withdrew objection at trial). Although counsel for M.D.S. initially asserted this argument at trial and moved for a mistrial on this ground, she withdrew this motion at M.D.S.'s direction when he next appeared in the district court on the third day of trial. Defense counsel specifically advised the district court that M.D.S. "want[s] to get the case over and does not want [defense counsel] to go forward with the motion for mistrial." Because he withdrew his objection to the district court's decision to proceed with the second day of his trial in his absence, M.D.S. has waived his Sixth Amendment challenge as a ground for appeal.

Even if the issue were not waived and a basis existed to conclude that the district court abused its discretion, M.D.S. would not be entitled to a new trial if the district court's error was harmless beyond a reasonable doubt. *See Finnegan*, 784 N.W.2d at 251 & n.6 (citing *State v. Powers*, 654 N.W.2d 667, 681 (Minn. 2003)). A juvenile's absence during a critical stage of trial is harmless beyond a reasonable doubt when evidence of the juvenile's guilt is overwhelming and the juvenile's absence did not prejudice the case. *See State v. Bouwman*, 354 N.W.2d 1, 8 (Minn. 1984) (applying harmless-error standard to criminal defendant's absence from trial). M.D.S. was present for two days of a three-day trial. One officer testified about M.D.S.'s arrest on the first day of trial and was cross-examined in M.D.S.'s presence. During M.D.S.'s absence on the second day of trial, four additional officers testified that M.D.S. resisted arrest. Because M.D.S. testified that he blacked out and has no memory of what occurred during his arrest, it is

unlikely that M.D.S.'s presence during the testimony of these arresting officers would have significantly assisted defense counsel in vindicating his right to confront and cross-examine the witnesses. When one of these arresting officers appeared on the third day of trial for re-cross-examination in M.D.S.'s presence, pursuant to M.D.S.'s subpoena, M.D.S.'s counsel declined to cross-examine the officer after M.D.S. expressed his desire to "get the case over [with]." Moreover, Officer Shohara, the officer who deployed his Taser to overcome M.D.S.'s resistance and who provided the lengthiest testimony in M.D.S.'s absence, testified again as a rebuttal witness on the third day of trial and was cross-examined in M.D.S.'s presence.

The record contains overwhelming evidence of M.D.S.'s guilt. *See Bouwman*, 354 N.W.2d at 8-9 (holding that violation of defendant's constitutional right to be present during portion of trial was harmless in part because record contained overwhelming evidence supporting defendant's guilt). In support of M.D.S.'s delinquency adjudication of obstructing legal process, five police officers, including two officers who testified in M.D.S.'s presence, testified that M.D.S. actively resisted arrest. On the first day of trial when M.D.S. was present, the state also presented more than sufficient evidence in support of M.D.S.'s delinquency adjudication of fourth-degree criminal damage to property. M.D.S. did not even dispute the last two of these offenses at trial.

M.D.S. is not entitled to a new trial.

Affirmed.