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State v. Kropp Appellant's Brief Dckt. 47713

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IN THE SUPREME COURT OF THE STATE OF IDAHO

STATE OF IDAHO, Plaintiff-Respondent. vs. DAVID ALEXANDER KROPP, Defendant-Appellant,	S.Ct. No. 47713 Kootenai CR-2017-13500

OPENING BRIEF OF APPELLANT

Appeal from the District Court of the First Judicial District of the State of Idaho
In and For the County of Kootenai

HONORABLE SCOTT WAYMAN
Presiding Judge

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A. *Nature of the Case*

David Kropp asks this Court to vacate his convictions for Burglary and for being a Persistent Violator. The court abused its discretion when it would not continue or delay the trial after Mr. Kropp reported that he and the defense alibi witness had gone off the road on the way to court, were stuck in the snow, and were waiting for a tow truck to arrive. The error was structural and requires vacation of the convictions.

B. *Procedural History and Statement of Facts*

Mr. Kropp was charged by Amended Information with three counts of burglary and with being a persistent violator. R 86-87. The third burglary count was amended during the trial to specifically allege an aiding and abetting theory. R 126. The evidence at trial was that the burglaries all occurred at a storage facility in Post Falls over the weekend of February 25-26, 2017. T p. 164- p. 217.

Prior to trial, Mr. Kropp disclosed the identity of an alibi witness, his cousin, Ashely Homer, of St. Maries, Idaho. She would testify that Mr. Kropp was with her the weekend of the burglaries. R 91.

On the first day of trial, Teresa Rutter testified that she, Mr. Kropp, and an unnamed third-party burglarized Unit 144 at the Pleasant View Storage facility in Post Falls. This occurred on Friday, February 24, 2017. T p. 173, ln. 6-13; p. 179, ln. 6. She and Mr. Kropp returned the next day and stole items out of Units 145 and 150. T p. 187, ln. 9; p. 190, ln. 24.

No one else testified to seeing Mr. Kropp at the storage units during the

charged burglaries. There was no forensic evidence, such as fingerprints, linking Mr. Kropp to the individual storage units.

Mr. Kropp, Ms. Rutter, and Michael Namet were seen at Unit 225 on February 26, 2017. They were arrested later that day. Some items from Units 144, 145 and 150 were found inside the vehicle Mr. Kropp was driving. Amongst many other items in the car which were not from the burglaries, there was a bolt cutter. T p. 371, ln. 17. (No one was charged with burglarizing Unit 225. Ms. Rutter testified that that unit belonged to her friend and they were trying to move her "stuff out of storage because the place had been getting hit." T p. 165, ln. 10-12.)

Ms. Rutter admitted that she had entered into a plea agreement where she would testify against Mr. Kropp. T p. 213, ln. 9-11. But she complained that she "didn't get the deal" because she was sent to prison instead of "a rider." *Id.*, ln. 15-17.[1]

The second day of trial was scheduled to begin at 9:00 a.m. The court came in at 9:06, R 161, and defense counsel told it that Mr. Kropp was not present.

> I received some texts from my client with photographs of his car stuck in the snow, swerved to miss a deer, waiting on tow truck. And then I've called the police and tow truck company. Towing company is on another call and it will be a few hours. My client has instructed me to ask for a continuance.

T p. 276, ln. 13-20. Counsel received that message at 8:52 a.m. T p. 277, ln. 9. Counsel did not know when the accident occurred. T p. 282, ln. 20-25.

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[1] Ms. Rutter spoke too soon. Two months after her testimony, she filed an I.C.R. 35 motion. It was granted and she ended up with her rider after all. *State v. Teresa Ann Rutter*, Kootenai Co. CR-2017-17150.

The court recessed until 9:35. R 161. Counsel then explained:

> Your Honor, I spoke with my client and the car is somewhere between Chatcolet and Plummer in what was described as the Conklin Flats. It is, relatively speaking, very far off the road.
>
> The police said that they'd get there when they could and the tow truck driver said at least two hours, probably three, but don't think -- don't worry about it till 4:00. My client has instructed me that he does not waive his right to confront his witnesses and so forth; in other words, he wants to be here and does not want me to proceed without him.

