

UNREPORTED  
IN THE COURT OF SPECIAL APPEALS  
OF MARYLAND

No. 1903

September Term, 2015

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ROSETTA PRICE HORNE

v.

STATE OF MARYLAND

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Graeff,  
Kehoe,  
Shaw Geter,

JJ.

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Opinion by Shaw Geter, J.

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Filed: November 10, 2016

\*This is an unreported opinion, and it may not be cited in any paper, brief, motion, or other document filed in this Court or any other Maryland Court as either precedent within the rule of stare decisis or as persuasive authority. Md. Rule 1-104.

After a jury trial in the Circuit Court for Montgomery County, Rosetta Price Horne, appellant, was found guilty of financial exploitation of a vulnerable adult, financial exploitation of an individual at least 68 years of age, theft scheme with a value of more than \$100,000, and fraudulent misappropriation by a fiduciary. Horne was sentenced to incarceration for concurrent terms of ten years, with all but five years suspended, for the theft scheme, financial exploitation of a vulnerable adult, and exploitation of an individual at least 68 years of age, and a concurrent term of five years for fraudulent misappropriation by a fiduciary. This timely appeal followed.

### **ISSUE PRESENTED**

The sole issue presented for our consideration is whether the circuit court erred in trying Horne *in absentia*. Finding no error, we shall affirm.

### **FACTUAL BACKGROUND**

The issue presented does not require a detailed recitation of the facts. It is sufficient to note that this case has its genesis in an investigation into allegations that Horne and three of her children, Demetrius Price, Shawna Price, and Tammy Price,<sup>1</sup> engaged in the financial exploitation of Rene Cuzon du Rest, a gentleman in his eighties who suffered from “some form of dementia, probably Alzheimer’s disease,” for whom Horne was providing care. Horne and her children were subsequently indicted as co-defendants and elected to be tried by a jury. A significant amount of evidence was presented at trial

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<sup>1</sup> At the conclusion of the State’s case, judgment of acquittal was entered as to all charges against Horne’s son, Demetrius Price. The jury found Horne’s daughter, Shawn Price, not guilty on all counts, and a mistrial was declared with respect to the charges against Horne’s daughter, Tammy Price.

showing the financial exploitation of Cuzon du Rest. Julie Niel, a special investigator with the Montgomery County State’s Attorney’s Office testified as an expert in the analysis of financial crimes. She reviewed bank statements for Cuzon du Rest and each of the defendants, as well as credit card records, real estate records, tax and wage records, and retail records from several stores for the period from January 2012 through December 2014, focusing particularly on the period from May 2013 to May 2014. Niel gave detailed testimony in support of the State’s claim that Horne exploited Cuzon du Rest financially. In particular, she testified that Horne had obtained a power of attorney for Cuzon du Rest and, thereafter, a substantial number of cashier’s checks were issued from his accounts. Cuzon du Rest’s liquid assets as of May 2013 totaled \$586,016.99. A year later, those assets totaled \$31,552.35, and Cuzon du Rest had credit card debt of a little more than \$34,000, so that his liabilities exceeded his liquid assets. With that background in mind, we turn to the issue before us.

### **DISCUSSION**

Horne contends that the trial court erred in conducting a portion of the trial in her absence without taking the required steps to ensure that her absence was both knowing and voluntary, thereby depriving her of her “constitutional and rule-based right to be present for all meaningful trial proceedings.” She further asserts that even if the court determined correctly that she was voluntarily absent from trial, the court failed to exercise the required discretion in determining that the trial should continue in her absence. We disagree and explain.

On July 28, 2015, after the State and Horne’s co-defendant Demetrius Price had presented their cases, Horne was called to testify on her own behalf. After stating her name and address, Horne was asked where she was born. In response, Horne asked the trial judge if she could say something. The judge responded in the negative, stating that she had to answer the questions asked of her. Horne stated that she had a witness that she thought was going to appear at trial. The judge excused the jury and then gave Horne an opportunity to speak with her attorney. After the recess, defense counsel advised the court that Horne had been taken by emergency medical personnel to Shady Grove Hospital. The judge decided “to suspend proceedings for the day” in order to obtain more information about Horne’s situation.

