COA NO. 45229-4-II

SUPREME COURT NO. 91410-9

IN THE SUPREME COURT OF THE STATE OF WASHINGTON

STATE OF WASHINGTON,

Respondent,

v.

RENEE REYNOLDS,

Petitioner.

ON APPEAL FROM THE SUPERIOR COURT
OF WASHINGTON FOR CLARK COUNTY

The Honorable John Nichols, Judge

PETITION FOR REVIEW

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FILED IN COA ON MARCH 12, 2015

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RULES, STATUTES AND OTHER AUTHORITIES

A. IDENTITY OF PETITIONER

Petitioner Renee Reynolds asks this Court to review the decision of the court of appeals referred to in section B.

B. COURT OF APPEALS DECISION

Petitioner seeks review of the court of appeals decision in State v. Reynolds, COA No. 45229-4-II, filed February 10, 2015, attached as an appendix to this petition.

C. ISSUES PRESENTED FOR REVIEW

1. Whether the trial court violated Reynold's constitutional right to a public trial by taking "for-cause" challenges at a private bench conference?

2. Whether the court violated Reynold's constitutional right to a public trial where it took peremptory challenges based on a piece of paper passed back and forth between the parties?

3. Whether the trial court violated Reynold's constitutional right to be present at all critical stages of trial, where the court called the attorneys up to the bench for a private conference at which the court took "for-cause" challenges?[1]

[1] Similar issues are pending before this Court in State v. Unters Love, Supreme Court No. 89619-4. This Court heard argument in Love on March 10, 2015.

D. STATEMENT OF THE CASE

Following a jury trial in Clark County, Washington, petitioner Renee Reynolds was convicted of possessing methamphetamine and heroin. CP 38-39, 42-55. The substances were discovered when the department of corrections executed an arrest warrant[2] at the residence where an anonymous caller reported Reynolds was staying. 1RP 16-23, 43. Reynolds proceeded to trial following an unsuccessful motion to suppress the evidence. 1RP 47-51.

Voir dire took place on August 12, 2013. After general questioning, the court asked for "a quick side bar with counsel." RP 67. When the court came back on the record, it indicated it had additional questions for juror 14, after which the prosecutor moved to excuse the juror for cause. RP 67-70. The court granted the motion and asked the parties whether each had any additional challenges for cause. RP 70. Both said no. RP 70.

However, the court's minutes indicate jurors 21 and 22 were excused for cause before the court conducted the individual questioning of juror 14. CP 62-64.

Once juror 14 was struck, the court informed jurors they could stand and stretch while the parties passed "the magic

clipboard." RP 71. The court explained, "we use this magic clipboard to go back and forth to do our strikes." RP 71.

Somehow, the prosecutor broke "the magic clipboard" and the court held another sidebar. RP 73. After which, the transcript of voir dire indicates the court excused jurors: 8, 10, 11 and 3, respectively. RP 73. The court did not announce which side was dismissing which juror. RP 73.

The juror information sheet is not consistent with what the court announced. CP 61; RP 73. It indicates the prosecutor struck jurors 3 and 13; whereas, the defense struck 11, 8, 17 and 10. CP 61.

On appeal, Reynolds first argued the manner in which for-cause and peremptory challenges were taken violated her right to a public trial. Brief of Appellant (BOA) at 3-14. Division II disagreed. Regarding the for-cause challenges exercised at the private bench conference, the court held:

> However, Reynolds has not provided a sufficient record for us to determine what happened at the sidebar conference. Reynolds's inability to show that either party actually challenged jurors 21 and 22 for cause at sidebar precludes us from finding a public trial right violation.

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[2] The DOC warrant was for failing to report to her community corrections officer. 1RP 20, 43.

Appendix at 4.

Regarding the silent exercise of peremptory challenges via the "magic clipboard," the court held exercising public challenges does not implicate the public trial right. Appendix at 4 (citing inter alia State v. Marks, __ Wn. App. __, 339 P.3d 196 (2014)).