T p. 279, ln. 4-14. He continued:

> I will tell the Court I have seen he and Ms. Homer, who is under subpoena, in the same vehicle that's in the photograph that they sent here in town. And it's my understanding that it's Ms. Homer's vehicle. And I don't know that my client has any other vehicle besides that one.

T p. 280, ln. 9-15. He then asked for a mistrial. T p. 283, ln. 14-18. When asked how many witnesses the parties had to present, defense counsel said he had one. T p. 284, ln. 6.

The court denied the motion to continue. It made the following finding and conclusion in doing so.

1. "The mere fact that this defendant has had some car troubles . . . does not relieve a defendant of the obligation of appearing for is trial."

2. "[C]ounsel for the defendant has indicated that he received notice at 8:52 this morning that his client, when trying to commute from St. Maries, Idaho to trial here in Coeur d'Alene, had been in a vehicle that wound up off the road and apparently stuck in a snowbank, allegedly for an encounter with a deer."

3. "We don't know how long the defendant has been stuck with this vehicle. We don't know how long the defendant will be stuck. All we have is an estimate that the defendant has apparently been in contact with law enforcement, and all we have is an estimate that a tow truck driver may be showing up at some point."

4. "The Court notes that Mr. Kropp posted bond to get out of jail, and what we have here, other than a request that -- for a tow truck, is any other information indicating any other efforts that Mr. Kropp is making or has made or is going to make to be here at the trial."

5. "If we had information that Mr. Kropp was going to be here at a time certain, and that we could confidently proceed with him here, the Court would prefer to do that, but we don't have that information."

6. "The Court recognizes that there are sometimes delays that occur that impede court proceedings. It is not unheard of. But normally we can determine how long of a delay that would be and here we don't have that information."

7. "[T]hat Mr. Kropp, the defendant, is somewhere between St. Maries and Plummer, Idaho. The Court also notes that there is public transportation from Plummer, Idaho, to Coeur d'Alene."

8. "The fact that he chose to travel to St. Maries or reside in St. Maries was his choice, a choice that he made voluntarily. The fact that he has chosen to commute from St. Maries is his choice."

9. "The Court has driven many times from St. Maries to Coeur d'Alene. The Court has driven many times from Plummer to Coeur d'Alene. And either with some assistance or through public transportation, or any other method from friends or family to get a person at their trial, we have delayed the start of the trial to give Mr. Kropp the opportunity to do that, and he has not been able to appear for over an hour."

10. "So under the totality of the circumstances I have presented here, I find that he has voluntarily absented himself during this trial."

T p. 284, ln. 17 - p. 290 ln. 7-10.

The court, however, also considered factors not relevant to the factual determination of whether Mr. Kropp was voluntarily absent.

11. "[W]ere we to wait an unknown amount of hours for Mr. Kropp to show up, it is entirely likely we would not be able to finish this trial in the time allotted today."

12. "Rather than delay the start of the trial for an unknown amount of time, rather than have the jury wait, I think it is within the Court's discretion to allow the case to proceed and give Mr. Kropp the opportunity to

> appear should he choose to. Based on those findings, we'll go forward with the trial."

T p. 291, ln 1-20.

Defense counsel then noted that Mr. Kropp "does not waive his right to be here. He does not waive his constitutional right." Further,

> By not having my client present, while the State continues to present evidence, severely inhibits my ability to present and --to present a defense, more importantly to represent him in the prosecution's phase of this trial. I would go so far as to say that there are some clients that are not involved in the trial. Mr. Kropp, as I would hope that the Court has seen, is very involved in this trial, passing me notes and keeping me informed of his thoughts on the witness testimony.

T p. 292, ln. 5-14.

Finally, he told the court that he had the alibi witness who was stuck with Mr. Kropp under subpoena. He noted, "I believe that that creates certain rights for my client to be able to present his defense." T p. 291, ln. 23 – p. 293, ln. 2.

The court denied both the motion for a mistrial and the motion to postpone the trial. T p. 293, ln. 6-10. The court instructed the jury that:

> Before we get started, I wish to advise you that the defendant has been unable to attend court at 9:00 o'clock a.m. The jury is not to speculate as to the reason for the defendant's absence.