The following morning, Horne did not appear for trial. Defense counsel advised the court that Horne had been discharged from Shady Grove Hospital the previous day, but went to the Washington Hospital Center that morning because, according to her daughter, Tammy Price, she was “out of breath.” Defense counsel suggested that the court would “have to issue a bench warrant,” and requested a mistrial. The prosecutor advised the court that she believed Horne started having trouble breathing several days before she was called to testify. The State provided the court with a certified copy of the complaint Horne had provided to the paramedics the day before. The State also advised that at Shady Grove Hospital, Horne complained that she had been suffering from shortness of breath for about four weeks. Horne received various tests at the hospital, was ultimately diagnosed with “dyspnea,” or shortness of breath, and was discharged at 4:27 p.m. Upon hearing that Horne was not at court on July 29<sup>th</sup>, the State contacted the Washington Hospital Center

and was told that Horne had been admitted and discharged. The State requested that the court issue a bench warrant and continue to try Horne *in absentia*. Counsel for Tammy Price agreed with the State that the case should go forward, but counsel for Horne objected. Counsel for Tammy Price advised the court that, according to some of Horne's children, Horne had a doctor's appointment scheduled for later that day. The court agreed that the case against Horne should continue in her absence, stating:

All right. As counsel has rightly stated, the question is to whether [sic] to proceed with this case and try one of the co-defendants in absentia. It's first whether the defendant's absence is knowing and voluntary, and if so, whether the public interest and need to proceed clearly outweighs that of the voluntarily absent defendant in attending trial.

The evidence that we now have in the record indicates that the, first of all, the co-defendant, Rosetta Horne, was clearly aware that she was being absent from this proceeding and that she is not here today. And, in fact, although the Court suspended the proceedings yesterday in order to give her an opportunity to treat any medical issue, number one, the evidence indicates that she has had this medical issue for some time, was aware of it, and there is no indication that she did anything to prepare for it.

Further, that she was discharged from the first hospital she went to at approximately 4:27 yesterday and then she, hours later, went to a second hospital from which she was discharged. This is clearly a person who is voluntarily looking for a reason not to appear in Court, and the Court does find that her absence is knowing and voluntary.

Further, the question of whether the public interest and the need to proceed clearly outweighs that of the voluntary absent defendant attending this case, attending the trial, well clearly, there had been a tremendous amount of resources put into this case. This case was started last week. We have three other co-defendants, and it is clear to the Court, that there is a greater public interest in continuing with the trial, as the co-defendants have a right to be heard on the jury they selected and to proceed to the end of this trial.

It would be prejudicial to them, as well as it would be to the public interest, to delay that in any way, or to excuse the presence of Rosetta Horne, the voluntarily absencing co-defendant.

Therefore, it is going to be the ruling of the Court that we will proceed with this case against all four individuals, and against Ms. Horne in absentia. We will also be issuing a bench warrant for Rosetta Horne, and I will order that that be done today, returnable to the Circuit Court, and that, if she is arrested during the time of this trial, then I'll ask that the Court be, that the bench warrant be returnable to me.

The jury returned to the courtroom and trial proceeded. Counsel for Horne stated that there were no witnesses in addition to Horne herself and, thereafter, Tammy Price was called to testify on her own behalf. During cross-examination of Tammy Price, the judge suspended the proceedings, excused the witness, and sent the jurors to the jury room because Horne had returned to the courtroom. Counsel for Horne asked the court to quash the bench warrant that had been issued for her. The judge addressed Horne saying, “it is imperative that you be here for every day of this trial for your own protection and to assist your counsel in your defense.” The judge quashed the bench warrant and the trial resumed with Horne present. Eventually, Horne was called to continue her testimony. After Horne took the stand, defense counsel stated, “[n]o further questions, Your Honor,” and rested. None of the other parties chose to cross-examine Horne.

It is well established that a criminal defendant “is entitled, as a constitutional right, under Maryland common law, and under Maryland Rule 4-231, to be present at trial.” *Collins v. State*, 376 Md. 359, 375 (2003)(citing *Pinkney v. State*, 350 Md. 201, 208-09 (1998)). The right of a defendant to be present at trial is embodied in Maryland Rule 4-231, which provides, in part, as follows:

(a) **When presence required.** A defendant shall be present at all times when required by the court. A corporation may be present by counsel.

(b) **Right to be present – Exceptions.** A defendant is entitled to be physically present in person at a preliminary hearing and every stage of the trial, except (1) at a conference or argument on a question of law; (2) when a nolle prosequi or stet is entered pursuant to Rules 4-247 and 4-248.