Second, Reynolds argued the private bench conference at which for-cause challenges were exercised violated her right to be present. BOA at 14-19. Reynolds argued her right to be present was violated when she was excluded from the sidebar conference at which jurors 21 and 22 were excused for cause. BOA at 16-17. Reynolds argued there was a second violation when the court called for a sidebar after the prosecutor broke "the magic clipboard" and before the court announced which of the jurors were released by peremptory challenge. BOA at 17.

Again, however, the court disagreed:

> Here, Reynolds was present in the courtroom during all of voir dire, and therefore had the opportunity to hear all questioning that formed the basis for any future juror challenges. Further, Reynolds was present in the courtroom and witnessed counsel conduct the jury selection process. There is no evidence that she did not have the opportunity to exercise her right to consult with her counsel or otherwise be involved in counsel's use of peremptory or for cause challenges. The sidebar conference did not deprive Reynolds of the "'power . .

> . to give advice or suggestion or even to supersede'" her counsel. [State v. Irby, 170 Wn.2d 874, 883, 246 P.3d 796 (2011)] (quoting Snyder v. Commw. of Mass., 291 U.S. 97, 106, 54 S. Ct. 330, 78 L. Ed. 674 (1934)).

Appendix at 7.

E. REASONS WHY REVIEW SHOULD BE ACCEPTED AND ARGUMENT

1. WHETHER THE COURT'S TAKING OF FOR-CAUSE CHALLENGES AT A PRIVATE BENCH CONFERENCE AND WRITTEN PEREMPTORY CHALLENGES VIOLATED REYNOLDS' RIGHT TO A PUBLIC TRIAL INVOLVES A SIGNFICANT QUESTION OF LAW UNDER THE STATE AND FEDERAL CONSTITUTION AND AN ISSUE OF SUBSTANTIAL PUBLIC INTEREST THAT SHOULD BE RESOLVED BY THIS COURT.

As will be discussed below, the record establishes that for-cause challenges were taken at a private bench conference, despite the court of appeals' attempt to obfuscate the record. Whether the public trial right attaches to for-cause challenges is a significant question of law under the state and federal constitutions that should be resolved by this Court. RAP 13.4(b)(3). Because lower courts need guidance, this is also an issue of substantial public interest that should be resolved by this Court. RAP 13.4(b)(4).

The appellate court's opinion that peremptory challenges are not implicated by the public trial right conflicts with United States Court precedent. This Court therefore should accept review of the peremptory challenge issue as well. RAP 13.4(b)(1).

The court of appeals decision in this case recognized that "If one or both of the parties had made juror challenges for cause at the sidebar conference and the parties argued those challenges, the public trial right may have been implicated." Appendix at 6. But the court held "the record does not disclose what happened at the sidebar conference with regard to the two jurors who were dismissed for cause." Appendix at 6. The decision faulted Reynolds for what it characterized as an inadequate record and declined to decide the issue, citing State v. Koss, 181 Wn.2d 493, 501-04, 334 P.3d 1042 (2014), and State v. Slert, 181 Wn.2d 598, 607, 334 P.3d 1088 (2014). Appendix at 6.

In the first case cited, Koss argued inter alia his right to a public trial was violated when the trial judge received and answered two questions, in writing, during deliberations, in a closed court proceeding. Koss, 181 Wn.2d at 496. As this Court noted, however, the transcript, clerk's papers and docket did not reveal any such proceeding, open or closed. Nor were there any

declarations, affidavits, or other materials documenting the existence of a proceeding, open or closed, in which these questions and answers were considered. Id. Under such circumstances, this Court applied its long-standing rule that the appellant bears the burden or providing a record showing that the alleged unconstitutional event occurred. Id.

