675605

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NO. 67560-5-I

COURT OF APPEALS OF THE STATE OF WASHINGTON

DIVISION I

STATE OF WASHINGTON,

Respondent,

v.

ISAIAH KALEBU,

Appellant.

APPEAL FROM THE SUPERIOR COURT FOR KING COUNTY

THE HONORABLE MICHAEL HAYDEN

BRIEF OF RESPONDENT

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A. ISSUES PRESENTED

1. Did the trial court properly exercise its discretion in refusing to strike the entire jury pool summoned, where Kalebu objected that the pool included both King County case assignment areas in violation of LGR 18, and the judge did disqualify and excuse all jurors from outside the correct case assignment area?

2. Did Kalebu waive any objection to his absence from a chambers conference between his attorneys and the judge, where his attorneys invited any error when they requested the conference occur in a location where Kalebu could not observe it from his remote viewing location?

3. Was the court's consultation with defense counsel as to the procedure by which Kalebu would testify not a critical stage of trial that would require Kalebu's presence?

4. Was any error in Kalebu's absence from a brief chambers conference between his attorneys and the judge harmless beyond a reasonable doubt?

B. STATEMENT OF THE CASE

1. PROCEDURAL FACTS.

The defendant, Isaiah Kalebu, was charged with five crimes: 1) aggravated murder in the first degree of Theresa Butz; 2) felony murder in the first degree of Theresa Butz; 3) attempted murder in the first degree of Jennifer Hopper; 4) rape in the first degree of Jennifer Hopper; and 5) burglary in the first degree, all occurring July 18-19, 2009. CP 138-41. Each charge included an allegation that Kalebu was armed with a deadly weapon. Id. Counts 2-4 included the aggravating factor that the defendant acted with deliberate cruelty to the victim. Id. Count 5 also charged that the crime was committed with sexual motivation and that the victim of the burglary was present when the burglary occurred. Id. The prosecutor decided not to seek imposition of the death penalty. 7RP 2.[1]

Kalebu was tried in King County Superior Court, the Honorable Michael Hayden presiding. 1RP 2. A jury found Kalebu guilty as charged on all counts and found that all of the special allegations had been proved. CP 233-49. It concluded that the

[1] The Verbatim Record of Proceedings will be cited by volume, consecutively numbered, in the same manner as Appellant. A table listing the volumes and the hearing dates included in each is attached as Appendix 1.

premeditated murder charged in Count 1 was committed in the course of, in furtherance of, or in immediate flight from both rape in the first degree and burglary in the first degree. CP 235-36.

The trial court sentenced Kalebu to the mandatory term of life without the possibility of early release on the aggravated murder conviction. CP 288. Relying on the aggravating factor of deliberate cruelty found by the jury as to count 3 and 4, the court imposed exceptional sentences upward on those counts. CP 288, 283-84. The total sentence imposed was life plus 1176 months. CP 288.

2. THE CRIMES.

On the evening of July 18, 2009, Theresa Butz grilled steaks in the backyard of her home at 727 South Rose Street in the South Park neighborhood of Seattle and she and Jennifer Hopper ate dinner inside. 37RP 74, 132. The couple went to bed together about midnight, in the northwest bedroom. 37RP 116, 137. Although they were careful to lock the doors of the home, they did leave their windows open. 37RP 142, 157.

When Hopper woke, a stranger who was Isaiah Kalebu stood next to the bed, naked, with a knife in his hand. 37RP 138, 142. He was a slim, muscular black man with short hair.

37RP 142. Kalebu immediately put the knife to Hopper's throat and told her to be quiet; he said that he did not want to hurt her and just wanted sex. 37RP 139. Butz also woke up and Kalebu directed Butz to undress. 37RP 139-40.

Kalebu then raped both Hopper and Butz many times, always holding that large knife. 37RP 142-49, 154; 38RP 11, 31. After the first rape, Kalebu shut all three of the windows in the bedroom. 37RP 142. He then raped both victims vaginally, orally, and anally. 37RP 144, 148, 149; 38RP 10-12, 14.

During this series of rapes, Kalebu stopped at one point and leaned against the dresser, knife in hand, watching the two women. 37RP 153-54. Hopper could see him there, in the light coming through the window from the street. 38RP 10-11. Kalebu asked the women if they had any money; they said they had no cash but he could have whatever he wanted from their purses, pleading with Kalebu not to hurt them. 37RP 154. Kalebu said he would not hurt them, then continued his assaults. 37RP 154; 38RP 12.

After the first ten rapes, Kalebu wiped himself off with a pair of Butz's khaki shorts that were at the foot of the bed. 38RP 15. He then raped both women orally, and raped Hopper again vaginally. 38RP 23-26, 31. During that rape of Hopper, Butz put

up some physical resistance, and Kalebu told Butz to stop. 38RP 33. Hopper told Butz to stop as well, because Hopper did not want to make Kalebu angry. 38RP 34. Then Kalebu raped both women anally, with his fist. 38RP 34-36. He then raped Hopper again, vaginally. 38RP 36-37.

At the conclusion of that rape, the last sexual assault that occurred, Kalebu apparently cut Butz, because she asked "Why are you cutting me?" and starting pushing him away. 38RP 37. Kalebu told Butz to be quiet or he would kill her girlfriend. 38RP 37. Then Kalebu forced both women to accompany him to the center bedroom, where he turned on the light and got something from his jeans, which were on the bed. 38RP 38-40. When Hopper saw Kalebu's face in full light, she realized that he was going to kill the two of them. 38RP 40. Hopper thought the object Kalebu retrieved was a small pocketknife. 38RP 41.

Kalebu then took the women back to their bedroom and onto the bed, as they begged for their lives. 38RP 41-42. He wielded two knives now, one in each hand, and used his knees to pin both of them down. 38RP 42. Both women were resisting and Kalebu was cutting and stabbing both of them. 38RP 42-44. Somehow Butz managed to force Kalebu off the bed and they struggled.

38RP 44-45. Butz picked up a metal bedside table and pushed Kalebu back with it, then crashed through a closed window, landing outside and running as far as the curb before she collapsed. 38RP 45. The table later was recovered outside the window. 40RP 118.

