STATE OF WISCONSIN

IN SUPREME COURT

No. 2016AP238-CR

STATE OF WISCONSIN,

Plaintiff-Respondent,

v.

MICHAEL L. WASHINGTON,

Defendant-Appellant-Petitioner.

REVIEW OF A DECISION OF THE COURT OF APPEALS, DISTRICT II, AFFIRMING A JUDGMENT OF CONVICTION AND POSTCONVICTION ORDER ENTERED IN THE CIRCUIT COURT FOR RACINE COUNTY, THE HONORABLE WAYNE J. MARIK, ALLAN B. TORHORST, AND DAVID W. PAULSON, PRESIDING

# RESPONSE BRIEF OF PLAINTIFF-RESPONDENT

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## ISSUE PRESENTED

Did Michael Washington waive his statutory right to be present at trial when Washington's pattern of manipulative and disruptive conduct caused his removal from the courtroom before the jury was selected and Washington expressly declined numerous invitations to return?

The postconviction court denied Washington's request for a new trial, concluding that Washington, by his conduct, affirmatively waived his statutory right to be present at trial.

The court of appeals affirmed in a published decision, *State v. Washington*, 2017 WI App 6, 373 Wis. 2d 214, 890 N.W.2d 592, holding that Washington knowingly and voluntarily waived his statutory right to be present during the course of trial.

## STATEMENT ON ORAL ARGUMENT AND PUBLICATION

Oral argument and publication are customary for cases before this Court.

## INTRODUCTION

A defendant may waive his statutory right to be present at any portion of his criminal proceedings. That waiver may be express or inferred by conduct. Here, Washington engaged in disruptive behavior causing his removal from the courtroom before his trial began. He refused numerous invitations to return and was tried in absentia. Washington's conduct, under the circumstances, was a valid waiver of his statutory right to be present at trial.

Wisconsin Stat. § 971.04(3) does not compel a different conclusion. That statute provides that conduct constituting a mere forfeiture by absence can operate as a valid waiver if the defendant is present when the trial starts. Because Washington waived his right to be present—as opposed to his forfeiting it by failing to appear—the court's holding a trial in absentia did not violate the statute. Finally, even if the court violated the statute, any error was harmless under the circumstances.

## STATEMENT OF THE CASE

By Information, the State charged Washington with burglary of a dwelling and obstructing an officer, both as a repeater. (R.1; 2.) The charges were based on an incident on April 1, 2011, in which Washington entered R.V.'s apartment in Racine, encountered R.V., and was immediately arrested outside R.V.'s apartment with bags containing R.V.'s belongings. (R.1.)

### I. Before trial, Washington went through three appointed attorneys and one trial date.

From early in the proceedings, Washington demonstrated unwillingness to work with his appointed attorneys. Washington's first two attorneys sought and obtained permission to withdraw, citing breakdowns in the attorney-client relationships. (R. 53:2; 55:5.) Both counsel noted that Washington was writing pro se letters to the court. (R. 53:4; 55:3.) Washington's second counsel also noted that Washington proposed unviable defenses and made unreasonable discovery demands. (R. 55:5.)

When the court[1] allowed Washington's second attorney to withdraw, it remarked that Washington was engaging in a pattern of ignoring his attorneys' advice and demanding that they withdraw if they disagreed with Washington. (R. 55:7–8.) It reminded Washington that his right to an attorney did not mean that the attorney had to do everything that Washington demanded. (R. 55:16–17.) It warned Washington that it would not permit any subsequent attorneys to withdraw if the pattern continued. (R. 55:18.)

Washington's third attorney, Wendy Paul, likewise sought to withdraw months after her appointment, citing a deterioration in their relationship. (R. 60:2.) The court initially granted the motion, but then reconsidered and denied it, because Washington had made a speedy trial demand, and a new attorney would not be prepared for the trial scheduled in November. (R. 60:6–7.)

The day before that scheduled trial, Attorney Paul again asked to withdraw, noting that Washington had filed two motions without her knowledge and that they had a fundamental difference of opinion about viable defenses. (R. 61:3.) The court reminded Washington that his counsel was not his puppet, and that it believed that Washington was engaging in "act[s] of manipulation." (R. 61:6–9.) It also denied the motion to withdraw because Washington refused to withdraw his speedy trial demand. (R. 61:9.)

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[1] The Honorable Wayne J. Marik presided over the pretrial, trial, and sentencing proceedings. The Honorable Allan B. Torhorst entered the amended judgment of conviction, and the Honorable David W. Paulson entered the order denying the postconviction motion in this case.

The morning of the scheduled trial, November 16, 2011, Attorney Paul notified the court that the day before, Washington informed her "of some new information for the very first time" that could assist Washington's defense. But, she said, Washington's speedy trial demand prevented her from having the time to investigate that new information, and Washington refused her recommendation that he withdraw the demand. (R. 63:3.) After further discussion, Washington withdrew the speedy trial demand. (R. 63:6–7.) The court rescheduled the trial. (R. 63:7–8.)

By the next hearing on January 31, 2012, Attorney Paul asked the court a third time to withdraw, stating that the attorney-client relationship was irreparably broken. (R. 64:2.) When asked by the court, Washington acknowledged that he did not know if "there [was] an attorney in the world who [he] would get along with" and who would not want to withdraw. (R. 64:2–3.) The court discussed Washington's continued failure to work with his attorneys and the trial delays that resulted. (R. 64:4.) When the court stated that Washington did not "seem[] to . . . get along with any attorneys," Washington responded, "[M]aybe they don't get along with me, have you ever considered that?" (R. 64:4.)