(c) **Waiver of right to be present.** The right to be present under section (b) of this rule is waived by a defendant:

(1) who is voluntarily absent after the proceeding has commenced, whether or not informed by the court of the right to remain; or

(2) who engages in conduct that justifies exclusion from the courtroom; or

(3) who, personally or through counsel, agrees to or acquiesces in being absent.

In *Pinkney*, the Court of Appeals discussed a defendant’s right to be present at trial and recognized that before trying a defendant *in absentia*, the trial court must both (i) find a knowing and voluntary waiver of the right to be present at trial, and (ii) exercise sound discretion in determining whether to proceed with the trial of an absent criminal defendant. *Pinkney*, 350 Md. at 213. The trial court must “generally be satisfied of two primary facts: that the defendant was aware of the time and place of trial, and that the non-appearance was both knowing and sufficiently deliberate to constitute an agreement or acquiescence to the trial court proceeding in his or her absence.” *Id.* at 215-16. “[T]he record must reflect that adequate inquiry has been made to ensure that a defendant’s absence is not in fact involuntary. A court cannot presume waiver from a silent record.” *Id.* at 217 (citing *State v. Collins*, 265 Md. 70, 80 (1972)).

With regard to the trial court’s exercise of discretion to determine whether to proceed with trial in the absence of a criminal defendant, the court must balance “the right

of the defendant to be present at trial, and the need for the orderly administration of the criminal justice system.” *Id.* at 213. Such discretion “should be exercised after a review of all the appropriate concerns and with the recognition that the public interest and confidence in judicial proceedings is best served by the presence of the defendant at trial.” *Id.* at 218. That trial has already commenced is “a significant factor which properly informs the trial court as to whether to exercise its discretion to proceed with the trial of a criminal defendant after the court has found a voluntary relinquishment of the right to be present.” *Id.* at 221-22. Although “the point at which the trial commences” is not “a sacrosanct line of demarcation,” the Court in *Pinkney* noted:

Recognition of the significance of the commencement of trial reflects the common sense notion that a defendant who is present on the day of trial would generally be aware of the obligation to be present, and thus more culpable in his or her absence. In addition, once the trial has commenced, the State’s interest in a timely conclusion to that trial significantly increases due to the expenditure of judicial and other resources.

*Id.* at 222 (citations omitted).

In the case at hand, the State argues that Horne waived her argument that the trial failed to conduct the necessary investigation to determine whether her absence was knowing and voluntary because, on July 29, 2015, defense counsel stated that the court was “obviously going to have to issue a bench warrant, I would think, and I would ask for a (unintelligible) or mistrial as to Ms. Horne.” We agree.

The sole purpose of a bench warrant “is to assure the presence of the person in court so that the hearing or trial may proceed.” *Arrington v. Dep’t of Human Resources*, 402 Md. 79, 105 n.12 (2007). There was no suggestion by counsel that Horne was involuntarily



or unknowingly absent from the trial. Counsel’s statement clearly acknowledged her voluntary absence and the need to for a bench warrant to secure her attendance. Thus, Horne’s argument on appeal is inconsistent with the position defense counsel took at trial. As a general rule, parties are not free to assert one position at trial and another inconsistent position on appeal. *Burch v. State*, 346 Md. 253, 289 (1997); *Claybourne v. State*, 209 Md. App. 706, 748 n. 28, *cert. denied*, 432 Md. 212 (2013). Waiver is the “intentional relinquishment or abandonment of a known right.” *State v. Rich*, 415 Md. 567, 580 (2010) (internal quotations and citations omitted). *See also Booth v. State*, 327 Md. 142, 180 (waiver found where counsel affirmatively advised court there was no objection); *Choate v. State*, 214 Md. App. 118, 130, *cert. denied*, 436 Md. 328 (2013) (“We are especially disinclined to take the extraordinary step of noticing plain error where, as here, the appellant affirmatively (as opposed to passively) waived his objection”). Here, defense counsel’s statement affirmatively acknowledged the need for a bench warrant to secure Horne’s attendance at trial and waived any claim that the trial court failed to conduct the necessary investigation to determine that Horne’s absence from trial was knowing and voluntary.