T p. 298, ln. 24-p. 299, ln. 4.[2] The trial then continued. *Id.*

After the court came back into session after the lunch break, defense counsel told the court that he had received a text message, "Almost there," two minutes

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[2] The court did not instruct the jury that it could not draw an adverse inference from the defendant's absence. Compare ICJI 301 ("You must not draw any inference of guilt from the fact that the defendant does not testify, nor should this fact be discussed by you or enter into your deliberations in any way.")

prior and a message, "Eight miles from Coeur d'Alene," ten minutes prior. T p. 366, ln. 4-9. When the court asked how many witnesses were left to be called by the parties, defense counsel said it was likely he would call the alibi witness. *Id.*, ln. 15-18. The court waited for approximately ten minutes and commenced the trial even though Mr. Kropp was not present. Defense counsel renewed his previous motions. T p. 367, ln. 10-16. Prior to the jury coming in, the state told the court that it had learned over the recess that there was a warrant for Mr. Kropp's arrest out of Washington State. It stated its belief that Mr. Kropp was aware of the existence of the warrant but offered no evidence in support of its suspicion. T p. 367, ln. 24 – p. 368, ln. 8.

Neither Mr. Kropp nor the alibi witness appeared. Without any witness or his client, defense counsel rested the defense case without presenting any evidence. T p. 402, ln. 12-13. When asked in front of the jury if he wished to call any witness, defense counsel replied, "I do not have any witnesses, your Honor." T p. 399, ln. 9-12. He did not argue the alibi defense to the jury. T p. 424-428.

The jury found Mr. Kropp guilty of all three counts of burglary and of being a persistent violator. R 203-205.

Mr. Kropp filed a motion for new trial. R 247. Attached to the motion was a copy of a Benewah County Sheriff's Accident Report. R 250. The report showed that 8:59 a.m., on the morning of the second day of trial, Ashley Homer, the alibi witness, called the police and said that her vehicle had gone "over the bank" on Chatcolet Road outside Plummer. The report noted that she had contacted Jay's Towing, but that he was two hours out. *Id.* The court denied the motion for new

trial. R 279.

The court imposed a judgment of conviction. R 283. Mr. Kropp filed a timely Notice of Appeal. R 298.

III. ISSUES PRESENTED ON APPEAL

1. Did the court abuse its discretion in proceeding with the trial in Mr. Kropp's absence?

2. Did the court abuse its discretion in denying the motion to continue the trial to allow the defense alibi witness to appear and testify?

3. Can the state meet its burden of proving those errors harmless beyond a reasonable doubt?

IV. ARGUMENT

A. *The Trial Court Abused its Discretion in Proceeding with the Trial in Mr. Kropp's Absence.*

1. Legal standards

The right of an accused to be present at trial is grounded in the Due Process Clauses of the Fifth and Fourteenth Amendments and the Confrontation Clause of the Sixth Amendment to the United States Constitution and by Article I, § 13 of the Idaho Constitution. *United States v. Gagnon*, 470 U.S. 522, 526 (1985); *State v. Elliott*, 126 Idaho 323, 325 (Ct. App. 1994). Idaho Criminal Rule 43(b) also applies, and provides in pertinent part:

> (b) Continued presence not required. The further progress of the trial to and including the return of the verdict shall not be prevented and the defendant shall be considered to have waived defendant's right to be present whenever a defendant, initially present:
>
> > (1) Is voluntarily absent after the trial has commenced (whether or not the defendant has been informed by the court of the obligation to remain during the trial).

However, in determining whether a defendant's absence constitutes a waiver of the right to be present under this rule, the trial court must: "(1) make sufficient inquiry into the circumstances of a defendant's disappearance to justify a finding whether the absence was voluntary, (2) make a preliminary finding of voluntariness, when justified, and (3) afford the defendant an adequate opportunity to explain the absence when the defendant is returned to custody and before sentence is imposed." *Elliott*, 126 Idaho at 328, *citing State v. Thomson*, 872 P.2d 1097, 1100 (Wash. 1994).

