Circuit Court for Baltimore City
Case No. 117145004

UNREPORTED

IN THE COURT OF SPECIAL APPEALS

OF MARYLAND

No. 2089

September Term, 2018

JERMAINE HARRELL

v.

STATE OF MARYLAND

Berger,
Arthur,
Moylan, Charles E., Jr.
(Senior Judge, Specially Assigned),

JJ.

PER CURIAM

Filed: June 11, 2019

Convicted by a jury in the Circuit Court for Baltimore City of first-degree assault and second-degree assault, Jermaine Harrell, appellant, presents one question for our review:

> Did the trial court violate Mr. Harrell's right to be present at every stage of the trial by proceeding with jury instructions and closing argument in his absence?

For the following reasons we shall affirm.

BACKGROUND

Mr. Harrell was charged with attempted first-degree murder, first-degree assault, and lesser included offenses, and was free on bail at the time of trial. He was not present in the courtroom when the case was called on the first day of trial. Defense counsel explained that Mr. Harrell had gone across the street for a cup of coffee and would be there "briefly." The court asked defense counsel to text Mr. Harrell to let him know that he would not be allowed to bring coffee into the courtroom and remarked that it was "unusual" for someone charged with attempted murder to stop for coffee before their trial. While they waited for Mr. Harrell, the court and counsel addressed several preliminary matters.

When Mr. Harrell arrived, the court advised him as follows: "So, Mr. Harrell, I am a very punctual judge. So when court proceeds, with or without you, we're going to proceed. So we've already called for a jury of 90. So I just expect punctuality. Okay?" Mr. Harrell responded, "Yes, ma'am. Yes, Your Honor."

At the end of the first day of trial, which was on a Friday, the jury was instructed to report to the jury room at 9:15 a.m. the following Monday. After the jury was excused, the

court advised Mr. Harrell, "please be here at 9:15, okay?" and Mr. Harrell replied, "Yes, Your Honor."

Mr. Harrell was not present in the courtroom when the case was called for trial at 9:20 Monday morning. Defense counsel explained that he had just spoken to Mr. Harrell, who was in an Uber on his way to court and would be there "as fast as he can." The court responded: "Well, I told everybody to be here at 9:15. And I indicated to your client, 'cause I did urge him to be punctual, that we would start at 9:15, and it's now 9:22. So we're proceeding." Defense counsel reiterated that Mr. Harrell was "trying to get here as quickly as he can," to which the court replied:

> Right. And I indicated on Friday that if he wasn't present we were just going to proceed in absentia. He seemed to understand that. It's now 9:20. We have a full complement of jurors. So if you'll just review the verdict sheet and jury instructions. Then when Mr. Harrell decides to join us, he can.

After discussing jury instructions with counsel, the court called for the jury. Defense counsel objected "for the record" to proceeding without Mr. Harrell and explained that Mr. Harrell thought he was supposed to be there at 9:30 instead of 9:15. The court proceeded to instruct the jury and, at 9:45, called upon the prosecutor to give the State's closing argument.[1] The prosecutor began by noting Mr. Harrell's tardiness, commenting that Mr. Harrell was "showing us who he is."

[1] According to the prosecutor, it was 9:42 when she began her closing argument. We shall adopt the time references used by the court.

The prosecutor's closing argument was paused at approximately 9:52, when the court called counsel and Mr. Harrell, who was then present, to the bench, and the following colloquy ensued:

> THE COURT: Why are you late?
>
> MR. HARRELL: I had my times confused.
>
> THE COURT: What time did you think?
>
> MR. HARRELL: I thought we were starting at 9:30.
>
> THE COURT: Okay. Well, even if it was 9:30, you're still 20 minutes late. But now you're really 35 minutes late 'cause it's now 9:52 or 53. But remember I told you that - -
>
> MR. HARRELL: Yes, ma'am.
>
> THE COURT: - - if you were not here at 9:15, we were just going to go ahead and proceed, right? . . . Remember on Friday when I said tell the jury and everybody else to be here at 9:15. And I said that if you weren't here we were just going to proceed. And that's why I knew you were going to be here on time, right? And you said yes? Yes?
>
> MR. HARRELL: Yes, ma'am . . . .