During the final struggle, Hopper was screaming as loudly as she could. 38RP 45. After Butz went out the window, Hopper looked at Kalebu and he looked at her; then Kalebu ran. 38RP 45-46. Hopper ran the other way, to the front door and outside, where neighbors who heard the window break and heard the screams for help already had called 911 and were coming to the area. 35RP 30, 48-51; 36RP 13-16, 46-50; 38RP 46-49.

Theresa Butz had suffered at least eight cuts across her throat, a stab wound that severed her left bicep muscle, and another deep stab wound that penetrated her heart, along with many other injuries. 42RP 47-63, 68-69, 75-81. She died in the street. 36RP 53-56; 37RP 16-18. Hopper suffered four lacerations to her neck, one of which severed her external jugular vein, which is very near the carotid artery. 42RP 15-19. Hopper also had two long straight cuts to the inside of her left arm between her elbow and shoulder. 42RP 19-22. She was taken by ambulance to the

emergency room, covered in blood; her cuts were repaired by a plastic surgeon. 42RP 10-13, 23.

3. COMPETENCY PROCEEDINGS.

At the request of defense counsel, on May 12, 2010, the trial court ordered an evaluation of Kalebu's competency to stand trial. 8RP 10. Experts at Western State Hospital concluded that Kalebu was not demonstrating any psychological impairment that would interfere with his competency. 10RP 3. The defense did not contest that conclusion and on June 11, 2010, the court found Kalebu competent to stand trial. 10RP 3-4.

On August 31, 2010, defense counsel informed the court that the defense expert, Dr. David Dixon, had produced a report opining that Kalebu was not competent. 12RP 4. The court ordered another evaluation by experts at Western State Hospital. 12RP 6. After a three-day contested competency hearing that began on December 7, 2010, and ended on January 10, 2011, the trial court found that Kalebu was competent to stand trial. 15RP 1; 17RP 158. The court concluded that while Kalebu had a diagnosis of bipolar disorder, his recent erratic behavior was not a product of his mental illness but occurred because Kalebu was making

conscious choices to act in a manner that he saw would benefit him. 17RP 156-58. The court concluded that Kalebu was intelligent and was not always honest with evaluators and others; he feigned symptoms when they were in his interest and acted appropriately when that was in his interest. 17RP 15-58.

On February 4, 2011, Kalebu engaged in a tirade in court, asserting that he was not competent. 18RP 2-11, 21-23. Kalebu threatened to attempt suicide if given the opportunity. 18RP 11, 13.

On February 9, 2011, the court reiterated its finding that Kalebu was competent to stand trial, but asked whether there was medication available to improve his mental state. 19RP 3-5. An attorney for the jail reported the opinion of the psychiatric director of the jail, who strongly believed that Kalebu was not bipolar, but had a mood disorder and was impulsive, and his behavior was purely a matter of his choice. 19RP 6, 16, 18. The doctor opined that Kalebu was manipulative and enjoyed tormenting female staff. 19RP 20. The court declined to interfere with the jail medical treatment. 19RP 22.

On May 25th, the defense moved for a finding that Kalebu was incompetent based on a report of defense expert Dr. Paul Spizman and Kalebu's escalating outbursts in court. 32RP 6-11.

During two interviews with Kalebu, Spizman had administered tests for malingering (feigning symptoms) and both times, Kalebu failed the tests. 32RP 22-24. Kalebu admitted to Spizman that he exaggerated symptoms when he thought it was to his benefit. 32RP 24-25. The court concluded:

> I do not view him as being incompetent, I view him as being goal-directed, decisive and volitional. He does act up in court. It's my view he acts up when he decides that he wants to. He acts out in his own perceived way of fulfilling his own goals.

32RP 35. The court affirmed its competency ruling. 32RP 36.

4. TRIAL.

A DNA scientist quickly examined a swab from Hopper and obtained a DNA profile from spermatozoa on the swab. 43RP 122-29. Entered into the forensic DNA databank (CODIS), the profile matched the DNA profile obtained from a 2008 Auburn Police case. 43RP 131-33. There was a security video from the Auburn case showing the suspect; the video was shown in the media at noon on July 24, 2009, five days after the crimes. 43RP 60-66. The man in the Auburn video was identified as Isaiah Kalebu: by a prosecutor handling an ongoing criminal case against Kalebu, who had seen Kalebu at two hearings that week; and by

Kalebu's mother, who identified Kalebu and recognized the dog in the video as Kalebu's dog. 42RP 119-29; 46RP 6-8, 64.

Swabs were taken from Hopper at the hospital before she was cleaned and swabs were taken from Butz's body before the autopsy. 40RP 52-53, 59-62; 42RP 70-71. The khaki shorts on which the attacker had wiped himself were collected, as well as a pair of plaid boxer shorts found on the bed in the center bedroom. 40RP 138; 41RP 21, 36. In the hallway of the home, a Bank of America document was on the floor and was collected; it appeared to have blood on it. 40RP 133; 41RP 17-18; 45RP 86.

There was an open window in the bathroom, with the bathtub beneath it. 40RP 101-03. Police found blood on that window ledge and saw dirty fingerprints on the edge of the tub. 40RP 101, 149, 151. Two examiners separately analyzed a latent print on the outer edge of the bathtub and both identified it as the left palm print of Kalebu. 44RP 113; 45RP 20-29, 60-62. Two examiners separately analyzed another latent print on the outside of the bathtub and both identified it as the left ring finger of Kalebu. 44RP 113; 45RP 30-35, 62-63. Two examiners separately analyzed a latent print on the front edge of the dresser in the

northwest bedroom and both identified it as a print of the outer edge of Kalebu's left palm. 44RP 114; 45RP 35-40, 63.

Police photographed bare footprints at the base of the bed in the northwest bedroom. 44RP 103; 45RP 63-65. The footprints were analyzed and positively identified as Kalebu's left and right footprints. 45RP 63-66, 69-82. A print examiner found a latent footprint on the Bank of America statement found in the hallway of the home and positively identified that footprint as Kalebu's right footprint. 45P 85-90.

Spermatozoa were found on the khaki shorts the rapist used to wipe himself; the DNA profile of that male sample matched Kalebu's DNA profile. 43RP 169-72. The estimated probability of selecting an unrelated individual at random from the United States population with a matching profile is one in 62 quadrillion (15 zeroes after the 62). 43RP 171-72.