The court reiterated that Washington was engaging in a manipulative pattern to prevent the case from being resolved. (R. 64:5–6.) The court found that Washington would likely engage in the same pattern with any subsequent attorneys, so it denied the motion. (R. 64:6–7.)

## II. Washington had an outburst on the morning of the next scheduled trial, was removed from the courtroom, and refused to return.

On the morning of trial on February 14, 2012, before jury selection began, Washington was present in the

courtroom. Attorney Paul informed the court that the week before, she attempted to speak with Washington about her investigation of the information he had provided her in November. (R. 65:2.) But she said that Washington changed the subject, and when she tried to redirect him to the trial and theory of defense, he "stated that [Paul] was not his attorney. And refused to speak to [Paul] about that." (*Id.*) Paul said that since then, she wrote Washington inviting him to call her collect when he wanted to talk, but she had not heard from him. (R. 65:3.)

When asked by the court, Washington denied that Paul was providing adequate representation and stated that he wanted her to withdraw. (R. 65:3.) The court reminded Washington of his pattern of manipulation:

> THE COURT: Well, sir, we've been down this road so many times over and over and over.
>
> DEFENDANT: And we can keep going over and over it again.
>
> THE COURT: No, we're—
>
> DEFENDANT: She's not representing me, man.
>
> THE COURT: Sir, the matter is set for trial.
>
> DEFENDANT: I don't know what it's set for, she ain't representing me.
>
> THE COURT: All right, Mr. Washington?
>
> DEFENDANT: I'm telling you[,] she's not representing me, man.
>
> THE COURT: Sir, will you let me speak. The matter is scheduled for a jury trial this afternoon. And it is going to be going forward as a jury trial. We have addressed this issue of who is your—
>
> DEFENDANT: I said she's not representing me and we ain't going no trial now, I mean that.

> THE COURT: Sir, we will go forward with the trial[,] and if necessary you may have to be removed from the courtroom.
>
> DEFENDANT: I'm gone. She's not representing me.

(R. 65:3–4.)

The court then made a record of Washington's outburst and removal from the courtroom, expressing concerns that the trial would never proceed in light of Washington's manipulation:

> Mr. Washington semi was removed and semi left on his own after the last outburst. So we are out of his presence right now. And the real issue that has come up here is one of manipulation. I think Mr. Washington has been trying to manipulate this case in my opinion for a very long period of time. We had selected a jury and prior to that jury being sworn not too long ago some new information was disclosed. The adjournment was granted so that that could be investigated. Since then I believe he has on two or three additional occasions attempted to discharge counsel and I've denied that motion saying we would be going forward. So we're going to have to decide how to proceed here and as I say the concern that I have is that there's no end in sight if we allow this to continue and allow him to continue with this type of manipulation.

(R. 65:4–5.)

The circuit court then discussed Washington's constitutional right to be present. It noted that it lacked audiovisual equipment to allow Washington to participate in the trial remotely. (R. 65:5.) It stated that if necessary, staff would escort Washington to the courtroom, the court would warn him on the record if he continued to not cooperate, and staff would remove him if the warning failed with the trial proceeding without him. (R. 65:6.) The court stated that

Washington would have time to cool off before trial was to begin that afternoon. If at that point Washington refused to cooperate, the court would permit the trial to go on but would allow counsel to regularly consult with Washington and see if he wanted to return. (R. 65:7.)

After Washington's outburst, he refused many opportunities to return.

When the afternoon session began, the court asked a deputy to "see what [Washington's] demeanor is and if he is willing to return to the courtroom." (R. 65:9.) The deputy reported that "the officer upstairs asked Mr. Washington if he would like to come down and participate in his jury trial. Mr. Washington said no. No further comment." (R. 65:10.)

The court then found that Washington, through his manipulation, intended to delay the proceedings and that, by his conduct, he waived his constitutional right to be present. (R. 65:11–15.) The court observed that escorting Washington involuntarily to trial would not be appropriate for safety reasons:

> I believe at this point . . . recognizing the way in which he . . . behave[d] and act[ed] when he was brought into court earlier and his expressed unwillingness to come down now or participate that attempting to involuntarily bring Mr. Washington back into court would unduly jeopardize the safety of officers and perhaps even Mr. Washington since his aggressiveness and his attitude suggest that he may be physically resistant to being brought back in and that it could result in an altercation.

(R. 65:15.)

The court made clear that Washington could return to the courtroom at any point if he was "willing to cooperate and behave," that Attorney Paul would continue to represent

Washington, that Paul would get reasonable opportunities to confer with Washington throughout the trial, and that Washington would be "periodically advised" of his right to return to the courtroom. (R. 65:16.)

Shortly after that ruling, the court allowed Attorney Paul to confer with Washington. (R. 65:20.) When she returned, Paul said that she explained the court's ruling to Washington, and that Washington refused to participate in the trial. (R. 65:21.) The court and counsel proceeded with jury selection, which took the rest of that day. (R. 65:22.)

Notably, during jury selection, the court instructed the pool that Washington was absent, that he had a right to be present, and that Washington waived that right. (R. 65:22–23.) It cautioned the pool that Washington's absence "must not influence" it or its "eventual verdict in any manner whatsoever":

> Mr. Washington will be represented by an attorney during this trial just as if he were present. Mr. Washington may invoke his right to be present at any time if he wishes to do so, therefore it is possible that he may be present at some later point during this trial despite his absence at this time.

(*Id.*) The court reiterated that the jurors must not draw any inferences from Washington's absence or allow it to affect their verdict. (*Id.*)

When asked, two members of the jury pool indicated that they had problems with Washington's absence. (R. 65:63–65.) Neither of those members served on the jury. (R. 65:73.) When asked, no one else in the pool indicated that he or she had a problem with Washington's absence. (R. 65:66.)