Trial then resumed. As stated above, the jury convicted Mr. Harrell of first-degree assault and second-degree assault.

DISCUSSION

Although a criminal defendant has the right to be present at all stages of trial, this right is subject to waiver. *State v. Hart*, 449 Md. 246, 265 (2016). Maryland Rule 4-231(c) provides that the right to be present at trial 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.

"A finding by the trial court of a waiver of the right to be present does not *require* the court to proceed with a trial *in absentia*; it is merely a first step which *permits* the court to do so." *Pinkney v. State*, 350 Md. 201, 218 (1998). "After resolving the question of waiver, the court must exercise its discretion and decide whether to proceed in the defendant's absence." *Id*. "Trial *in absentia* is not favored." *Id.*

Although "voluntary absence must be clearly established[,]" there is no specific "litany which the trial court must slavishly follow in order to establish that a defendant's absence is knowing and voluntary." *Id*. at 217 (citation omitted). The court may draw an initial inference that a defendant's absence was voluntary "[i]f reasonable inquiry does not suggest that the defendant's absence was involuntary, and if the information before the court implicitly suggests no other reasonable likelihood of involuntary absence." *Id.* at 216-17. *See also Reeves v. State*, 192 Md. App. 277, 295 n. 5 (2010) ("a finding of voluntary absence may be inferred from the circumstances.").

Mr. Harrell asserts that the trial court did not make a finding that he knowingly and voluntarily waived his right to be present, and that the record does not support such a finding. We disagree.

In *Reeves*, we upheld a trial court's determination that a defendant's absence was voluntary and found no abuse of discretion in the court's decision to proceed in the defendant's absence on facts similar to those in the present case. There, the defendant was

not present when the jury reached its verdict. *Id.* at 286. Defense counsel informed the court that he [or she] had communicated with the defendant, and that "[h]e said he's on his way." *Id*. In affirming the trial court's decision to proceed under those circumstances, we held that:

> [d]espite counsel's assertion that appellant said he was "on his way," appellant's absence two hours and twenty minutes after the jury was told to return, after having been instructed the previous evening to "make certain we know where you're at," was evidence from which the trial judge could conclude that appellant voluntarily failed to appear.

Id. at 294.

Here, defense counsel's representation that Mr. Harrell was "on his way," despite the fact that the court had previously advised Mr. Harrell that trial would proceed without him if he failed to be punctual, and the lack of any explanation that might have led to a finding that Mr. Harrell's absence was involuntary, was sufficient for the court to conclude that Mr. Harrell was voluntarily absent and/or had agreed or acquiesced to the trial proceeding in his absence, so as to constitute a waiver under Rule 4-231(c) of his right to be present at trial. That Mr. Harrell himself offered no explanation for his absence, other than that he "had his times confused," bolsters our conclusion. *See Reeves*, 192 Md. App. at 299 ("evidence that a defendant's absence was voluntary that comes to light after a trial court proceeds in the defendant's absence may be considered in determining whether the trial court's decision was erroneous.")

Mr. Harrell alternatively asserts that even if the record supported a finding of voluntary absence, the court abused its discretion in proceeding with trial after being advised that he was on his way. We disagree. "Circumstances exist when an accused's

voluntary absence and defiance of the court is itself sufficient to justify a trial in the defendant's absence." *Pinkney*, 350 Md. at 221. Based on the facts and circumstances here, we find no abuse of discretion in the court's decision to proceed in Mr. Harrell's absence.

JUDGMENTS OF THE CIRCUIT COURT FOR BALTIMORE CITY AFFIRMED. COSTS TO BE PAID BY APPELLANT.