A single DNA profile was obtained from each of two locations on the boxer shorts left behind by the rapist: the interior of the front fly and the back waistband. 44RP 51. The DNA profiles from both areas on the boxers matched Kalebu's DNA profile. 44RP 51. The estimated probability of selecting an unrelated individual at random from the United States population

with a matching profile is again one in 62 quadrillion. 44RP 51. When he was arrested five days after these crimes, Kalebu was not wearing any underwear. 43RP 73.

An oral swab taken from Butz at autopsy contained two DNA profiles: one was Butz's DNA profile, the other was Kalebu's DNA profile. 43RP 174. A swab taken from the area of Butz's nipples at autopsy contained two DNA profiles: one was Butz's DNA profile, the other was Kalebu's DNA profile. 44RP 47. The estimated probability of selecting an unrelated individual at random from the United States population with a matching profile in each instance is again one in 62 quadrillion. 43RP 174; 44RP 47.

A swab taken from Hopper's thighs at Harborview contained two DNA profiles: one was Hopper's DNA profile, the other was Kalebu's DNA profile. 44RP 49. A swab taken from Hopper's vulvar area contained two DNA profiles: one was Hopper's DNA profile, the other was Kalebu's. 43RP 172-74. The estimated probability of selecting an unrelated individual at random from the United States population with a matching profile in each instance is one in 62 quadrillion. 43RP 174; 44RP 47.

Another sample of the blood swabs taken from the Auburn break-in was tested in 2011. 45RP 108-13, 136, 141, 147-48. The

DNA profile of the sample matched the DNA profile of Kalebu. 45RP 150-51. The estimated probability of selecting an unrelated individual at random from the United States population with a matching profile is one in 13 quintillion (18 zeroes after the 13). 45RP 150-51. Kalebu's mother identified Kalebu as the man depicted in the security video of that break-in and she recognized the dog in the video as Kalebu's dog. 46RP 6-8, 64. The analyst directly compared the DNA profile from this break-in to the DNA profile from Hopper's vulvar swab: she confirmed that the two profiles matched. 45RP 161-62.

A private DNA testing laboratory also analyzed a sample from the khaki shorts the attacker used to wipe himself and found a DNA profile; that profile matched Kalebu's DNA profile. 46RP 12, 14, 22. A more sensitive tool was used for that analysis. 46RP 13. The statistical frequency of the DNA profile in that analysis is one in 5.2 sextillion (21 zeroes after the 5.2) Caucasian individuals, one in 9.25 sextillion Hispanic individuals, and one in 131 quintillion[2] African-Americans. 46RP 14-15.

[2] The word "centillion" was used in the transcript. However, the witness described the number as including 18 zeroes, which would be quintillion. 46RP 14-15.

Hopper saw three video recordings of Kalebu on a media website in the weeks after these crimes; in two of them she heard Kalebu speak. 38RP 70; 42RP 121-24; 43RP 86. She identified Kalebu as the man who attacked her and Butz, without any doubt. 38RP 70.

When Kalebu testified, he was asked if he knew anything about the events that occurred on June 19, 2009, at 727 South Rose Street; he answered that he was there, was told by his God to attack his enemies, and did so. 48RP 11-12.

C. ARGUMENT

1. THE TRIAL COURT DID NOT ABUSE ITS DISCRETION IN DENYING KALEBU'S MOTION TO STRIKE THE ENTIRE VENIRE.

Kalebu claims that because the trial court sent jury summons county-wide, while the local rule provides for a jury source list limited to the Seattle case assignment area in this case, there was a material departure from jury selection procedures that requires reversal of his convictions although no actual prejudice resulted. This argument should be rejected. The trial court immediately excused all jurors from outside the Seattle assignment area and did not abuse its discretion in concluding that this remedy resulted in

substantial compliance with the procedures regarding jury summons. Because Kalebu has not shown any prejudice to the selection of a random, impartial jury, he has not established reversible error.

a. Relevant Facts.

This case was assigned a Seattle case designation at filing. CP 1; LCrR 5.1(d). As trial approached, the court directed that a large pool of jurors be summoned from the entire county, believing that the defense would request that procedure. 7RP 7-8; 22RP 27-30. Kalebu objected to the inclusion of jurors from the south (Kent) jury assignment area, and demanded that the entire jury pool be stricken. CP 68; 23RP 2-5, 9-13. The court denied that motion. It directed the jury coordinator to send letters to those jurors from the south jury assignment area, telling them not to appear, and declared jurors from that area were disqualified. 23RP 14. There is no allegation by Kalebu that any juror residing in the south assignment area deliberated in this case.

b. Jurors Were Drawn From The Area Specified By Statute And Court Rule.

Although the original group of 3000 potential jurors summoned was drawn from the entire county, the trial court excused all jurors who resided outside the north (Seattle) assignment area. As a result, the jury pool used, and the jury actually empanelled, was properly drawn from only the north assignment area. This procedure substantially complied with the rules for summoning jurors.

The purpose of article I, section 22 of the Washington Constitution is to guarantee a fair and random selection of jurors from the county in which a crime is alleged to have occurred. City of Tukwila v. Garrett, 165 Wn.2d 152, 155, 196 P.3d 681 (2008). The statutory requirements for drawing up jury source lists "are merely directory and need be only substantially complied with." Id. at 159, citing State v. Twyman, 143 Wn.2d 115, 121-22, 17 P.3d 1184 (2001). The purpose of the statutory procedures is to provide a fair and impartial jury. Garrett, 165 Wn.2d 159-60. The Supreme Court in Garrett quoted a 1914 case emphasizing that not every error warrants reversal:

> The purpose of all these statutes is to provide a fair and impartial jury, and if that end has been attained

> and the litigant has had the benefit of such a jury, it ought not to be held that the whole proceeding must be annulled because of some slight irregularity that has had no effect upon the purpose to be effected.

State v. Rholeder, 82 Wn. 618, 620-21, 144 P. 914 (1914), quoted in Garrett, 165 Wn.2d at 160.