But the circumstances here are different than in Koss, as the record shows the challenged unconstitutional event. The court's minutes state: "The court conducts a side bar with counsel; to discuss challenges for cause. Perspective juror numbers 21 and 22 are stricken for cause." CP 63 (emphasis added). Avoiding the issue, however, the appellate court surmises the record might not mean what it says. But it's hard to imagine how the record could be any clearer. The appellate court's attempt to sidestep a significant constitutional issue based on speculation that the record's plain language potentially could mean something other than what it says should not be condoned.

And contrary to the court of appeals decision in this case, this Court's decision in Slert actually supports review of the for-cause challenge issue raised here. In Slert, two panels of potential jurors were given a juror questionnaire. Counsel and the judge

reviewed the completed questionnaires in chambers and agreed to dismiss 4 jurors based simply on their answers. Afterward, the court went on the record in the courtroom and stated "I have already, based on the answers, after consultation with counsel, excused [4] jurors." Slert, 161 Wn.2d at 602-03 (citation to record omitted).

The lead opinion held Slert had not established a closure:

> In this case, the record Slert provided doesn't establish that the two potential jury panels had been sworn in, whether voir dire had been initiated under CrR 6.4(b), who moved to take the conversation into chambers, whether the trial court invited comment from the courtroom, what specifically was discussed in chambers, or many other facts that could usefully bear on our analysis.

Slert, 161 Wn.2d at 608. However, the lead opinion comprised only four members of this Court and did not constitute a majority.

Significantly, five members of this Court found the record sufficiently established a public trial right violation. The four-member dissent would have reversed based on the violation, whereas the concurrence would have held the issue could not be raised for the first time on appeal. Slert, 181 Wn.2d at 618 (Stephens, J., dissenting); Slert, 181 Wn.2d at 610-12 (Wiggins, J., concurring). Thus, neither of the cases cited by the court of

appeals excused it from considering Reynolds' constitutional challenge.

The Sixth Amendment to the United States Constitution and article I, section 22 of the Washington Constitution guarantee the right to a public trial. Waller v. Georgia, 467 U.S. 39, 104 S. Ct. 2210, 81 L. Ed. 2d 31 (1984); State v. Wise, 176 Wn.2d 1, 288 P.3d 1113 (2012). The state constitution also requires that "[j]ustice in all cases shall be administered openly." CONST. art. I, section 10.

Under United States Supreme Court precedent, the public trial right attaches to the exercise of jury challenges:

> As the jury system evolved in the years after the Norman conquest, and the jury came to be but a small segment representing the community, the obligation of all freeman to attend criminal trials was relaxed; however, the public character of the proceedings, including jury selection, remained unchanged. Later, during the fourteenth and fifteenth centuries, the jury became an impartial trier of facts, owing in large part to a development in that period, allowing challenges. 1 W. Holdsworth, A History of English Law 332, 335 (7th ed. 1956). Since then, the accused has generally enjoyed the right to challenge jurors in open court at the outset of the trial.
>
> Although there appear to be few contemporary accounts of the process of jury selection of that day, one early record written in 1565 places the trial "[I]n the towne house, or in some open or common place." T. Smith, De Republica Anglorum 96 (Alston ed. 1906). Smith explained that "there is nothing put in writing but the enditement":

> "all the rest is done openlie in the presence of the Judges, the Justices, the enquest, the prisoner, and so many as will or can come so neare as to heare it, and all depositions and witnesses given aloude, that all men may heare from the mouth of the depositors and witnesses what is saide." Id., at 101 (emphasis added). If we accept this account it appears that beginning in the sixteenth century, jurors were selected in public.

Press-Enterprise Co. v. Superior Court, 464 U.S. 501, 506, 104 S. Ct. 819, 78 L. Ed. 2d 629 (1984) (footnotes omitted).

This Court should accept review not only because this case involved significant questions of law under the state and federal constitutions, but because the appellate court's decision conflicts with Press Enterprise, but it involves a constitutional issue of substantial public interest that should be resolved by this Court. RAP 13.4(b)(1), (3), (4).