In *Elliott*, the Court adopted the analysis of the Washington Supreme Court instead of the more stringent standard found in *United States v. Rogers*, 853 F.2d 249 (4th Cir. 1988), *cert. denied*, 488 U.S. 946 (1988). The Court wrote: "We prefer instead the analysis of the Washington Supreme Court in *State v. Thomson*[.]"

> We agree with the Washington court. The procedure enunciated in *Thomson* amply protects the defendant's rights by assuring that the trial court will examine the circumstances of the defendant's absence before determining whether the absence is voluntary, and by providing the defendant an opportunity to explain his or her absence before judgment of conviction is formally entered. It allows the court to discontinue the trial if the voluntariness of the defendant's absence appears doubtful in light of all the circumstances.

State v. Elliott, 126 Idaho at 328.

One part of the *Thomson* procedure is that "[t]he court will indulge a presumption against a waiver of the right." *State v. Thomson*, 123 Wash. 2d at 881. This presumption is constitutionally based. The U.S. Supreme Court has stated that a finding that a fundamental right has been waived "is not lightly to be made." *Moore v. Michigan*, 355 U.S. 155, 161 (1957). Idaho Courts follow the same rule:

"A waiver is a voluntary relinquishment or abandonment of a known right or privilege, and courts should indulge every reasonable presumption against waiver." *State v. Lopez,* 144 Idaho 349, 352 (Ct. App. 2007), *citing Barker v. Wingo*, 407 U.S. 514, 525 (1972). This rule is both long-standing and well-established. *See e.g., Hodges v. Easton*, 106 U.S. 408, 412 (1882). (When there is a fundamental guarantee of the rights and liberties of the people involved, "every reasonable presumption should be indulged against its waiver.")

In the usual case, the denial of a motion to continue is reviewed for an abuse of discretion. *State v. Daly*, 161 Idaho 925, 929 (2017). However, when the denial of a continuance results in a trial in absentia a heightened standard of review is applied. When the appellant "contends that the trial court's decision to proceed with the trial in his absence was a violation of his constitutional right to be present during the trial . . . we conduct an independent review on appeal based upon the totality of the circumstances." *State v. Miller*, 131 Idaho 186, 188 (Ct. App. 1998), *citing State v. Elliott*, 126 Idaho at 325.

2. Why relief should be granted

a. *The court abused its discretion because it failed to apply the presumption against finding a waiver of a constitutional right.*

The abuse of discretion standard of review asks whether the district court:

(1) correctly perceived the issue as one of discretion,
(2) acted within the outer boundaries of its discretion,
(3) acted consistently with the legal standards applicable to the specific choices available to it, and
(4) reached its decision by the exercise of reason.

Roberts v. Jensen, No. 46675, 2020 Ida. LEXIS 165, at *14 (July 30, 2020), *citing*

Lunneborg v. My Fun Life, 163 Idaho 856, 863 (2018). Here the court abused its discretion because it failed to apply the presumption against waiver when finding Mr. Kropp's absence was voluntary. If anything, it appears to presume to the absence was voluntary, notwithstanding defense counsel stating that Mr. Kropp did not waive his right to be present. Further, the court appears to put the burden of proving involuntariness on Mr. Kropp. This is contrary to the *Thomson* procedure of starting from the presumption against waiver. In failing to apply that presumption to its fact-finding, the court failed to act consistently with the legal standards applicable to the question and thus abused its discretion. *Roberts v. Jensen*, supra.

b. *Under independent review, the court's finding of a voluntary absence is not supported by the record.*

At the time the court found that Mr. Kropp's absence was voluntary, there was not sufficient evidence to even make the preliminary determination required under *Elliott* that the absence was voluntary. All the court knew was that:

1. Defense counsel received notice at 8:52 a.m. that Mr. Kropp's vehicle, on its way from St. Maries to Coeur d'Alene got stuck in a snowbank.

2. A tow truck had been called.

3. The tow truck operator said it could be four hours before he arrived.

4. Mr. Kropp had told his attorney that he did not waive his presence at trial.

5. Mr. Kropp was somewhere between St. Maries and Plummer, Idaho.

These facts are not sufficient to justify even a tentative finding of voluntary absence under *Elliott.* If anything, that evidence shows the opposite: that Mr. Kropp did not waive his right to be present, but that he would not be able to drive

from his location outside of Plummer to Coeur d'Alene for up to five hours.