The trial court's selection process is reviewed for abuse of discretion. State v. Tingdale, 117 Wn.2d 595, 600, 817 P.2d 850 (1991).

The Supreme Court repeatedly has found that when a jury list of county residents is not drawn exactly as required by law, that is not a material departure from the law where the defendant has been provided a fair and impartial jury.[3] E.g. Garrett, 165 Wn.2d at 155-62 (some municipal court jurors drawn from outside the city); Twyman, 143 Wn.2d at 121-22 (some district court jurors outside the boundaries of that court); State v. Finlayson, 69 Wn.2d 155, 417 P.2d 624 (1966) (proportion from specific areas not in compliance with former statute); Roche Fruit Co. v. Northern Pacific Ry., 18 Wn.2d 484, 139 P.2d 714 (1943) (women jurors sought via newspaper ad); Rholeder, 82 Wn. at 618-21 (list drawn from

[3] Including residents from outside the county has been found to be a material departure from the constitutional requirement that jurors must be residents of the county in which the crime is alleged to have occurred. City of Bothell v. Barnhart, 172 Wn.2d 223, 233-34, 257 P.3d 648 (2011).

sources not specified in the statute). The list actually used in this case was in complete compliance with the law; that additional jurors were originally summoned is less of a departure from the statute than the departures that the court held were not material in those cases.

Washington courts are directed to summon jurors randomly from the jury source list, which is a list of licensed drivers, identicard holders, and registered voters of the county. RCW 2.36.010. Counties with more than one superior court facility may divide the jury source list into jury assignment areas. RCW 2.36.055. King County has two superior court facilities and has drawn two jury assignment areas. LGR 18. Originally, rule LGR 18 allowed a jury to be drawn from the entire county on the court's motion or by request of the parties. LGR 18(e)(2) (2007). Effective September 1, 2009, the rule does not provide for exceptions to the divided jury source list. LGR 18.

The initial summons to jurors in the entire county did not comply with LGR 18. When Kalebu objected and brought the mandatory language of the current rule to the attention of the trial court, the court excused all jurors who resided in the south assignment area. 23RP 14. In the trial court, Kalebu argued that

excusing the south end jurors would not cure the initial error because it defeated the random quality of the remainder of the jury pool. 23RP 2-5. He has abandoned that argument on appeal.

In this appeal, Kalebu argues that because the rule was violated, there was a material departure from the rule mandating reversal. App. Br. at 30. His claim that a violation of LGR 18 requires that the panel be stricken is contrary to the many cases holding that a violation is not always material. E.g. Garrett, 165 Wn.2d at 155-62; Finlayson, 69 Wn.2d 155; Roche Fruit, 18 Wn.2d 484; Rholeder, 82 Wn. at 618-21. CrR 6.4 provides that the only reason to sustain a challenge to an entire panel is if there has been "a material departure" from the procedures prescribed, not that a challenge to the entire panel must be granted for any variance from the prescribed procedures. CrR 6.4(a). The Supreme Court has described a material violation as a "gross departure from the statute." Twyman, 143 Wn.2d at 122, quoting State v. Rice, 120 Wn.2d 549, 562, 844 P.2d 416 (1993).

A defendant "does not have the right to a particular juror or jury." Garrett, 165 Wn.2d at 161. The jurors from whom this jury panel was drawn were all residents of the north assignment area, in compliance with LGR 18. Kalebu has not established a material

departure from the procedures required and has not suggested any prejudice to his right to a fair and impartial jury. This claim should be rejected.

c. There Is No Constitutionally Protected Interest In The Procedure For Summoning Jurors.

For the first time on appeal, Kalebu argues that the jury assignment area procedure in LGR 18 has created a liberty interest protected by due process, so deviation from the procedure is constitutional error. This claim lacks merit because the analysis of liberty interests upon which it relies applies to prisoners' rights and is inapplicable to this jury selection procedure. The argument also should be rejected under RAP 2.5(a)(3) because it was not raised in the trial court and Kalebu has not established that actual prejudice resulted from a constitutional error, as required to obtained review for the first time on appeal.

The legal test upon which Kalebu relies has been abrogated. Kalebu cites the test set out in In re Pers. Restraint of Cashaw, 123 Wn.2d 138, 144, 866 P.2d 8 (1994), that laws that dictate a particular decision given specified facts can create liberty interests.

Cashaw relied on contemporary federal case law.[4] 123 Wn.2d at 144. But the rule recognized in Cashaw was rejected by the United States Supreme Court in Sandin v. Conner, 515 U.S. 472, 115 S. Ct. 2293, 132 L. Ed. 2d 418 (1995). That Court held that while states may create liberty interests, those interests generally will be limited to freedom from restraint that "imposes atypical and significant hardship on the inmate in relation to the ordinary incidents of prison life." Id. at 483-84. See Campbell v. Burt, 141 F.3d 927, 930-31 (9th Cir. 1998) (recognizing limitation by Conner).

The recognition of liberty interests that are created by the existence of a mandatory procedure has been limited to the context of prisoners' rights. In re Pers. Restraint of Meyer, 142 Wn.2d 608, 617, 16 P.3d 563 (2001). Even if the doctrine is applied in the context of this trial procedure, this argument fails because the procedures in question are not mandatory, they are simply directory. Garrett, 165 Wn.2d at 159; Twyman, 143 Wn.2d at 121-22.

The United States Supreme Court has made it clear that violation of a statutory mandate, an error of law, does not constitute a denial of due process. Engle v. Isaac, 456 U.S. 107, 121 n. 21,

[4] As Kalebu cites only cases relying upon federal due process, it must be assumed that he is relying on the same federal due process guarantee.

102 S. Ct. 1558, 71 L. Ed. 2d 783 (1982). The Washington Supreme Court has echoed that conclusion, holding that procedural laws do not create liberty interests—process is not an end in itself. Cashaw, 123 Wn.2d at 144-45; Meyer, 142 Wn.2d at 619.

Due process analysis makes clear that the procedure itself cannot be a protected liberty interest; it is the outcome that may be a liberty interest (e.g., the award of good time). Hewitt v. Helms, 459 U.S. 460, 470-72, 103 S. Ct. 864, 74 L. Ed. 2d 675 (1983). Kalebu has not identified the outcome of which he has been deprived. If a defendant has a liberty interest in an outcome, a second analytical step must be undertaken – consideration of whether the process provided to decide whether to grant the outcome (or deprive the prisoner of the outcome) satisfies due process. Id. at 472. Kalebu was provided a randomly selected fair and impartial jury, which is the constitutional mandate. He does not have a liberty interest in the procedure used to accomplish that.