### III. Washington refused to return the next morning for trial, after which the jury was sworn and the court held trial in his absence.

The next morning, before the final jury panel returned to the courtroom and was sworn in, both a corrections officer and Attorney Paul made contact with Washington. Paul confirmed that Washington refused to come to the courtroom. (R. 66:2.) The court found that Washington was "still by his conduct refusing to come down, waiving his right to be present, so we will continue without him." (*Id.*) The court indicated that it would give Paul opportunities to talk to Washington, and asked Paul to inform Washington that he should alert jail staff if, at any time, he changed his mind about coming to the trial. (R. 66:2–3.)

After that, while discussing how the parties would handle the in-court identification of Washington without his presence, Attorney Paul acknowledged that under the circumstances, forcing Washington to appear at trial was not ideal. (R. 66:10.) The court agreed that "it may well be far more prejudicial to [Washington] to force him to be brought in by officers when he's physically apparently resistive to that as he demonstrated yesterday that he was likely to be in." (*Id.*)

Shortly after, the jury panel returned to the courtroom and was sworn. (R. 66:13–14.) Trial began with testimony from R.V. and one of the responding police officers. (R. 66:32–71.) During a recess, Attorney Paul again made contact with Washington and reported that he did "not want to participate in trial." (R. 66:73.) She also told the court that she explained Washington's right to testify, that he said he understood his right, and that he did not want to testify. (*Id.*) The court determined that Washington continued to waive his right to be present. (R. 66:73–74.)

During trial, Attorney Paul advanced a defense that Washington was too intoxicated to form the requisite intent to commit the crimes. Paul emphasized that Washington's blood tested at .241 BAC and that Washington was behaving bizarrely when he encountered R.V. and the police (R. 66:52–53, 55–56, 84, 106–09). She also convinced the court to instruct the jury on voluntary intoxication. (R. 66:88-95.) Attorney Paul rested at the close of the State's case, which ended the evidence portion of the trial at 11:15 a.m., just a few hours after trial began. (R. 66:84, 97.) After a lunch recess, counsel presented closing arguments and the court instructed the jury. (R. 66:98–128.) Specifically, the court instructed the jury that Washington had a right to be present, that he waived that right, and that that fact could not influence the verdict. (R. 66:124–25.)

When the court learned that the jury had reached a verdict, the court directed jail personnel to ask Washington if he wanted to be present to receive the jury's verdict. (R. 66:129.) According to the court, Washington "indicated very emphatically to personnel[,] which was heard over the telephone by someone in this courtroom[,] that he . . . does not wish to come down." (R. 66:129.) The jury returned to the courtroom and found Washington guilty of both counts. (R. 66:130.)

### IV. Sentencing, postconviction, and appeal.

Washington was present for sentencing (R. 67:2), where he received sentences totaling five years' initial confinement and five years' extended supervision. (R. 35.)

By postconviction motion, Washington sought a new trial, alleging that the circuit court violated his statutory right to be present under Wis. Stat. § 971.04. (R. 47.) The postconviction court denied the motion after concluding that

Washington waived his statutory right to be present when he "chose to be excluded." (R. 48; 69:19.)

Washington appealed, and the court of appeals, District II, affirmed. It held that under the circumstances, Washington "knowingly and voluntarily abandoned his right under Wis. Stat. § 971.04 to be present during the trial proceedings." *Washington*, 373 Wis. 2d 214, ¶ 15. The court distinguished Washington's knowing waiver of his statutory right to be present from cases holding that a defendant cannot forfeit, by his mere absence, the right to be present at trial. *Id.* ¶ 18 & n.5.

This Court granted Washington's petition for review.

## STANDARD OF REVIEW

This case involves the statutory interpretation of Wis. Stat. § 971.04. This Court interprets a statute and its application to the facts de novo, while benefitting from the lower courts' analyses. *State v. Soto*, 2012 WI 93, ¶ 14, 343 Wis. 2d 43, 817 N.W.2d 848. Similarly, whether a defendant's conduct in a criminal proceeding establishes a waiver of a statutory right is a question of law that this Court reviews de novo.[2] *Id.*

[2] Washington cites *State v. Herfel*, 49 Wis. 2d 513, 521, 182 N.W.2d 232 (1971), for its proposition that this court reviews a postconviction court's factual findings de novo when that court is different from the trial court. That standard is not relevant here because the postconviction court made only legal conclusions, not any factual findings beyond what the trial court made.

## ARGUMENT

### Because Washington knowingly and voluntarily waived his statutory right to be present at trial, the trial court was permitted to try him in absentia.

#### A. A defendant may waive his constitutional right to presence at any time.

A defendant's right to be present at trial is protected both in the federal and Wisconsin constitutions[3] and by statute.[4] Washington does not dispute that he waived his constitutional right to be present at his trial. Rather, he argues that his absence from the courtroom before trial commenced violated his statutory right to be present at trial.

Although the focus of this case is the statutory right to be present, a brief discussion of the corresponding constitutional right informs the statutory analysis.

A defendant has a constitutional right to be present in the courtroom at all stages of his trial. *State v. Divanovic*, 200 Wis. 2d 210, 219–20, 546 N.W.2d 501 (Ct. App. 1996). A defendant may waive his right to be present. "[A] waiver is the intentional relinquishment or abandonment of a known right whereas "forfeiture is the failure to make the timely assertion of a right." *State v. Ndina*, 2009 WI 21, ¶¶ 28–31, 315 Wis. 2d 653, 761 N.W.2d 612.[5]

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[3] U.S. Const. amend. XIV; Wis. Const. art. 1, § 8; *State v. Divanovic*, 200 Wis. 2d 210, 219-20, 546 N.W.2d 501 (1996).