2. WHETHER THE COURT'S TAKING OF FOR-CAUSE CHALLENGES AT A PRIVATE BENCH CONFERENCE VIOLATED REYNOLD'S RIGHT TO BE PRESENT INVOLVES A SIGNFICANT QUESTION OF LAW UNDER THE STATE AND FEDERAL CONSTITUTIONS THAT SHOULD BE REVIEWED BY THIS COURT.

The court of appeals held Reynolds was not deprived of her right to be present when she was excluded from the sidebar conference at which for cause challenges were held because she

had the opportunity to hear all of the questioning leading up to the challenges, and because there is no evidence she did not have the opportunity to consult with counsel before the exercise of such challenges. Appendix at 7.

Under this Court's decision in Irby, however, Reynolds had the constitutional right to be present not only during the questioning of the jury, but when for cause challenges were exercised. State v. Irby, 170 Wn.2d 874, 884, 246 P.3d 796 (2011). Moreover, the state in Irby made an argument similar to what the court of appeals held here, which this Court rejected. In Irby, there was approximately 50 minutes intervening between the time the judge sent out the initial email about excusing potential jurors and the time the defense responded. The state surmised that during this time, the defense could have consulted Irby about these jurors. But this Court refused to speculate, reasoning: "where . . . personal presence is necessary in point of law, the record must show the fact." Irby, 170 Wn.2d at 884 (citing Lewis v. United States, 146 U.S. 370, 13 S. Ct. 136, 36 L. Ed. 1011 (1892)).

As in Irby, the record here does not show Reynolds had the opportunity to consult with counsel before the court called her attorney up to the bench to exercise for cause challenges.

Reynolds' exclusion from the bench conference violated her right to be present in the same respect as the email exchanges violated Irby's. Because the lower court's decision conflicts with this Court's decision in Irby, this Court should accept review. RAP 13.4(b)(2).

A criminal defendant has a fundamental right to be present at all critical stages of a trial. Rushen v. Spain, 464 U.S. 114, 117, 104 S. Ct. 453, 78 L. Ed. 2d 267 (1983); Irby, 170 Wn.2d at 880-881.

The federal constitution does not explicitly guarantee the right to be present, but the right is rooted in the Sixth Amendment's confrontation clause and the Fourteenth Amendment's due process guarantee. United States v. Gagnon, 470 U.S. 522, 526, 105 S. Ct. 1482, 84 L. Ed. 2d 486 (1985). Under the federal constitution, a defendant has the right to be present "whenever his presence has a relation, reasonably substantial, to the fullness of his opportunity to defend against the charge." Snyder v. Massachusetts, 291 U.S. 97, 105-106, 54 S. Ct. 330, 78 L. Ed. 2d 674 (1934). Stated another way, "the presence of a defendant is a condition of due process to the extent that a fair and just hearing would be thwarted by his absence." Snyder, 291 U.S. at 107-108.

The federal constitutional right to be present for jury selection is well recognized. See Lewis v. United States, 146 U.S. 370, 373-74, 13 S. Ct. 136, 36 L. Ed. 1011 (1892); Gomez v. United States, 490 U.S. 858, 873, 109 S. Ct. 2237, 104 L. Ed. 2d 923 (1989).

In contrast to the United States Constitution, article 1, section 22 of the Washington Constitution explicitly guarantees the right to be present,[3] and provides even greater rights. Irby, 170 Wn.2d at 885 n.6. Under our state provision, the defendant must be present to participate at every stage of the trial when his substantial rights may be affected. Id. at 885. This right does not turn "on what the defendant might do or gain by attending. . . or the extent to which the defendant's presence may have aided his defense[.]" Id. at 885 n.6.

This Court should accept review of this significant question of law under our state and federal constitutions. RAP 13.4(b)(3).

[3] Article 1, section 22 provides: "In criminal prosecutions the accused shall have the right to appear and defend in person, or by counsel."