Kalebu also should be precluded from raising this claim for the first time on appeal. A claim of error may be raised for the first time on appeal only if it is a "manifest error affecting a constitutional right." RAP 2.5(a)(3); State v. McFarland, 127 Wn.2d 322, 333, 899 P.2d 1251 (1995). The defendant must show both a

constitutional error and actual prejudice to his rights. State v. Kirkman, 159 Wn.2d 918, 926-27, 155 P.3d 125 (2007). To demonstrate actual prejudice, there must be a "plausible showing by the [appellant] that the asserted error had practical and identifiable consequences in the trial of the case." Id. at 935. Because Kalebu had a trial composed of jurors from the Seattle assignment area, he has not established actual practical consequences of the overbroad initial summons.

2. KALEBU'S ABSENCE FROM A CONFERENCE BETWEEN THE JUDGE AND DEFENSE COUNSEL ABOUT THE PROCEDURE BY WHICH KALEBU WOULD TESTIFY WAS NOT REVERSIBLE ERROR.

Kalebu contends that his convictions must be reversed because, after the State rested on June 28, 2011, his attorneys asked the trial court to discuss a procedural question in chambers and the trial court granted that request. He contends that although his attorneys made the request and did not remind the court that Kalebu would not be able to view the proceedings in chambers, this chambers conference deprived Kalebu of his right to be present at a critical stage of the proceedings, and constituted reversible error. This claim should be rejected. Review of this claim is barred

because Kalebu's attorneys invited any error. Moreover, the conference involved only a procedural matter and did not constitute a critical stage of the trial. Finally, even if error occurred, it was harmless beyond a reasonable doubt given the overwhelming evidence of Kalebu's guilt of all charges.

a. Relevant Facts.

The trial court repeatedly made an effort to ensure Kalebu's presence for all hearings. At the first hearing over which Judge Hayden presided, on August 26, 2009, defense counsel suggested that paperwork extending the time for the prosecutor to make his decision about seeking the death penalty could be submitted off the record. 1RP 14. The court responded that even if a hearing seems to be perfunctory or ministerial, Kalebu should be present for all hearings. 1RP 15. On June 9, 2010, when Kalebu refused to come to court, the court recessed for two days to allow his attorneys to consult with him. 9RP 2-3; 10RP 1-4.

On October 18, 2010, when Kalebu refused to come to court, the court again recessed, advising defense counsel to inform

Kalebu that if he refused to come, the judge would sign an order authorizing the use of reasonable force to bring him. 13RP 3-7. At the next hearing, Kalebu refused to come to court, the court signed an order authorizing the use of force, and Kalebu was transported to court strapped in a chair. 14RP 11-12. The same use of force was required to get Kalebu to court on February 9, 2011, and the court addressed Kalebu's refusal to attend about every other hearing. 19RP 2. At that hearing, the court noted that Kalebu had to be removed from two previous hearings. 19RP 29.

In March 2011, the court reiterated its intention to do virtually everything in open court. 20RP 2-3. On March 25, 2011, Kalebu told jail staff that he would come to court but would not walk, so he was brought in the chair again. 21RP 6-7. In the middle of the hearing, Kalebu burst out with a long string of profanity, then refused to return to court after the resulting recess. 21RP 25-28. Use of force again was required to get Kalebu to court on April 25 and April 27, 2011. 22RP 3-6; 24RP 11-12, 31.

The court went so far as to establish a remote viewing location in the courthouse where Kalebu could view the trial

proceedings, because Kalebu's behavior was so disruptive[5] that he could not be present in the courtroom. 19RP 28-29; 22RP 12, 18-19; 27RP 2; 28RP 2-3; 40RP 115. On at least two occasions, Kalebu refused to come from the jail to observe in the remote location. 30RP 102; 31RP 1. During the middle of the State's opening statement, Kalebu told jail staff that he wanted to be in the courtroom. 35RP 72. The court recessed after the opening and defense counsel spoke to Kalebu, who then said he did not want to come to court. 35RP 72.

On June 9th, the court day began with word that Kalebu had initially stated that he wanted to come to court, then changed his mind. 38RP 3. When counsel then informed the court that Kalebu had been taken to the jail to change out of his civilian clothes, the court repeated the proceedings after Kalebu returned. 38RP 4-5.

Mid-trial, Kalebu swallowed a golf pencil during a lunch break and was taken to the hospital. 41RP 71-81. Trial recessed for the day. 41RP 82. Kalebu was watching the trial the next day

[5] Examples of Kalebu's disruptions appear at 18RP 3-23 (profane "tirade," as described by judge); 19RP 8-12 (profane, interrupts repeatedly); 19RP 29 (court notes Kalebu had to be removed from two previous hearings); 21RP 25-28 (continuous profanity until removed); 22RP 10-13 (profane, interrupts until removed); 25RP 10-12, 24 (interrupting); 32RP 13 (defense noting that Kalebu in a prior hearing had spit at his attorney in court); 32RP 36-41 (profane, interrupts until hearing recessed); 47RP 39 (tried to bolt from courtroom at prior hearing). Kalebu refused to commit not to have outbursts when the jury was present. 24RP 34.

from the usual remote courtroom; defense counsel indicated that Kalebu had no physical problem that required delay. 42RP 3-4.

On June 22, minutes before being brought to court, Kalebu made another suicide gesture at the jail and was taken to the hospital again. 44RP 3-4, 15-16. The trial recessed for the morning. 44RP 12. When the court reconvened that afternoon, it was informed that when Kalebu returned from the hospital, jail staff found a piece of metal concealed in Kalebu's mouth. 44RP 32.