[4] Wis. Stat. § 971.04.

[5] This Court recently decided *State v. Suriano*, 2017 WI 42, 374 Wis. 2d 683, 893 N.W.2d 543. There, this Court discussed the concepts of waiver and forfeiture in the context of a defendant's

*(continued on next page)*

A defendant may waive that right by misconduct or consent *Divanovic*, 200 Wis. 2d at 220. "Although the law requires waiver of the right to be present, when a defendant is voluntarily absent from the trial proceedings, a defendant's failure to assert the right to be present can constitute an adequate waiver and an express waiver on the record is not essential." *Id.* (citations omitted).

When a defendant's misconduct causes his removal from the courtroom, that misconduct functions as a valid waiver and the court may hold a trial in absentia. *Illinois v. Allen*, 397 U.S. 337, 343 (1970). In *Allen*, for example, the court permissibly tried Allen in absentia after his outbursts during voir dire and the government's case-in-chief caused his removal. *Id.* at 340–41. The Court observed that there were "at least three constitutionally permissible ways for a trial judge to handle an obstreperous defendant like Allen: (1) bind and gag him, thereby keeping him present; (2) cite him for contempt; (3) take him out of the courtroom until he promises to conduct himself properly." *Id.* at 343–44. Similarly, there is no constitutional bar to a trial in absentia when a defendant in custody refuses to appear and the record demonstrates that he understood his right to be present. *Divanovic*, 200 Wis. 2d at 221.

In contrast, courts have held that trial courts violated a defendant's constitutional right to presence where a court held a trial in absentia after a defendant merely *forfeited* his right to be present, such as where he was purposely absent, but the record did not show that he knowingly waived his

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constitutional right to counsel. Because that discussion differs in context and focus from the law governing the statutory right reviewed here, in this brief the State focuses on how courts have applied the concepts of waiver and forfeiture in statutory right-to-presence cases.

right to be present. *See State v. Haynes*, 118 Wis. 2d 21, 25–26, 345 N.W.2d 892 (Ct. App. 1984).

### B. Just as a defendant may waive his constitutional right to be present, a defendant may waive, either expressly or by his conduct, his statutory right to be present.

In Wisconsin, defendants also have a statutory right to be present at trial. Wisconsin Stat. § 971.04 provides that a defendant charged with a felony "shall be present" at various stages in criminal proceedings, including arraignment and evidentiary hearings, Wis. Stat. § 971.04(1)(a), (d); and, as is relevant here, voir dire, Wis. Stat. § 971.04(1)(c); trial, Wis. Stat. § 971.04(1)(b); "at any view by the jury," Wis. Stat. § 971.04(1)(e); and the jury's return of the verdict, Wis. Stat. § 971.04(1)(f).

As with a defendant's constitutional right, a defendant may waive his statutory right to be present *See State v. Soto*, 2012 WI 93, ¶ 40, 343 Wis. 2d 43, 817 N.W.2d 848. And as with his constitutional right, a defendant may waive his statutory right expressly or by conduct, and may do so at any time during the criminal proceedings.

That rule is consistent with the statute's purpose. In *State v. Dickson*, this Court examined a predecessor of section 971.04 and explained that the statute's purpose is to protect the defendant from being tried in absentia based on a mere forfeiture: "there may not be a trial in absentia without the consent of the defendant." 53 Wis. 2d 532, 546, 193 N.W.2d 17 (1972). This Court observed that a defendant could, however, waive "expressly or by conduct" his right to be present. *Id.* More recently, this Court in *Soto*, reiterated that under the current version of section 971.04(1)(g), a defendant "may waive, but not forfeit, the right to be in the

same courtroom as the presiding judge" at the pronouncement of judgment and imposition of sentence. 343 Wis. 2d 43, ¶ 44.

Hence, because a defendant can *waive* his statutory right to be present at any time, section 971.04 does not provide an absolute right for a defendant to be present at all significant portions of a criminal proceeding. Rather, it simply prevents courts from holding most significant portions of a criminal proceeding in absentia when a defendant merely *forfeits*, by his mere absence, his right to be present.

### C. Wisconsin Stat. § 971.04(3) does not affect the rule that a defendant can waive his right to presence at any portion of trial; rather, it creates a limited exception for when forfeiture-by-absence can operate as a valid waiver.

Again, Wis. Stat. § 971.04(1)(b) provides that a defendant, absent a valid waiver—either express or by conduct—shall be present at trial. So, like any of the enumerated proceedings in subsection (1), a defendant may waive expressly or by conduct his statutory right to be present at trial. *See Soto*, 343 Wis. 2d 43, ¶ 40.

Wisconsin Stat. § 971.04(3) creates an exception to that rule, but not in the way that Washington proposes. That subsection simply allows a forfeiture, under certain circumstances, to operate as a valid waiver of the right to be present at trial.

The text of the statute compels that interpretation. Subsection (3) provides that a court may continue a trial when, after "the beginning of the trial" the defendant "voluntarily absents himself" from the court's presence without the court's permission:

> If the defendant is present at the beginning of the trial and thereafter, during the progress of the trial or before the verdict of the jury has been returned into court, voluntarily absents himself or herself from the presence of the court without leave of the court, the trial or the return of verdict of the jury in the case shall not thereby be postponed or delayed, but the trial or submission of said case to the jury for verdict and the return of verdict thereon, if required, shall proceed in all respects as though the defendant were present in court at all times.

Wis. Stat. § 971.04(3).[6] Accordingly, there are two important phrases in subsection (3): "the beginning of trial" and "voluntarily absents himself." As Washington notes, and the State agrees, the court of appeals has held that "the beginning of trial" under subsection (3) occurs when the jury is sworn. *State v. Miller*, 197 Wis. 2d 518, 521–22, 541 N.W.2d 153 (Ct. App. 1995); *State v. Dwyer*, 181 Wis. 2d 826, 837, 512 N.W.2d 233 (Ct. App. 1994).

