NO. 29513-3-III

IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON DIVISION THREE

STATE OF WASHINGTON,

Respondent,

v.

MERLE HARVEY,

Appellant.

ON APPEAL FROM THE SUPERIOR COURT OF THE STATE OF WASHINGTON FOR SPOKANE COUNTY

The Honorable Tari S. Eitzen, Judge

SUPPLEMENTAL REPLY BRIEF OF APPELLANT

DAVID B. KOCH
Attorney for Appellant

NIELSEN, BROMAN & KOCH, PLLC
1908 East Madison
Seattle, WA 98122
(206) 623-2373

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A. STATEMENT OF THE CASE IN REPLY

Several times, in its Supplemental Brief of Respondent, the State asserts that Harvey has conceded the courtroom was physically open to the public throughout jury selection. Supp. Brief of Respondent, at 3, 6, 8, 14. The State does not cite to a specific location in the Supplemental Brief of Appellant where it finds this concession and, indeed, there was no concession.

The State may be focusing on page 3 of the brief, which says, "While Harvey and any spectators in the courtroom could observe and hear most of jury selection, the trial judge handled portions of the proceedings at private sidebar conferences." Supp. Brief of Appellant, at 3 (emphasis added). "Any" is commonly used to describe an undetermined quantity. This was not intended as a concession the courtroom was continuously physically open to the public throughout jury selection. In his Statement of Additional Grounds for Review, Harvey has ably argued the courtroom was, in fact, closed to the public.

B. ARGUMENT IN REPLY

1. HARVEY'S CHALLENGES ARE PROPERLY BEFORE THIS COURT.

The State argues that Harvey cannot challenge the violation of his right to public trial under article 1, § 22 and the Sixth Amendment because his attorney did not object below. Brief of Respondent, at 4-5. But it is firmly established that the absence of an objection is not a waiver, and a violation of these rights can be raised for the first time on appeal. See, e.g., State v. Wise, 176 Wn.2d 1, 13 n.6, 288 P.3d 1113 (2012); State v. Strode, 167 Wn.2d 222, 229, 217 P.3d 310 (2009); State v. Brightman, 155 Wn.2d 506, 517-518, 122 P.2d 150 (2005); State v. Bone-Club, 128 Wn.2d 254, 257, 906 P.2d 325 (1995).

The State also argues that Harvey may not properly argue a violation of the public's and press's right to open proceedings under article 1, § 10 and the First Amendment because he lacks standing. Brief of Respondent, at 1, 6-8. But the Washington Supreme Court has indicated this remains an open question. Wise, 176 Wn.2d at 15-16 n.9. Harvey believes he has standing and, in any event, he has properly asserted his own right to a public trial.

The State also contends that requiring open jury selection usually benefits the prosecution and harms the defendant. As an example, it asserts that prosecutors often accept the panel already seated in the box, leaving jurors aware that any peremptory removals are by the defense, "which most defendants, their counsel, and the court find unacceptable." Brief of Respondent, at 8.

The State provides no citation to authority for these assertions. The significant benefits to a criminal defendant of an open jury selection process are well recognized. See Supplemental Brief of Appellant, at 7-8. Moreover, the State's example does not reflect what happened at Harvey's trial. The written sheet documenting peremptory challenges – filed weeks after the fact – shows multiple prosecution challenges. See CP 439. Thus, even accepting as legitimate the State's general concern about disclosing peremptory challenges, there was no valid reason to conceal the process from the public here.

2. THE PRIVATE SIDEBAR CONFERENCES AND PEREMPTORY CHALLENGES VIOLATED HARVEY'S RIGHT TO PUBLIC TRIAL.

The State argues the entire jury selection process was open to the public "since all substantive matters were conducted in open

court," the private sidebar conferences were "ministerial," and "the public record clearly reflects" what took place. Brief of Respondent, at 10. This is incorrect.

The private sidebar conferences, in which only the court and counsel participated, were not conducted in the open. It was impossible for the public to determine why jurors were being dismissed (were they being dismissed for something they stated on the record or for some other reason?) and impossible to determine the parties' positions on the dismissals (who supported removal, who opposed it, and why?). The conferences were not ministerial, since they determined who would decide Harvey's case. Moreover, the "public record" on which the State now relies to explain the dismissal of jurors 19, 43, 60, and 77 is the transcript of jury selection, prepared years after trial, which finally reveals what was said during the sidebar conferences. See Supp. Brief of Respondent, at 10-11. That information simply was not available during the trial itself. Moreover, the State makes no attempt to explain (and even the transcript does not reveal) the reason for dismissal of juror 78. See SRP 297.

Contrary to the State's argument, the sidebar conferences were not akin to legal matters from which members of the public

traditionally have been excluded. See Supp. Brief of Respondent, at 11-12 (citing cases having nothing to do with jury selection). Jury selection issues – for cause and peremptory challenges in particular – have traditionally been litigated in the public eye. State v. Wilson, 174 Wn. App. 328, 344, 298 P.3d 148 (2013) (potential jurors may be excused outside public view only if they do not amount to for cause or peremptory excusals traditionally done in open).