After the State concluded its case-in-chief, the court recessed for defense counsel to discuss with Kalebu whether he wished to testify. 46RP 85-86. Defense counsel returned and announced that Kalebu wanted to testify but that he would be testifying in narrative style, that his attorneys had no questions. 46RP 86-87. Kalebu was brought to the trial court and had an extended dialogue with the court about his willingness to behave and security procedures. 46RP 89-94. The court informed Kalebu that it intended to have defense counsel help Kalebu prepare questions, which counsel would ask. 46RP 95. It gave defense counsel an entire day to work out the process. 46RP 97.

The following day, Kalebu viewed the proceedings from the remote location. 47RP 2. Defense counsel stated that he did not

intend to ask Kalebu questions because one part of the testimony was not material or relevant; as to the second part, he would reveal the reason only in chambers with the judge. 47RP 2-3, 6. The court made the findings required to conduct a closed hearing. 47RP 6-7.

In chambers, defense counsel explained that Kalebu wanted to testify about being treated poorly and about his mental problems, and counsel believed Kalebu wanted "stage time," noting that Kalebu had been on television the day before and enjoyed that. 47RP 8, 11.[6] Counsel said the difficulty for defense counsel was that Kalebu told them he wanted to confess but claim God made him do it. 47RP 8. Kalebu had first revealed the nature of his defense on March 25, 2011, when his counsel stated that a mental defense would be presented. 21RP 53. By April 25th, Kalebu had withdrawn any mental defense.[7] 22RP 33-25. Counsel did not want to be branded ineffective for allowing Kalebu to testify when he intended to confess; counsel had told Kalebu that if he wanted to confess, he should plead guilty but Kalebu did not want to do that. 47RP 10-11. The court noted that Kalebu had a right to

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[6] The transcripts of the closed hearings have not been sealed.

[7] Kalebu had refused to cooperate with a defense expert who tried to evaluate a possible mental defense. 32RP 16.

testify and that the question was how he would do that. 47RP 12. The manner the testimony would occur was discussed and the conference concluded. 47RP 12-18.

When courtroom proceedings resumed, the prosecutor noted that Kalebu was not observing the in camera proceeding. 47RP 18. The court stated that it would get a transcript of the proceeding for Kalebu. 47RP 18. In Kalebu's presence, the court informed him that counsel would assist Kalebu to write out questions to be asked and counsel would ask the questions. 47RP 21. After a discussion of the security precautions, and a warning that Kalebu would be removed if he misbehaved, Kalebu asked to be taken back to the remote courtroom. 47RP 21-46. The court noted that the only thing discussed in chambers was the legal issue relating to the manner in which testimony would be elicited; defense counsel agreed. 47RP 67.

When Kalebu testified the next day, he was asked if he knew anything about the events that occurred on June 19, 2009, at 727 South Rose Street; he answered that he was there, was told by his God to attack his enemies, and did so. 48RP 11-12. Counsel then asked whether Kalebu had ever been diagnosed as having a mental illness. 48RP 12. Although the State immediately objected,

Kalebu answered that he had, several times. 48RP 12. That answer was stricken, although the court ruled that Kalebu could testify to Kalebu's own opinion that he is mentally ill. 48RP 13-15. Kalebu chose not to do so. 48RP 16.

b. This Issue Has Not Been Preserved For Review.

The claim that Kalebu was denied his constitutional right to be present at the chambers conference cannot be raised for the first time on appeal because his attorneys invited the error. A party may not set up an error in the trial court and then complain of it on appeal. State v. Tortorelli, 149 Wn.2d 82, 94, 66 P.3d 606 (2003). The rule applies even when a constitutional error is claimed. Id.; State v. Studd, 137 Wn.2d 533, 552, 973 P.2d 1049 (1999). Because it was defense counsel who demanded a private conference with the court in chambers, outside the view of the remote camera used by Kalebu, he cannot complain on appeal that the court acceded to that request.

Further, a claim of error may be raised for the first time on appeal only if it is a "manifest error affecting a constitutional right." RAP 2.5(a)(3); McFarland, 127 Wn.2d at 333. The defendant must

show both a constitutional error and actual prejudice to his rights. Kirkman, 159 Wn.2d at 926-27. To demonstrate actual prejudice, there must be a "plausible showing by the [appellant] that the asserted error had practical and identifiable consequences in the trial of the case." Id. at 935. Because the hearing consisted of only defense counsel's repetition of what Kalebu had said that he intended to testify and a discussion of the manner in which the testimony would be elicited, Kalebu has not established practical and identifiable consequences of his failure to personally observe the conference. His speculation that his decision to testify might have changed if he had heard the exchange is unpersuasive, as there was no information as to which he was not informed.

c. The Court's Consultation With Defense Counsel As To The Procedure By Which Kalebu Would Testify Was Not A Critical Stage Of Trial.

A defendant has the "right to be present at any stage of a criminal proceeding that is critical to its outcome if his or her presence would contribute to the fairness of the procedure." State v. Berrysmith, 87 Wn. App. 268, 273, 944 P.2d 397 (1997), citing inter alia Kentucky v. Stincer, 482 U.S. 730, 745, 107 S. Ct. 2658,

96 L. Ed. 2d 631 (1987). "The presence of the defendant is a condition of due process to the extent that a fair and just hearing would be thwarted by his absence, and to that extent only." United States v. Gagnon, 470 U.S. 522, 526, 105 S. Ct. 1482, 84 L. Ed. 2d 486 (1985) (quoting Snyder v. Massachusetts, 291 U.S. 97, 105-06, 108, 54 S. Ct. 330, 78 L. Ed. 674 (1934), *overruled on other grounds by* Malloy v. Hogan, 378 U.S. 1, 84 S. Ct. 1489, 12 L. Ed. 2d 653 (1964)). The exclusion of the defendant must be considered in light of the whole record. Gagnon, 470 U.S. at 526-27.

A defendant does not have a right to be present during chambers conferences on legal matters, at least where they do not require resolution of disputed facts. In re Pers. Restraint of Lord, 123 Wn.2d 296, 306, 868 P.2d 835 (1994). A defendant does not have a right to be present for proceedings involving ministerial matters. In re Pers. Restraint of Pirtle, 136 Wn.2d 467, 484, 965 P.2d 593 (1998).