It is the second phrase that is at dispute in this case. By its plain meaning, a defendant "voluntarily absents himself" when he absconds, i.e., when he forfeits his presence by absence. Courts assessing this portion of the statute have applied it to situations where a defendant absconds from proceedings.[7] And read in context with the whole statute, subsection (3) most sensibly provides that a

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[6] Wisconsin Stat. § 971.04(3) also lists specific proceedings at which a defendant need not be present, including pronouncements or entries of postconviction orders.

[7] *See, e.g.*, *State v. Koopmans*, 210 Wis. 2d 670, 563 N.W.2d 528 (1997) (Koopmans absconded and failed to appear at sentencing); *State v. Miller*, 197 Wis. 2d 518, 541 N.W.2d 153 (Ct. App. 1995) (Miller absconded during trial and failed to return); *State v. Dwyer*, 181 Wis. 2d 826, 832, 512 N.W.2d 233 (Ct. App. 1994) (Dwyer left during voir dire and did not return for trial).

forfeiture by absence—which alone normally could not operate as a valid waiver of a right to be present at trial—could so operate if the defendant otherwise appears at the beginning of trial. It does not prevent, as Washington suggests, a defendant from otherwise knowingly waiving his right to be present at trial before the jury is sworn.

The Judicial Council notes accompanying the statute align with that conclusion. The notes state that subsection (3) is "designed to prevent a defendant from stopping a trial which has commenced by absenting himself." (Pet-App. 141.) Tellingly, the notes do not suggest that the subsection is designed to create a right to presence that is not waivable by conduct; the focus is on preventing a defendant from derailing already-initiated proceedings by disappearing.

That meaning is in accordance with the corresponding federal statute, Fed. R. Crim. P. 43, and cases interpreting it.[8] Similar to Wis. Stat. § 971.04(1), Rule 43 requires the defendant's presence at "every trial stage, including jury impanelment and the return of the verdict." Fed. R. Crim. P. 43(a). And similar to Wis. Stat. § 971.04(3), Rule 43(c) provides that a defendant waives his continued presence at trial if he is "initially present at trial" and "is voluntarily absent after the trial has begun." Fed. R. Crim. P. 43(c)(1)(A). Under those circumstances, "the trial may proceed to completion, including the verdict's return and

[8] As Washington observes, the Judicial Council notes cite to Florida Rules of Criminal Procedure with similar language. (Washington Br. 7.) But Washington does not argue that the Florida rule or any interpretation of it supports his position. Accordingly, the State focuses on the corresponding federal rule, which appeared to provide the genesis for both the Florida and the Wisconsin rule.

sentencing, during the defendant's absence." Fed. R. Crim. P. 43(c)(2).

Rule 43(c) codified longstanding Supreme Court case law from *Diaz v. United States*, 223 U.S. 442 (1912). *See Crosby v. United States*, 506 U.S. 255, 259–60 (1993) (discussing statutory exception and *Diaz*). In *Diaz*, the defendant absconded twice from his trial, and it continued in his absence. The Court held that "where the offense is not capital and the accused is not in custody, . . . if, after the trial has begun in his presence, he voluntarily absents himself, this does not . . . prevent the completion of the trial." 223 U.S. at 455. "[O]n the contrary," the Court wrote, that act "operates as a waiver of his right to be present and leaves the court free to proceed with the trial in a manner and with like effect as if he were present." *Id.*

The *Crosby* Court explained the rationale for that rule in *Diaz*—which essentially allows a forfeiture-by-absence to function as a knowing waiver. When a defendant is present for the start of trial and absconds, his "initial presences serves to assure that any waiver is indeed knowing." *Crosby*, 506 U.S. at 261. Thus, while it is unfair to impute knowledge on a defendant before trial that the trial may be commenced in his absence if he disappears, it is likely that a defendant would be aware of that consequence of his absconding during trial. *Id.* at 262 (citing *Taylor v. United States*, 414 U.S. 17, 20 (1973)). Accordingly, under Rule 43(c)(1)(A), where a defendant absconds—without more—before trial commences, a trial in absentia cannot be held. *See, e.g.*, *Crosby*, 506 U.S. at 256–57; *United States v. Arias*, 984 F.2d 1139, 1141–42 (11th Cir. 1993).

Importantly, *Crosby* and Rule 43(c) do not mandate a new trial for an absent defendant where the record demonstrates that he knowingly waived his right to be

present before trial commenced. *See United States v. Benabe*, 654 F.3d 753 (7th Cir. 2011). In *Benabe*, for example, the trial court removed the defendants from the courtroom for disruptive behavior the day before trial; they refused to return when the court invited them to do so at the beginning of jury selection. 654 F.3d at 761, 766–67. The Seventh Circuit held that the court did not run afoul of Rule 43(c) by trying the defendants in absentia when they were absent when trial began.

The *Benabe* court distinguished its defendants' conduct from that of the defendant in *Crosby*, who fled before trial commenced. The defendants in *Benabe*, in contrast, were disruptive and were warned of the consequences of their behavior. Accordingly, they "made a knowing and voluntary choice" when they refused to return to the courtroom. *Id.* at 772. Under those circumstances, "the purpose of Rule 43 certainly was served." *Id.* at 773; *see also Cuoco v. United States*, 208 F.3d 27, 31–32 (2d Cir. 2000) (holding that *Crosby* and Rule 43(c) exception did not prevent a defendant from validly waiving by other means his right to presence before trial commenced); *Smith v. Mann*, 173 F.3d 73, 76 (2d Cir. 1999) (recognizing *Crosby*'s limited holding, observing that "in some situations the requisite knowledge [to constitute a waiver] can be conclusively found even if the defendant is not present when the trial begins").