While the court purported to take judicial notice that there is public transportation from Plummer, Idaho, to Coeur d'Alene, it also knew that Mr. Kropp was not in Plummer. (Since the court was familiar with that road, it might have been aware those two cities are 19 miles apart.) Nor did it make any findings that whatever public transportation was available would be running on that day or at that time, or when Mr. Kropp might be able to arrive. It also did not know whether Mr. Kropp (or Ms. Homer) had money to pay the fare.

It also found that Mr. Kropp chose to reside in St. Maries. That finding is not relevant to the determination of whether Mr. Kropp's absence was voluntary. Moreover, there is no evidence that it was a voluntary choice. Perhaps he did not want to stay there but had no other options, being unable to afford a room at the Coeur d'Alene Resort or other hotel near the courthouse for the duration of the trial.

Thus, an independent review of the evidence available to the court, at the time it found Mr. Kropp was voluntarily absent, was not even sufficient to make the tentative finding required by *Elliott* to proceed with a trial in the defendant's absence.

3. Conclusion

The Court should determine that the trial court abused its discretion in continuing the trial without Mr. Kropp being present. It should also determine that there was not sufficient evidence presented to the court for it to make the preliminary determination that Mr. Kropp was voluntarily absent.

B. *The Trial Court Abused its Discretion in not Granting a Continuance to Permit Mr. Kropp's Alibi Witness to Appear and Testify.*

1. Legal standards

The Sixth Amendment to the United States Constitution grants the right to the party accused to have compulsory process for obtaining witnesses in his or her favor. The Sixth Amendment is applicable to state criminal proceedings through the due process clause of the Fourteenth Amendment. *Washington v. Texas*, 388 U.S. 14, 19 (1967).

> The right to offer the testimony of witnesses, and to compel their attendance, if necessary, is in plain terms the right to present a defense, the right to present the defendant's version of the facts as well as the prosecution's to the jury so it may decide where the truth lies. Just as an accused has the right to confront the prosecution's witnesses for the purpose of challenging their testimony, he has the right to present his own witnesses to establish a defense. This right is a fundamental element of due process of law.

Id. A similar compulsory process clause is found in Article 1 § 13 of the Idaho Constitution.

The Court of Appeals addressed the problem of a missing defense witness in *Schwartzmiller v. State*, 108 Idaho 329 (Ct. App. 1985). It observed that appellate review of such cases should focus on three relevant factual inquiries in determining whether a defendant's right to compulsory process has been violated:

1. the nature and extent of government conduct, if any, that contributed to the unavailability of the witness.
2. the importance of the evidence to the defendant's case, and
3. the defendant's diligence in exercising his Sixth Amendment right.

Id., at 330-331. While each inquiry is important, the effect of just one or two of the factual events may result in a deprivation of compulsory process. *Id.*

2. Why relief should be granted

In addition to erring by proceeding with the trial in Mr. Kropp's absence, the court also erred in not continuing the trial to allow for (or even compel) the presence of the subpoenaed defense alibi witness.

a. *The court abused its discretion because it failed to consider Mr. Kropp's constitutional right to present witnesses when it denied the motion to continue.*

Even if the trial was properly resumed in Mr. Kropp's absence, the court erred by not granting the motion to continue because the alibi witness was not available to testify. However, the court never addressed that aspect of the motion. Specifically, it did not make the three factual inquiries required by *Schwartzmiller v. State*, *supra.* Consequently, the court failed to act consistently with the legal standards applicable to the question and thus abused its discretion. *Roberts v. Jensen*, *supra.*

b. *Under independent review, the court's denial of a continuance to obtain the testimony of the alibi witness was error.*

Upon independent review of the *Schwartzmiller v. State* factors, it is manifest that the trial should have been continued to compel the attendance of the alibi witness. While the state's conduct did not contribute to the unavailability of the alibi witness, the other two *Schwartzmiller* factors weight heavily in Mr. Kropp's favor.