The hearing at issue in this case did not involve any factual dispute or even a contested legal matter. Defense counsel

requested the conference to explain why he did not intend to ask questions if Kalebu decided to testify. 47RP 2-3, 6. The nature of the conference was explained before it began. 47RP 2-7. The court accepted the explanation of defense counsel and determined the manner in which Kalebu's testimony would be elicited. 47RP 12-18. The hearing was not a critical stage of the trial. Due process does not require the presence of the defendant "when presence would be useless, or the benefit but a shadow." Berrysmith, 87 Wn. App. at 273, quoting Snyder, 291 U.S. at 106-07. Accord, State v. Wilson, 141 Wn. App. 597, 604, 171 P.3d 501 (2007).

The conference in this case was of much less significance than the chambers conference at issue in Berrysmith, supra, during which defense counsel moved to withdraw on the ground that he could not dissuade the defendant from perjuring himself. 87 Wn. App. at 271. The court in Berrysmith concluded that the chambers conference was not a critical stage of the proceedings because Berrysmith's presence was not necessary for a full and

just hearing on the purely legal question before the court. Id. at 276.[8]

This court also concluded that a chambers conference was not a critical stage that required a defendant's presence where the conference addressed whether defense counsel had a conflict of interest that required withdrawal. State v. Rooks, 130 Wn. App. 787, 125 P.3d 192 (2005). The court rejected the argument that the defendant had a constitutional right to be present even though the defendant speculated that he could have had an influence in the decision. Id. at 799-800.

There was no failure to provide Kalebu with knowledge of the events in chambers – he was informed of the issue to be addressed both before and after the conference. Kalebu was informed of the nature of the conference before it occurred and immediately after the conference, the court stated that it would provide a transcript to Kalebu; the court also explained the matter

[8] Other hearings held not to constitute a critical stage of criminal proceedings include: a hearing to determine competency of two child witnesses to testify, Kentucky v. Stincer, 482 U.S. at 732, 747; hearings relating to jury instructions and jury sequestration, Pirtle, 136 Wn.2d at 484; a hearing on a defense motion for a continuance, In re Pers. Restraint of Benn, 134 Wn.2d 868, 920, 952 P.2d 116 (1998); hearings related to jury questionnaires, pretrial instructions, evidentiary rulings, and other legal rulings, Lord, 123 Wn.2d at 306-07; a hearing to address a juror concern about a defendant's sketching jurors during trial, Gagnon, 470 U.S. at 523-27; and a hearing at which a juror described recognizing and witness and the court denied a defense motion to excuse the juror, Wilson, 141 Wn. App. at 601-06.

that had been considered and Kalebu indicated that he understood. 47RP 2-7, 18, 21.

In order to establish a constitutional violation, it is the defendant's burden to demonstrate how his absence affected the outcome – prejudice will not be presumed. Lord, 123 Wn.2d at 307; Wilson, 141 Wn. App. at 605. Speculation that the defendant's presence might have affected the outcome is insufficient. Wilson, 141 Wn. App. at 605-06. Kalebu offers no argument that his absence affected the outcome of the hearing. His constitutional claim fails on that basis alone.

Kalebu does argue that his absence from the chambers conference deprived him of his ability to make an intelligent decision about whether to testify. He offers no legal authority suggesting that a theoretical effect on the defendant's decision whether to testify establishes a violation of due process. Equally important, it was defense counsel who informed the court of the likely negative impact of Kalebu's anticipated testimony on his defense; defense counsel told the court that he had discussed this with Kalebu, and had told Kalebu that if he wanted to confess he should plead guilty. 47RP 8-11. The court did not comment except to say that Kalebu had a right to testify and say whatever he

wanted to say although it could hurt the defense theory, but that the issue was how that testimony would occur. 47RP 12-13, 16-18.

Kalebu asserts that two additional critical issues were considered during the conference: whether Kalebu would be permitted to testify and whether Kalebu could present an insanity defense at this point in the trial. App. Br. at 41. This is incorrect. Neither defense counsel nor the judge suggested that Kalebu could be prevented from testifying if he chose to do so. 47RP 8-18. Defense counsel did express frustration that Kalebu was stating an intention to confess but claim that God made him do it. 47RP 8-11.

As to whether Kalebu would be permitted to raise an insanity defense, the court was not asked to consider the issue and did not consider the issue. 47RP 8-18. Defense counsel did speculate that after lengthy cross-examination of the defendant, the defense would move for a recess for a mental health examination so they could change their defense and the court would refuse. 47RP 10-11. The court did not respond to that hypothetical, which was part of a lengthy expression of frustration by counsel. 47RP 8-11. Defense counsel made it very clear that Kalebu understood the defense that was being presented and that counsel had discussed with Kalebu the disadvantage of confessing. 47RP 9-11. After

Kalebu testified, he did request that the jury be instructed on an insanity defense; the court refused the request. 48RP 38-39, 59.

Kalebu asserts that the State constitution "arguably" provides greater protection than the federal constitution. App. Br. at 34. However, he does not provide the analysis required by State v. Gunwall, 106 Wn.2d 54, 720 P.2d 808 (1986), to establish that. While Kalebu does cite to a recent statement by the Supreme Court that the state constitutional protection arguably is greater, the word "arguably" indicates that this proposition has not been settled; the analysis of the state constitution also was dicta (the court already had found a violation of the federal constitution). State v. Irby, 170 Wn.2d 874, 880-85 & n. 6, 246 P.3d 796 (2011). Moreover, the only authority on which the court relied was a 1914 case that interpreted a former version of the Washington Constitution and a former statute mandating a defendant's presence. Irby, 170 Wn.2d at 885, citing State v. Shutzler, 82 Wn. 365, 144 P. 284 (1914). The Washington Constitution in 1914 guaranteed "the right to appear and defend in person, and by counsel," but the current provision includes "the right to appear and defend in person, or by counsel." Wash. Const. art. I, § 22; Laws of 1921, ch. 13, § 1 (emphasis added). The analysis of Shutzler thus is not controlling.