Washington discusses *Crosby* in his brief (Washington Br. 7), but he does not address *Benabe* or the other federal circuit decisions recognizing that *Crosby* did not prevent a defendant from otherwise waiving his right to be present at trial. Moreover, Washington selectively quotes *Diaz*, (Washington Br. 8), but leaves out that case's crucial language providing that when a defendant is not in custody and voluntarily absents himself, that conduct functions as a knowing waiver.

Hence, reading Wis. Stat. § 971.04(3) in harmony with its federal counterpart in Rule 43(c), a defendant's forfeiture-by-absence after his initial presence at trial can operate as a valid waiver of his right to be present for the remainder of a trial. As reasoned by the Seventh Circuit in *Benabe*, *Crosby* does not hold otherwise. Because Wis. Stat. § 971.04(3) does not limit when a defendant can knowingly waive his right to be present at trial, the only question remaining is whether Washington waived his right to be present at his trial here. As shown below, he did.

### D. The record demonstrates that Washington validly waived his right to be present at trial.

On the morning of trial, Washington had an outburst in court when discussing his pattern of refusing to work with his attorneys. Washington declared "we ain't going no trial now, I mean that," the court warned him that he may be removed from the courtroom, and Washington replied, "I'm gone. She's not representing me." (R. 65:3–4.)

The court then made a record of Washington's outburst and removal from the courtroom, indicating that Washington "semi was removed and semi left on his own after the last outburst," that he had a history of manipulating the case, and that the court has consistently informed him that the trial was going forward with Attorney Paul as his counsel. (R. 65:4–5.)

After that, Washington refused at least five invitations to return. He refused to return when the afternoon session began. (R. 65:10.) The court found, given Washington's unwillingness to return and past "aggressiveness and his attitude" that forcing him to return would cause a safety risk to both Washington and court staff. (R. 65:15.) The court then set a plan for Attorney Paul to periodically confer with

Washington and for Washington to be periodically advised of his right to return. (R. 65:16.)

Shortly after that ruling, Paul met with Washington and explained the court's ruling; Washington refused to participate. (R. 65:21.) The court and counsel proceeded with jury selection, which took the remainder of that day. (R. 65:22.)

The next morning, when asked, Washington again refused to come to the courtroom. (R. 66:2.) The court found that Washington was "still by his conduct refusing to come down, waiving his right to be present, so we will continue then without him." (*Id.*)

After trial began, and during a recess, Attorney Paul again made contact with Washington and reported that he did "not want to participate in trial." (R. 66:73.) The court found that Washington continued to waive his right to be present. (R. 66:73–74.)

When the jury reached a verdict the afternoon of the same day the trial began, Washington was again asked if he wanted to return; Washington again refused. (R. 66:129.)

In sum, either court staff or Washington's counsel or both asked Washington whether he wanted to be present at jury selection, at the start of trial, mid-trial, and for the return of verdict. Washington refused every invitation. Further, there is nothing in the record to indicate that Washington informed jail staff that he wished to return to the courtroom.

Under the circumstances, Washington knowingly waived his statutory right to be present. Washington's affirmative refusals to the court's invitations return to the courtroom waived his statutory right to be present for jury

selection, for trial, and for the return of verdict. *See, e.g.*, *Soto*, 343 Wis. 2d 43, ¶ 49 (holding that Soto affirmatively waived his right to be present at his plea hearing when he and his counsel deemed videoconferencing to be acceptable). Moreover, the court was not obligated to jeopardize the safety of court staff or prejudice the jury against Washington by forcibly escorting him to the courtroom. *See State v. Vaughn*, 2012 WI App 129, ¶ 26, 344 Wis. 2d 764, 823 N.W.2d 543 (refusing, based on safety concerns, to impose rule on circuit courts that they must drag "an obstreperous defendant . . . into court" to comply with palliative requirements). Accordingly, the court did not violate Washington's statutory right to be present.

### E. Washington's arguments are not persuasive.

#### 1. *Dwyer* does not compel a different conclusion.

Washington primarily seeks support in *Dwyer*, 181 Wis. 2d 826, and *Koopmans*, 210 Wis. 2d 670, to the extent that the courts in those cases understood Wis. Stat. § 971.04(1) and (3) to preclude circuit courts from finding that a defendant waived, by his absence alone, his right to be present at trial or sentencing. (Washington Br. 8–10.) But Washington ignores the distinction between forfeiture by mere absence and waiver, i.e., a clear expression in words or inferred by conduct of a desire to not be present.

That distinction is important, as this Court made clear in *Soto*. In *Soto*, the defendant elected to attend his plea hearing by teleconference. 343 Wis. 2d 43, ¶ 33. On appeal, he claimed that, based on Wis. Stat. § 971.04(1)(g), he could not waive his right to be in the same courtroom as the judge during his plea hearing. *Id.* ¶ 41 n.8.

This Court disagreed, holding that a defendant could waive his right to be present under section 971.04(1)(g), and concluding that Soto waived his right to be present when he agreed to participate by teleconference. This Court distinguished Soto's waiver from the forfeiture-by-mere-absence situation in *Koopmans*, where Koopmans had absconded to Belize months before her sentencing. In that case, the circuit court could not infer waiver of Koopmans's statutory right to be present at her sentencing based on her absence alone. 210 Wis. 2d at 679. To that end, this Court in *Soto* limited *Koopmans* to the narrow holding "that a defendant who absents herself from sentencing, without more, has not sufficiently demonstrated waiver of her right to be physically present." *Soto*, 343 Wis. 2d 43, ¶ 41 n.8. Thus, like in *Soto*, *Koopmans* does not control here, where Washington waived his right to be present by causing himself to be removed and clearly expressing his desire to not attend trial.