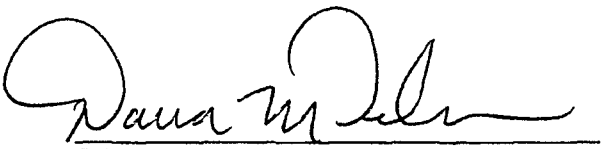
F. CONCLUSION

For the reasons stated above, this Court should accept review.

Dated this 12th day of March, 2015.

Respectfully submitted,

NIELSEN, BROMAN & KOCH



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IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON

DIVISION II

STATE OF WASHINGTON, Respondent, v. RENEE M. REYNOLDS, Appellant.	No. 45229-4-II UNPUBLISHED OPINION

MAXA, J. — Renee Reynolds appeals her two convictions of unlawful possession of a controlled substance. She argues that the trial court violated her public trial right and right to be present at all critical stages of the proceedings by announcing for cause dismissals of prospective jurors and allowing the parties to exercise peremptory challenges of prospective jurors at a sidebar conference. In a statement of additional grounds (SAG), Reynolds claims that governmental misconduct tainted her conviction. We affirm.

FACTS

On July 19, 2012, Department of Corrections Officer Reese Campbell received a telephone call explaining that Reynolds, who was noncompliant with her community placement conditions, was at a particular Vancouver home. There was an existing arrest warrant for Reynolds so Campbell, accompanied by two Vancouver police officers, went to the residence and was allowed into the home. Campbell discovered that Reynolds was in an upstairs

bathroom. Campbell knocked three times, heard the toilet flush, and arrested Reynolds after she opened the door. The police officers found drug paraphernalia in the toilet and trash can.

Suspecting that Reynolds had just used or disposed of drugs, a community placement violation, Campbell exercised his right to search Reynolds's car. He and another officer recovered heroin and methamphetamine during the search.

The State charged Reynolds with two counts of unlawful possession of a controlled substance based on the discovery of heroin and methamphetamine in her car. During jury selection, the trial court asked the venire if anyone had any undue problems with serving. Juror 21 responded that he represented Cowlitz PUD and had to attend a public multiparty rate hearing the next day. The trial court responded that it would discuss it later. Juror 22 also had a conflict, stating that he had a personal meeting the next day that he could not change.

Near the end of the attorneys' questioning of jurors the trial court conducted a sidebar conference to discuss challenges for cause. The sidebar lasted approximately three minutes. The clerk's minutes state that at this conference the trial court dismissed prospective jurors 21 and 22 "for cause." Clerk's Papers at 63. The record does not reflect whether one of the parties challenged these jurors for cause at the sidebar conference, or whether the trial court merely announced that it was dismissing them. The attorneys also passed an electronic clipboard between them to exercise peremptory challenges without orally exercising their challenges. During this process, a sidebar conference was held off the record. The trial court then seated the jurors and chose an alternative from those remaining in the jury pool.

The jury found Reynolds guilty of both charged offenses. Reynolds appeals.

ANALYSIS

A. PUBLIC TRIAL RIGHT

Reynolds claims that the trial court violated her public trial right by having the attorneys exercise their peremptory challenges by checking them off an electronic clipboard and by dismissing two potential jurors for cause during a sidebar conference. We disagree.

1. Legal Principles

We recently explained the legal principles involved in a public trial right challenge:

> The Sixth Amendment to the United States Constitution and article I, section 22 of the Washington State Constitution guarantee a defendant the right to a public trial. *State v. Wise*, 176 Wn.2d 1, 9, 288 P.3d 1113 (2012). In general, this right requires that certain proceedings be held in open court unless application of the five-factor test set forth in *State v. Bone-Club*, 128 Wn.2d 254, 258-59, 906 P.2d 325 (1995), supports closure of the courtroom. Whether a courtroom closure violated a defendant's right to a public trial is a question of law we review de novo. *Wise*, 176 Wn.2d at 9.
>
> The threshold determination when addressing an alleged violation of the public trial right is whether the proceeding at issue even implicates the right. *State v. Sublett*, 176 Wn.2d 58, 71, 292 P.3d 715 (2012). "[N]ot every interaction between the court, counsel, and defendants will implicate the right to a public trial or constitute a closure if closed to the public." *Sublett*, 176 Wn.2d at 71. To make this determination, our Supreme Court in *Sublett* adopted an "experience and logic" test. 176 Wn.2d at 73.
>
> To address whether there was a court closure implicating the public trial right, we employ a two-step process. *State v. Wilson*, 174 Wn. App. 328, 335-37, 298 P.3d 148 (2013). First, we consider whether the particular proceeding at issue "falls within a category of proceedings that our Supreme Court has already acknowledged implicates a defendant's public trial right." *Wilson*, 174 Wn. App. at 337; *see also Wise*, 176 Wn.2d at 11. Second, if the proceeding at issue does not fall within a specific protected category, we determine whether the proceeding implicates the public trial right using the *Sublett* experience and logic test. *Wilson*, 174 Wn. App. at 335.

State v. Marks, No. ___ Wn. App. ___, 339 P.3d 196, 198 (2014) (footnotes omitted).

2. Peremptory Juror Challenges

Reynolds argues that the trial court violated her right to a public trial by allowing peremptory juror challenges to be made at a sidebar conference. We held in *State v. Dunn*, 180 Wn. App. 570, 321 P.3d 1283 (2014), *review denied*, 340 P.3d 228 (2015), and again in *Marks*, 339 P.3d at 198, that exercising peremptory challenges does not implicate the public trial right. Accordingly, we hold that the trial court did not violate Reynolds's public trial right by allowing counsel to make peremptory challenges at a sidebar conference.

3. Juror Dismissals "For Cause"

Reynolds argues that the trial court violated her public trial right by allowing counsel to make juror challenges for cause at a sidebar conference. However, Reynolds has not provided a sufficient record for us to determine what happened at the sidebar conference. Reynolds's inability to show that either party actually challenged jurors 21 and 22 for cause at sidebar precludes us from finding a public trial right violation.

Division Three of this court in *State v. Love* held that the exercise of for cause juror challenges during a sidebar conference did not violate the defendant's public trial right. 176 Wn. App. 911, 919, 309 P.3d 1209 (2013), *review granted in part*, 340 P.3d 228 (2015). However, this division has not yet addressed whether juror challenges for cause implicate the public trial right. In this case, we need not decide whether a party's challenges for cause or argument on those challenges implicates the public trial right.

Here, the record does not show that the State or Reynolds actually challenged jurors 21 and 22 for cause at the sidebar conference. A party's challenge is not the only way a juror can be dismissed for cause. Under RCW 2.36.110, the trial court has a duty to excuse any juror who, in

the opinion of the judge, is unfit to serve as a juror for one of several reasons, including "conduct or practices incompatible with proper and efficient jury service." Here, the trial court may have decided during voir dire questioning of jurors 21 and 22 – which was done in open court – that they should be dismissed under RCW 2.36.110, and then merely announced that decision to counsel at the sidebar conference.

Further, RCW 2.36.100(1) allows a trial court to dismiss a juror for "undue hardship, extreme inconvenience, public necessity, or any reason deemed sufficient by the court." Although the clerk's minutes state that the dismissals were for cause, the questioning of jurors 21 and 22 showed only that they had unresolvable scheduling conflicts. As a result, the trial court may have decided to dismiss them under RCW 2.36.100(1).

The question therefore becomes whether a trial court's *announcement* to counsel of its decision dismissing jurors under RCW 2.36.100(1) or RCW 2.36.110 implicates the public trial right. Our Supreme Court has not held that the trial court's juror dismissals must be announced in open court. Therefore, we must apply the experience and logic test to determine if the public trial right applies. *Sublett*, 176 Wn.2d at 73.

