

NOTICE

Memorandum decisions of this Court do not create legal precedent. See Alaska Appellate Rule 214(d) and Paragraph 7 of the Guidelines for Publication of Court of Appeals Decisions (Court of Appeals Order No. 3). Accordingly, this memorandum decision may not be cited as binding authority for any proposition of law, although it may be cited for whatever persuasive value it may have. See McCoy v. State, 80 P.3d 757, 764 (Alaska App. 2002).

IN THE COURT OF APPEALS OF THE STATE OF ALASKA

MARIAN REBECCA SOIFUA,

Appellant,

v.

STATE OF ALASKA,

Appellee.

Court of Appeals No. A-12923
Trial Court No. 3AN-16-01503 CR

MEMORANDUM OPINION

No. 6905 — October 28, 2020

Appeal from the Superior Court, Third Judicial District,
Anchorage, Warren W. Matthews, Judge.

Appearances: Rachel E. Cella, Assistant Public Defender, and
Samantha Cherot, Public Defender, Anchorage, for the
Appellant. Diane L. Wendlandt, Assistant Attorney General,
Office of Criminal Appeals, Anchorage, and Kevin G. Clarkson,
Attorney General, Juneau, for the Appellee.

Before: Allard, Chief Judge, and Wollenberg and Harbison,
Judges.

Judge HARBISON.

Three asset protection officers confronted Marian Rebecca Soifua when she attempted to leave Walmart with unpaid merchandise. Soifua, who was armed with a handgun, physically assaulted and spit on one of the employees. Based on this incident,

Soifua was charged with first-degree robbery, third-degree assault, first-degree harassment, fourth-degree theft, and two counts of fourth-degree assault.¹

On the first day of trial, Soifua failed to appear. This was not Soifua's first failure to appear in the case: she had also failed to appear for two scheduled pretrial hearings. With a prospective jury panel waiting and with Soifua not responding to her attorney's attempts to contact her, the trial court issued a warrant for Soifua's arrest.

By the next day, Soifua's attorney had succeeded in locating her and the trial was able to proceed with Soifua present. Addressing Soifua directly, the trial court warned that it would not "countenance any further absences." Soifua assured the court that she understood.

The following day, which was the third day of the trial, Soifua was late by over an hour. According to Soifua's attorney, Soifua had experienced car trouble and had run out of minutes on her prepaid cell phone, so she was unable to call anyone for a ride. Once Soifua finally arrived, the trial court addressed her directly, warning her that "the court doesn't accept any of these excuses" and that further absences could result in her arrest. Soifua acknowledged this warning, and her attorney assured the court that there would be no further transportation issues because someone from the attorney's office would pick Soifua up at 7:00 a.m. each day and make sure she arrived timely for the start of the trial day at 8:30 a.m.

On the fourth day of trial, Soifua was again late. Neither she nor her attorney offered any explanation for her tardiness.

On the fifth day of trial, Soifua was forty-five minutes late. Soifua's attorney explained that her office had sent a taxi to pick up Soifua at a Fred Meyer store

¹ AS 11.41.500(a)(1), AS 11.41.220(a)(1)(A), former AS 11.61.118(a)(1) (2016), AS 11.46.150(a), and AS 11.41.230(a)(1), respectively.

at 7:45 a.m., but when the taxi arrived, the driver “proceeded to go inside Fred Meyer’s and do some grocery shopping,” forcing Soifua to “wait by the cab for him to come out.” Soifua did not arrive at the courthouse until 9:15 a.m. Concerned about Soifua’s repeated tardiness and failures to appear — and anticipating that jury deliberation would begin within a few hours — the trial court considered remanding Soifua into custody until the jury’s verdict. Soifua’s attorney assured the trial court that a remand was unnecessary because Soifua would report to her attorney’s office the following morning at 8:30 a.m. and remain there while the jury continued deliberating.

The jury reached a verdict shortly before 9:00 a.m. on the sixth day of trial. The jury acquitted Soifua of first-degree robbery and one count of fourth-degree assault, but convicted her on the remaining charges.

Soifua was not present when the jury returned its verdicts. Her attorney was unable to contact her, and had no information on why Soifua had not come to the attorney’s office at 8:30 a.m., as they had discussed. Finding that Soifua’s pattern of conduct constituted a voluntary absence, the trial court accepted the jury’s verdicts and issued a warrant for Soifua’s arrest.

Two months later, Soifua was arrested on the warrant.

On appeal, Soifua challenges the court’s finding that she was voluntarily absent. She argues the court did not expressly warn her that trial could proceed in her absence, and never subsequently inquired into her reasons for failing to appear.

We reject Soifua’s claim. Although a defendant has a right to be present at every stage of trial, including the return of the verdict, that right can be waived if the defendant is “voluntarily absent” after the trial has commenced.² Here, the record

² Alaska R. Crim. P. 38(c) (“A trial may continue without the presence of a defendant if the defendant is voluntarily absent after the start of the trial[.]”); *see also Lee v. State*, 509 (continued...)

establishes that Soifua’s absence at the time of the verdict was not a one-time occurrence caused by circumstances beyond her control, but the culmination of a pattern of conduct manifested through six days of trial, despite repeated warnings from the trial court.³ Soifua was not merely delayed on the final day of trial; she failed to appear at all and subsequently remained at large for two months.⁴

Soifua bore the burden of establishing that her failure to appear was involuntary.⁵ Yet, she never offered to show that her absence was involuntary and never requested an opportunity to present additional evidence, even though her failure to appear for the verdict and subsequent arrest on the warrant were addressed in the presentence report and at her sentencing hearing.⁶ In light of Soifua’s established pattern

² (...continued)

P.2d 1088, 1090 (Alaska 1973) (“It is clear that a voluntary absence would constitute a waiver of the right to be present.”).

³ *Cf. Taylor v. United States*, 414 U.S. 17, 20 (1973) (“It is wholly incredible to suggest that petitioner, who was at liberty on bail, had attended the opening session of his trial, and had a duty to be present at the trial, . . . entertained any doubts about his right to be present at every stage of his trial. It seems equally incredible to us, as it did to the Court of Appeals, ‘that a defendant who flees from a courtroom in the midst of a trial — where judge, jury, witnesses and lawyers are present and ready to continue — would not know that as a consequence the trial could continue in his absence.’” (quoting *United States v. Taylor*, 478 F.2d 689, 691 (1st Cir. 1973))).

⁴ Soifua subsequently was charged with and convicted of felony failure to appear in connection with her absence on the final day of the trial.

⁵ *See Charliaga v. State*, 758 P.2d 135, 137 n.1 (Alaska App. 1988).

⁶ *See Banfield v. State*, 1996 WL 33686477, at *6 (Alaska App. Jan. 31, 1996) (unpublished) (holding that the trial court did not err in concluding that defendant’s absence from the hearing was voluntary, and noting that defendant “never offered to show that his absence was other than voluntary and never asked the court for an opportunity to present additional evidence”).

of absences and tardiness at her trial, and Soifua's failure to offer any evidence of involuntariness, we conclude that the trial court did not err in finding that Soifua was voluntarily absent at the time of her verdict.⁷

The judgment of the superior court is AFFIRMED.

⁷ Because we conclude that Soifua was voluntarily absent, we need not reach her argument that an involuntary absence would constitute structural error.