Nor does *Dwyer*, another forfeiture-by-absence case, support Washington. In *Dwyer*, Dwyer informed the trial court during jury selection that she wanted to hire a new attorney. 181 Wis. 2d at 832. The court denied that request, and during a brief recess, Dwyer disappeared. *Id.* The court tried Dwyer in absentia over her attorney's objection. *Id.*

The court of appeals reversed, reasoning that a trial court could try a defendant in absentia when he, by his conduct, waived his right to be present. *Id.* at 837. But it further understood Wis. Stat. § 971.04(3) to allow a forfeiture by absence to operate as a waiver only if the defendant was present at the beginning of trial. *Id.* Because Dwyer absconded before trial began, i.e., before her jury was sworn, the court of appeals held that Dwyer was entitled to a new trial. *Dwyer*, 181 Wis. 2d at 837.

*Dwyer* is not on point. The *Dwyer* court understood "voluntary absence" under subsection (3) to mean conduct that would otherwise only be a forfeiture by absence. Unlike Dwyer's forfeiture by absence, i.e., her disappearance before the beginning of trial, Washington had an outburst on the morning of trial, was removed from the courtroom, and subsequently refused many informed invitations to attend his trial. Hence, the delimitation in subsection (3) does not apply here because there was no ambiguity in Washington's absence. Washington caused himself to be removed from court and expressly stated that he did not wish to return. He actively refused to attend and the court properly found that he knowingly exercised his right to waive his presence; he was not "voluntarily absent[] . . . without leave of the court." *See* Wis. Stat. § 971.04(3).

For that reason, Washington misses the point with his argument that if the result in *Dwyer* offended the Legislature, it could have amended Wis. Stat. § 971.04(3), but it did not. (Washington Br. 9.) Under its facts, *Dwyer* did not hold that a defendant could not waive his right to be present at trial unless he was present at its beginning; it merely held, consistent with subsection (3), that Dwyer's forfeiture could not function as a waiver where Dwyer absconded before trial began.

Finally, Washington argues that "the intentional nature of his actions is beside the point," and that absconding from trial is just as voluntary as an express choice to not be present. (Washington Br. 10.) He invokes *Dwyer* and *Koopmans* to support that point, where both defendants clearly chose to be absent by absconding, yet still were entitled to new trials. But the courts in those cases did not conclude that those defendants did not validly waive their right to be present because their absences were involuntary; they held that those voluntary absences

violated the statute because they occurred before trial began and because there was nothing to indicate that they could function as knowing waivers.

In sum, there is nothing in section 971.04 or case law to prevent a court from trying a defendant in absentia when that defendant waives his right to be present during any portion of a criminal proceeding listed under Wis. Stat. § 971.04(1). Here, Washington waived his right to be present by his conduct before voir dire began. After the jury was selected, he expressly waived his right to be present at the start of and throughout trial. The court's process and procedure under the circumstances did not offend Wis. Stat. § 971.04.[9]

### 2. Alternatively, if *Dwyer* demands that the trial court could not have tried Washington in absentia under the circumstances, this Court should overrule it.

Alternatively, if this Court accepts Washington's position—i.e., that under *Dwyer*, his refusal to be present when the jury was sworn means that he cannot waive, as a matter of law, his presence at the remainder of trial—*Dwyer* was wrongly decided and should be overruled. As argued in sections B and C above, the language of Wis. Stat.

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[9] Washington writes that the court violated the statute because the necessary precondition that Washington needed to be present at the beginning of the trial was not satisfied, and that "[t]he [S]tate has never disputed that [the court] violated the statute in trying Mr. Washington in this way." (Washington Br. 5.) Not so. The State has consistently maintained that Washington validly waived his right to be present at trial, that subsection (3) did not invalidate Washington's waiver, and that the court did not violate the statute by trying Washington in absentia under the circumstances.

§ 971.04(3) is most reasonably read to provide that conduct that normally constitutes a forfeiture—and thus could not justify a court holding proceedings in absentia—could operate as a valid waiver once a trial has begun and warrant a trial in absentia. If *Dwyer* holds that a defendant can never waive by his conduct his right to be present at trial, its holding is inconsistent with the statutory language and this Court's holding in *Soto*.

Indeed, if *Dwyer* holds that a court can never hold a trial in absentia for a defendant who is not present when the jury is sworn, the facts of this case demonstrate why that interpretation of Wis. Stat. § 971.04(3) is unworkable. A defendant could endlessly sandbag his trial so long as he prevents himself from being present before the jury is sworn, by either expressly waiving his right or by engaging in conduct that requires his removal from the courtroom. A defendant doing the latter could especially profit if his behavior demands his removal while a jury is being selected or just before it is sworn, given the risk that that behavior would prejudice the jury panel or pool and result in further delays.

Moreover, Washington fails to offer in his brief any suggestion of what the court should have done under the circumstances. The trial court made a detailed record of Washington's long pattern of trying to derail the trial by making and withdrawing speedy trial requests and refusing to work with his appointed attorneys. When the day of trial finally arrived, he had an outburst in which he removed himself or was removed, and he steadfastly refused the court's many invitations for him to return. The court of appeals, in commending the trial court's efforts here, favorably quoted the Supreme Court's remarks that a disruptive defendant cannot endlessly delay a trial: "[i]t would degrade our country and our judicial system to permit

our courts to be bullied, insulted, and humiliated and their orderly progress thwarted and obstructed by defendants brought before them charged with crimes." *Washington*, 373 Wis. 2d 214, ¶ 20 (quoting *Allen*, 397 U.S. at 346).