Even if the issue had not been waived, Horne would fare no better. In *Reeves v. State*, 192 Md. App. 277 (2010), we addressed a similar situation. In that case, Reeves, who was present throughout the trial, failed to appear in court when the verdict was read. *Reeves*, 192 Md. App. at 287. On appeal, Reeves argued that the trial court failed to conduct a reasonable inquiry to determine whether his absence from court was voluntary. *Id.* Although the trial judge in *Reeves* did not conduct an extensive inquiry on the record

as to Reeves’s whereabouts or the reason for his absence, we held that “the circumstances provided the judge a sufficient basis to conclude that [Reeves] voluntarily failed to appear that day.” *Id.* at 293.

Those circumstances included that Reeves was present during the entire presentation of evidence, argument, and jury instructions. *Id.* The trial judge advised the jurors to return at 9 a.m. on the day following the instructions and told counsel and Reeves “that they were not required to reassemble at 9 a.m.,” but that “deliberations would take at least two hours, ‘so just make certain we know where you’re at.’” *Id.* at 294. When Reeves failed to appear, defense counsel advised that he had spoken with Reeve’s family members and Reeves and believed that he was on his way to court. *Id.* “Other significant indicia pointed to a conclusion that [Reeves] voluntarily failed to appear for the verdict.” *Id.* The evidence against Reeves was substantial, he did not present any evidence in his defense, and he was likely to be convicted and incarcerated immediately after the verdict was rendered. *Id.* at 295. In light of these circumstances, we concluded that “although the trial judge did not conduct an elaborate inquiry on the record about [Reeves’s] whereabouts,” there was a sufficient basis to conclude that Reeves voluntarily failed to appear in court. *Id.* In addition, we took notice of the fact that, at sentencing, Reeves and his counsel acknowledged that Reeves had fled and was voluntarily absent from the rendering of the verdict. *Id.* As a result, any error in the court’s process of determining whether Reeves’s absence was voluntary was harmless beyond a reasonable doubt. *Id.*

In contrast to *Reeves*, in the case at hand, the trial judge conducted a much more extensive inquiry on the record into Horne’s whereabouts and the reason for her absence.

Horne was clearly aware of the time and place of the trial, having attended all of the pre-trial motions hearings and every day of trial up to and after she absented herself from the proceedings. After Horne was taken to the hospital, the trial judge specifically stated that he was “not going to act without additional information” as to Horne’s condition, suspended proceedings for the rest of that day, advised the parties and counsel that proceedings would resume on the following day at 9:30 a.m., and asked defense counsel to obtain information and “perhaps some documentation” regarding Horne’s condition. The judge stated that “I am just not going to guess at this point what’s going on.”

The following morning, the judge received information from Horne’s counsel, the prosecutor, and counsel for Tammy Price, that Horne had been discharged from both Shady Grove Hospital and the Washington Hospital Center, after she had been diagnosed as being out of breath. It was noted that she had high blood pressure, and that a doctor’s appointment had been scheduled for that afternoon. After Horne arrived in court on July 29, 2015, she offered no information to suggest that her absence from the proceedings had been anything other than voluntary. The court’s investigation clearly provided sufficient evidence to support its determination that Horne was voluntarily and knowingly absent from the trial.

Similarly, the trial court exercised and did not abuse its discretion in determining to proceed in Horne’s absence. Prior to Horne’s absence, pretrial motions, jury selection, and trial had consumed ten days. The State had presented its entire case and one of Horne’s co-defendants had presented his entire case. The need for the orderly administration of the criminal justice system and the fact that trial had already commenced were significant

factors for the court to consider. Indeed, the trial court specifically recognized that “there had been a tremendous amount of resources put into this case,” that trial had commenced, that “the co-defendants have a right to be heard on the jury they selected and to proceed to the end of the trial,” and that it would prejudice both the co-defendants and “the public interest” to delay the trial. Moreover, Horne was absent only for the direct examination and part of the cross-examination of her daughter, Tammy Price. Upon her return, she did not request any additional time for cross-examination or discussion with her attorney. For all these reasons, we conclude that the trial court exercised its discretion, and did not abuse its discretion, in determining to proceed in Horne’s absence.

**JUDGMENTS OF THE CIRCUIT COURT  
FOR MONTGOMERY COUNTY  
AFFIRMED; COSTS TO BE PAID BY  
APPELLANT.**