Even under the Shutzler rule Kalebu would not prevail. The court in Shutzler stated that a defendant has a right to appear "in person and by counsel . . . at every stage of the trial when his substantial rights may be affected . . . and any denial of the right without the fault of the accused" is presumed prejudicial. 82 Wn. at 367.[9] Because Kalebu's absence was the fault of his attorney, the conference in this case would not run afoul of this rule. In Shutzler, the court questioned and gave instructions to a deliberating jury without informing the defendant or the attorneys for either party. Id. at 365-66. In contrast, a conference with the defense attorney concerning the manner in which testimony will be elicited is not a stage where the substantial rights of a defendant may be affected.

d. Any Error Was Harmless Given The Hearing, Its Context, And The Overwhelming Evidence Of Kalebu's Guilt.

Even if Kalebu's absence from the brief chambers conference was constitutional error, it was harmless beyond a reasonable doubt. Kalebu does not argue that his absence had any effect on the ruling made at the conference, so there is no

[9] The presumption of prejudice adopted in Shutzler is no longer good law. Irby, 170 Wn.2d 886.

consequence that would be harmful. Even if the effect on Kalebu's thought processes the next day (when he chose to testify) were relevant, it is clear that his observation of this conference would not have changed his decision to testify. Moreover, Kalebu's brief testimony conceded only what he had knew had been proved beyond question, that he was the attacker; if believed, his testimony would have cast doubt on his mental state at the time, without allowing the State to rebut his suggestion that his mental state was compromised. Thus, Kalebu reinforced the defense theory that he acted without premeditation in killing Butz and attempting to kill Hopper.

It is inappropriate to analyze harmless error based on the effect of Kalebu's testimony itself. When a defendant has been excluded from a hearing, the issue is whether his presence would have had an effect on the fairness of that hearing, Gagnon, 470 U.S. at 526; Berrysmith, 87 Wn. App. at 273. Thus, the effect to be evaluated is the effect of the defendant's presence on the hearing result. No case is cited in which the court considered it relevant whether the experience of observing the hearing would have had some effect on the defendant's behavior afterward. Kalebu has not argued that his presence could have had an effect on the court's

decision as to the manner that his testimony would be elicited. So, his absence had no effect and was harmless error.

A violation of the constitutional right to be present may be harmless error; it is the State's burden to prove that the error was harmless beyond a reasonable doubt. Irby, 170 Wn.2d at 885-86. During the conference, defense counsel explained the discussion that defense counsel had with Kalebu about his decision to testify, including counsel's opinion of the harm it would cause. 47RP 8-11. Counsel stated that he had told Kalebu that the testimony he proposed to offer was essentially a confession. 47RP 11. The judge did not comment on the content of that explanation except to say that Kalebu had a right to testify and to agree that if Kalebu testified "I did it," that would put him at risk of putting in jeopardy the defense theory of the case. 47RP 12, 16. The bulk of the conference was consideration of how questions would be posed during the testimony. 47RP 12-18. Kalebu had all of the information that was discussed in the conference, so there is no doubt that observing that exchange between his attorneys and the judge would not have changed his decision to testify. An intelligent man, Kalebu certainly was aware that if he admitted he was the

attacker, he was conceding that point – a point that was essentially beyond dispute when the State rested.

Kalebu asserts on appeal that at the conclusion of the conference Kalebu would have seen that taking the stand involved great risk and little chance of reward. App. Br. at 42. To the contrary, there was very little risk, as Kalebu's identity as the attacker had been proved by overwhelming forensic evidence including: his footprints at the foot of the bed in the bedroom where the attacks occurred; his palm print on the dresser in that room; his fingerprint and palm print on the bathtub where the intruder entered; his footprint on a document in the hallway of the home; and finally, DNA matching Kalebu's with astronomical probability – on the khaki shorts the attacker used to wipe himself, on swabs from two areas on each of the women attacked, and on two locations on the boxer shorts left by the attacker (while Kalebu was without underwear when arrested).[10]

On the other hand, there were several opportunities for reward. First, if believed, Kalebu's testimony suggested he had a mental illness or at least that his mental state at the time was compromised; neither of these possibilities was suggested by any

[10] Details of the forensic evidence provided at pp. 9-13, supra.

evidence presented by the State. Although on appeal Kalebu argues that he confessed to premeditation, he certainly did not: he testified that he was told to "attack" his enemies, not that he was told to kill them. 48RP 11-12. Although the jury was not instructed as to insanity, in effect Kalebu presented a diminished capacity theory that disputed the State's proof of the mental state elements of the crimes charged. Most importantly to Kalebu, any question as to an impaired mental state would be relevant to whether he did act with premeditated intent to kill Butz and Hopper. Kalebu began to remove his restraints after his testimony concluded; he may have hoped to actually escape, to provoke the use of force by guards, or just to create a scene that would affect jurors or require a mistrial. 48RP 16-17.

Even if this court concludes that the State must establish that Kalebu's testimony itself was harmless beyond a reasonable doubt, that burden is satisfied in this case. As noted above, the forensic evidence identifying Kalebu as the man who attacked Hopper and Butz was overwhelming. In addition, Hopper saw three video recordings of Kalebu, in two of them she heard Kalebu speak; she identified Kalebu as the man who attacked her and Butz, without any doubt. 38RP 70; 42RP 121-24; 43RP 86. The only

other element contested by Kalebu was premeditated intent to kill. His statement that he intended to attack his enemies did not detract from arguments by his attorney that he intended to commit sexual assaults but reacted with deadly force only when the women resisted.

Kalebu's absence from the brief chambers conference with his attorney had no effect on the proceeding. Even if the court expands the analysis of the effect of any error to include the effect on Kalebu's decision to testify the next day, any error was harmless beyond a reasonable doubt.

D. CONCLUSION

For the foregoing reasons, the State respectfully asks this Court to affirm Kalebu's convictions and sentence.

DATED this 14TH day of June, 2013.

Respectfully submitted,

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APPENDIX 1

Certificate of Service by Mail

Today I deposited in the mail of the United States of America, postage prepaid, a properly stamped and addressed envelope directed to David B. Koch, the attorney for the appellant, at Nielsen Broman & Koch, P.L.L.C., 1908 E. Madison Street, Seattle, WA 98122, containing a copy of the Brief Of Respondent, in STATE V. ISAIAH KALEBU, Cause No. 67560-5-I, in the Court of Appeals, Division I, for the State of Washington.

I certify under penalty of perjury of the laws of the State of Washington that the foregoing is true and correct.

Name

Done in Seattle, Washington

08/14/13

Date