The experience and logic test does not suggest that the trial court's announcement of sua sponte juror dismissals implicates the public trial right. Regarding the experience prong, the dismissals of jurors 21 and 22 here were "announced" in writing on a document that was filed in the public record. We are aware of no authority indicating that this procedure is improper, or that a trial court's act of announcing juror dismissals historically has been open to the public. Regarding the logic prong, the public would not play a significant positive role in the functioning

of the trial court's *announcement* of juror dismissals. Therefore, we hold that a trial court's announcement that it is dismissing jurors does not implicate the public trial right.

If one or both of the parties had made juror challenges for cause at the sidebar conference and the parties argued those challenges, the public trial right may have been implicated. On the other hand, if the trial court here merely announced at the sidebar conference that it was dismissing jurors 21 and 22, the trial court did not violate Reynolds's public trial right. The problem here is that the record does not disclose what happened at the sidebar conference with regard to the two jurors who were dismissed for cause.

Our Supreme Court in *State v. Koss* held that the defendant bears the responsibility to provide a record showing that a court closure has occurred. 181Wn.2d 493, 501-04, 334 P.3d 1042 (2014). Similarly, the plurality opinion in *State v. Slert* held that the defendant has the burden of providing an adequate record to establish a violation of the public trial right, and in the absence of an adequate record a court will not infer that the trial court violated the constitution. 181 Wn.2d 598, 607, 334 P.3d 1088 (2014).

Here, Reynolds has not provided us with a sufficient record to determine whether what happened at the sidebar conference would implicate the public trial right. As a result, we will not assume that the trial court violated that right. We reject Reynolds's argument that the trial court violated her public trial right with regard to for cause juror challenges.

B. RIGHT TO BE PRESENT

Reynolds argues that the trial court violated her constitutional right to be present at all critical stages of the proceeding when it allowed counsel to make peremptory juror challenges and dismissed jurors 21 and 22 at sidebar conferences. We disagree.

Under the Sixth and Fourteenth Amendments to the United States Constitution and article I, section 22 of the Washington Constitution, a criminal defendant has a fundamental right to be present at all "critical stages" of trial. *State v. Irby*, 170 Wn.2d 874, 880, 246 P.3d 796 (2011). Our Supreme Court has recognized that jury selection is a critical stage of trial to which the right to be present attaches. *Id.* at 883-84. We assume without deciding that the right to be present attached, but hold that the right was not violated.

Here, Reynolds was present in the courtroom during all of voir dire, and therefore had the opportunity to hear all questioning that formed the basis for any future juror challenges. Further, Reynolds was present in the courtroom and witnessed counsel conduct the jury selection process. There is no evidence that she did not have the opportunity to exercise her right to consult with her counsel or otherwise be involved in counsel's use of peremptory or for cause challenges. The sidebar conference did not deprive Reynolds of the " 'power . . . to give advice or suggestion or even to supersede' " her counsel. *Irby*, 170 Wn.2d at 883 (quoting *Snyder v. Commw. of Mass.*, 291 U.S. 97, 106, 54 S. Ct. 330, 78 L. Ed. 674 (1934)).

We hold that the trial court did not violate Reynolds's right to be present during jury selection proceedings.

C. SAG ARGUMENTS

Reynolds claims that she was denied a fair trial because Officer Campbell lied about whether he had written a report about her arrest and lied about finding baggies in the toilet. She also claims that Officer Ronald Stevens lied when he said he took the evidence to the evidence room. But Reynolds's assertions involve matters outside the record and therefore cannot be properly addressed on appeal. *State v. McFarland*, 127 Wn.2d 322, 335, 338 n.5, 899 P.2d 1251

(1995) (stating that matters outside record must be raised in a personal restraint petition). Therefore, we do not consider them.

We affirm.

A majority of the panel having determined that this opinion will not be printed in the Washington Appellate Reports, but will be filed for public record in accordance with RCW 2.06.040, it is so ordered.

Maxa, J.
MAXA, J.

We concur:

Johanson, C.J.
JOHANSON, C.J.

J
LEE, J.

NIELSEN, BROMAN & KOCH, PLLC

March 12, 2015 - 3:36 PM

Transmittal Letter

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