The alibi witness's testimony was critical to Mr. Kropp's case. She was the only witness who could testify that she and he were together in St. Maries the weekend of the burglaries. Without her testimony, Mr. Kropp did not have an

affirmative defense to the charge. All that trial counsel was able to muster for his closing argument was a desultory attempt to impeach the credibility of Ms. Rutter. T p. 427, ln. 8-15.

Second, Mr. Kropp acted with due diligence because he had subpoenaed the witness.

3. Conclusion

Even if Mr. Kropp was voluntarily absent, the absence of the subpoenaed alibi witness was an independent and sufficient basis to continue the trial. The court abused its discretion in denying the motion to continue.

C. *The Court Should Find the Error Is Structural or, in the Alternative, not Harmless Beyond A Reasonable Doubt.*

1. An erroneous trial in absentia is structural error.

Where the error in question is a constitutional violation that affects the base structure of the trial to the point that the trial cannot serve its function as a vehicle for the determination of guilt or innocence, the appellate court shall vacate and remand. *State v. Perry*, 150 Idaho 209, 227-28 (2010).

This Court should find that an erroneous trial in absentia is structural error. In *Arizona v. Fulminante*, 499 U.S. 279 (1991), the Supreme Court stated a constitutional deprivation was a structural error when it affected the framework within which the trial proceeds, rather than simply an error in the trial process itself. *Id*, at 310. *See e.g., Gideon v. Wainwright*, 372 U.S. 335 (1963) (total deprivation of the right to counsel at trial); *Tumey v. Ohio*, 273 U.S. 510 (1927) (trial before a not impartial judge); *Vasquez v. Hillery*, 474 U.S. 254 (1986)

(unlawful exclusion of members of the defendant's race from a grand jury); *McKaskle v. Wiggins*, 465 U.S. 168, 177-178, n. 8 (1984) (the right to self-representation at trial); *Waller v. Georgia*, 467 U.S. 39, 49, n. 9 (1984) (right to public trial); *Sullivan v. Louisiana*, 508 U.S. 275 (1993) (defective reasonable doubt instruction). Like those errors, the right to be present at one's own criminal trial is of undeniable value but the effect of the deprivation of that right defies analysis by harmless-error standards because it affects "the framework within which the trial proceeds, and are not simply an error in the trial process itself." *State v. Perry*, 150 Idaho at 222, *quoting Fulminante*, 499 U.S. at 309-10.

Accordingly, the Court should vacate the convictions and remand for a new trial.

2. The finding of a violation of the right to compulsory process includes a finding the error was prejudicial.

The finding of a violation of the right to compulsory process includes a finding of the materiality of the missing testimony. To establish error from the denial of a continuance that was sought because of a witness's absence, a defendant must show, among other things, that the witness's testimony would have been material to his or her defense. *State v. Waggoner*, 124 Idaho 716, 723 (Ct. App. 1993). Thus, harmless error analysis in not applicable to this type of error. As is the case with a *Brady v. Maryland*, 373 U.S. 83 (1963) violation or a *Strickland v. Washington,* 466 U.S. 688 violation, the harmless error test is subsumed in the violation. *See, Kyles v. Whitley*, 514 U.S. 419, 435 (1995).

Accordingly, the Court should vacate the convictions and remand for a new

trial.

3. Alternatively, the state cannot show harmless error.

"A defendant appealing from an objected-to, non-constitutionally-based error shall have the duty to establish that such an error occurred, at which point the State shall have the burden of demonstrating that the error is harmless beyond a reasonable doubt." *State v. Perry*, 150 Idaho at 222. Here, Mr. Kropp has met his burden of proving objected-to error, but the state will not be able to meet its high burden of proof.

V. CONCLUSION

Mr. Kropp asks the Court to vacate the judgment and remand the case for further proceedings.

Respectfully submitted this day 12th of August 2020.

/s/ Dennis Benjamin
Dennis Benjamin
Attorney for Appellant

CERTIFICATE OF COMPLIANCE AND SERVICE

The undersigned does hereby certify that the electronic brief submitted is in compliance with all of the requirements set out in I.A.R. 34.1, and that an electronic copy was served on each party at the following email address(es): Idaho State

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Dated and certified this 12th day of August 2020.

/s/Dennis Benjamin
Dennis Benjamin