Of course, the sidebar conferences were not the only problem. The public could not assess the peremptory challenges, either. As discussed in Harvey's opening brief, without an ability to know which party used a peremptory challenge against which juror, it was impossible to discern, for example, whether a particular side had improperly targeted a protected group based on gender or race. See Supp. Brief of Appellant, at 12; see also State v. Saintcalle, ___ Wn.2d ___, ___ P.3d ___, 2013 WL 3946038, at *7, *30-32, *46-47 (Aug. 1, 2013) (lead opinion, concurrence, and dissent underscore harm resulting from improper race-based exercises of peremptory challenges and difficulty of prevention).

The sidebar conferences and chosen method for peremptory challenges denied Harvey his right to a public trial. Because this is structural error, his convictions must be reversed.

3. HARVEY WAS DENIED HIS RIGHT TO BE PRESENT FOR ALL CRITICAL STAGES OF TRIAL.

Harvey maintains that his absence from the sidebar conferences violated his federal rights under Sixth and Fourteenth Amendments and his state constitutional rights under the even greater guarantees of article 1, § 22. In response, the State only addresses the federal claim, disputing a violation. Brief of Respondent, at 14.

Initially, the State points out that Harvey previously alleged an unrelated violation of his right to be present (arguing he should have been present when the court answered two jury inquiries), which was rejected by this Court in its 2012 unpublished opinion. The State then argues Harvey should not now be permitted to "re-litigate the issue." See Brief of Respondent, at 12.

The State's argument should be rejected for several reasons. First, the two issues rely on entirely different facts. Second, the new issues *supplement* the original arguments on appeal; this is not a second appeal or collateral attack in which a

defendant essentially seeks reconsideration of a previously rejected claim from a final decision in a prior appeal. Third, and related to the second point, the State's position fails to acknowledge Harvey's significant attempts to obtain a transcript of voir dire prior to a decision in his case so that he could raise any issues it revealed. The trial court improperly prevented Harvey from making the current arguments earlier in the appeal process by unreasonably refusing a transcript of voir dire. The State now seeks to penalize Harvey further for a judicial mistake he fought hard to avoid.

Regarding the merits of Harvey's position, the State points out that, whereas Mr. Irby was not present with his attorney when potential jurors were released, Harvey was in the courtroom when his attorney discussed the release of jurors with opposing counsel and the court at sidebar. Brief of Respondent, at 14. But the fact remains that these sidebar conferences were purposefully secret and their content kept from everyone but the attorneys and the judge, including Harvey. As a practical matter, Harvey was no more involved during these discussions than Irby. The presence guarantee would be extremely anemic if merely being nearby

during a critical stage of trial, without any ability to hear what was happening, satisfied its requirements.

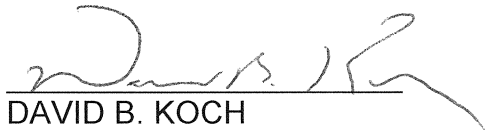
C. CONCLUSION

For the reasons discussed in Harvey's Supplemental Brief of Appellant, his Statement of Additional Grounds for Review, and this Supplemental Reply Brief, this Court should reverse and remand for a new trial.

DATED this 9th day of September, 2013.

Respectfully submitted,

NIELSEN, BROMAN & KOCH



DAVID B. KOCH
WSBA No. 23789
Office ID No. 91051
Attorneys for Appellant

LAW OFFICES OF
NIELSEN, BROMAN & KOCH, P.L.L.C.
1908 E MADISON ST.
SEATTLE, WASHINGTON 98122
Voice (206) 623-2373 · Fax (206) 623-2488
WWW.NWATTORNEY.NET

ERIC J. NIELSEN
ERIC BROMAN
DAVID B. KOCH
CHRISTOPHER H. GIBSON

OFFICE MANAGER
JOHN SLOANE

LEGAL ASSISTANT
JAMILAH BAKER

DANA M. LIND
JENNIFER M. WINKLER
ANDREW P. ZINNER
CASEY GRANNIS
JENNIFER J. SWEIGERT

OF COUNSEL
K. CAROLYN RAMAMURTI
JARED B. STEED

State v. Merle Harvey

COA No. 29513-3-III

Certificate of Service by email

I Patrick Mayovsky, declare under penalty of perjury under the laws of the state of Washington that the following is true and correct:

That on the 9th day of September, 2013, I caused a true and correct copy of the **Supplemental Reply Brief of Appellant** to be served on the party / parties designated below by email per agreement of the parties pursuant to GR30(b)(4) and/or by depositing said document in the United States mail.

Spokane County Prosecuting Attorney
kowens@spokanecounty.org

Merle Harvey
DOC No. 818251
Clallam Bay Corrections Center
1830 Eagle Crest Way
Clallam Bay, WA 98326

Signed in Seattle, Washington this 9th day of September, 2013.

X Patrick Mayovsky