### F. Even if the court erred, Washington is not entitled to relief because any error was harmless.

Violations of a defendant's right to be present under Wis. Stat. § 971.04 are subject to a harmless error analysis. *State v. Peterson*, 220 Wis. 2d 474, 489, 584 N.W.2d 144 (Ct. App. 1998). An error is harmless if it does not "affect the substantial rights of the adverse party." Wis. Stat. § 805.18(1). An error affects the adverse party's substantial rights if there is a reasonable possibility of a different outcome. *State v. Dyess*, 124 Wis. 2d 525, 544–45, 370 N.W.2d 222 (1985). A reasonable possibility is one in which the error, considered in the context of the whole trial, undermines confidence in the outcome. *Id.* at 545.

Looking at the whole trial, any violation of Washington's statutory right to be present at his trial was harmless for four reasons.

First, Attorney Paul fully participated in the jury selection and trial, which meant that Washington's interests were represented throughout. *See, e.g.*, *Peterson*, 220 Wis. 2d at 489–90 (finding harmless error in Peterson's absence where Peterson's attorney "was present and fully participated in the proceedings"). Here, Attorney Paul participated in voir dire (R. 65:22–73); she convinced the court to take steps to avoid prejudice against Washington if the State used a booking photo for identification (R. 66:11–12); she made an opening statement (R. 66:29–32); she cross-examined the State's witnesses (R. 66:47–53, 55–56, 69–71, 72–73, 81–82); she moved for dismissal and judgment

notwithstanding the verdict at the close of the State's case (R. 66:86, 135); she convinced the court to instruct the jury on voluntary intoxication (R. 66:88–95); and she made a closing argument (R. 66:106–10). Paul also conferred with Washington before and during trial, and reminded the court to check whether Washington wanted to be present for the verdict. (R. 66:2, 73, 129.)

Second, there was nothing more Attorney Paul could have done in defending Washington given that the State's case was strong, simple, and left little to dispute. R.V. confronted Washington in R.V.'s home, watched Washington leave and cross the street with a bag and backpack, and saw police confront and arrest Washington minutes later. The items found in Washington's possession were R.V.'s. During the arrest, Washington ignored an officer's warnings to stop, walked toward the officer, and had to be tased. This was not an intensive trial full of competing facts and inferences. There was no basis for Washington to claim that he was not the burglar; the evidentiary portion, from start to finish, took just a few hours and involved three witnesses.

Given that, Attorney Paul argued the only possible defense available, which was that Washington was too intoxicated to form the requisite intent to commit the crimes. To support that defense, Paul emphasized that Washington was significantly impaired and behaving bizarrely during and after the crime. As noted above, Paul also successfully persuaded the court to instruct the jury on voluntary intoxication. In all, Paul ably presented the only defense available to Washington.

Third, the court took steps to ensure that the jurors would not allow Washington's absence to affect their verdict. The court instructed the jury pool that Washington was not present, that he had a right to be present, and that in this

case, Washington waived that right. The court reiterated that the jurors must not draw any inferences from Washington's absence or allow it to affect their verdict. Potential jurors were asked whether Washington's absence would affect them; the two potential jurors who said that it would were dismissed. Finally, before deliberations, the court again instructed the jury that Washington had a right to be present, that he waived that right, and that his absence could not influence its verdict. There is nothing to indicate that the jury ignored those instructions. *State v. Truax*, 151 Wis. 2d 354, 362, 444 N.W.2d 432 (Ct. App. 1989) (appellate court "presume[s] that the jury follows the instructions given to it").

Fourth, Washington does not identify anything that happened during jury selection or trial that he would have asked Paul to handle differently. *See Peterson*, 220 Wis. 2d at 489 (deeming error harmless where "Peterson does not advance on appeal any specific contribution he would have made had he been present"). Indeed, the court and Attorney Paul expressed concerns that Washington was more likely to be prejudiced if the jury saw him being escorted into court against his will, or saw him engaging in disruptive conduct.[10] *Accord Vaughn*, 344 Wis. 2d 764, ¶ 26. Those were reasonable concerns under the circumstances.

[10] In addition to the circuit court's findings on Washington's conduct and behavior, at a *Machner* hearing in this case, Attorney Paul testified that Washington was a difficult client, constantly proposing unviable defenses and declining to permit Paul to investigate other defenses. Paul also stated that Washington would get upset when she tried to redirect him to important issues, saying that at one point when she visited him, he stormed out of the room and said that she did not represent him. (R. 68:9–16, 21–22.)

In short, Washington knowingly waived his right to be present at trial. Wisconsin Stat. § 971.04(3) does not apply, because this case did not involve a forfeiture by mere absence. Finally, even if the court erred, Washington is not entitled to relief because any error was harmless.

## CONCLUSION

For the foregoing reasons, the State respectfully asks that this Court affirm the decision of the court of appeals.

Dated: June 8, 2017.

Respectfully submitted,

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## CERTIFICATION

I hereby certify that this brief conforms to the rules contained in Wis. Stat. § 809.19(8)(b) and (c) for a brief produced with a proportional serif font. The length of this brief is 8214 words.

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## CERTIFICATE OF COMPLIANCE WITH WIS. STAT. § (RULE) 809.19(12)

I hereby certify that:

I have submitted an electronic copy of this brief, excluding the appendix, if any, which complies with the requirements of Wis. Stat. § (Rule) 809.19(12).

I further certify that:

This electronic brief is identical in content and format to the printed form of the brief filed as of this date.

A copy of this certificate has been served with the paper copies of this brief filed with the court and served on all opposing parties.

Dated: June 8, 2017.

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