No. 40333-1-II

THE COURT OF APPEALS FOR THE STATE OF WASHINGTON
DIVISION II

STATE OF WASHINGTON,

Respondent,

vs.

KENNETH SLERT,

Appellant.

Lewis County Superior Court Cause No. 04-1-00043-7

State's Supplemental Brief re: Harmless Error

JONATHAN L. MEYER
Lewis County Prosecuting Attorney

By: _____
ERIC EISENBERG, WSBA No. 42315
Deputy Prosecuting Attorney

Lewis County Prosecutor's Office
345 W. Main Street, 2nd Floor
Chehalis, WA 98532-1900
(360) 740-1240

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I. ISSUE PRESENTED[1]

1. This Court previously found that it violated Slert's right to presence for counsel and the judge to agree, in chambers, on four potential jurors to be dismissed because they had heard Slert was previously convicted of the same murder. Was this error harmless beyond a reasonable doubt?

II. STATEMENT OF THE CASE

A. SUMMARY OF ISSUE AND PROCEDURAL POSTURE

Kenneth Slert appeals his second-degree murder conviction following his third trial for the same offense. At trial, potential jurors filled out a questionnaire regarding pretrial publicity. The judge and both counsel, in chambers, identified four potential jurors whom they agreed should be excluded based on their questionnaire answers. This Court found that having this discussion in chambers violated the open-courts doctrine and the defendant's right to be present. *State v. Slert* (*Slert III*), 169 Wn. App. 766, 775-779, 282 P.3d 101 (2012). The Supreme Court accepted review solely of the open-courts question, and then reversed. *State v. Slert*, ___ Wn.2d___, 334 P.3d 1088 (2014). Four justices found that no closure occurred, *id.* at 1093 (opinion of

[1] This Court's order for additional briefing and the Supreme Court's opinion seem to focus the issue on remand solely to one of harmless error. If this Court disagrees and believes that a no-error analysis is within the scope of remand, the State requests the right to brief that issue as well. In a nutshell: this Court decided under *Irby* that error occurred, but the open-courts case law motivating this Court's interpretation of *Irby* has changed to such an extent within the past three years that the Court should now find no error under *Irby*.

Gonzalez, J.), and one opined that Slert was barred from raising the issue on appeal, *id.* at 1095 (Wiggins, J., concurring in result). The case now comes back before this Court on remand to address whether the right-to-presence violation was harmless error.

B. RELEVANT FACTS AND PROCEDURAL HISTORY[2]

In October of 2000, Kenneth Slert was camping in Lewis County, Washington, when a man named John Benson drove into his campsite. Verbatim Report of Proceedings (VRP) (Nov. 18, 2009) at 17, 20, 58; VRP (Jan. 27, 2010) at 492. The two were strangers. VRP (Nov. 18, 2009) at 229. Benson invited Slert into his truck to share some whiskey. VRP (Jan. 27, 2010) at 492. The interaction did not go well; Slert eventually shot and killed Benson. *Id.* at 493-95, 513. Slert claimed that the killing was justified because Benson attacked him. *Id.* But, the physical evidence suggesting an execution-style killing at close range, with one shot paralyzing Benson and a second shot fired with the gun touching Benson's head. VRP (Jan. 27, 2010) at 345, 349, 352-54, 363-64. Consistent with this evidence, Slert told a

[2] For a more expansive recitation of the facts, please see the State's Response Brief in the Court of Appeals or one of the previous appellate decisions in this case: *State v. Slert* (*Slert I*), No. 31876-8-II, 128 Wn. App. 1069, 2005 WL 1870661 (Aug. 9, 2005), and *State v. Slert* (*Slert II*), No. 36534-1-II, 149 Wn. App. 1043, 2009 WL 924893 (Apr. 7, 2009).

fellow inmate that he killed Benson because Benson had come on to him. VRP (trial) at 433, 478.

The State charged and convicted Slert of second-degree murder, but the conviction was overturned because the trial court erred in rejecting one of Slert's proposed self-defense instructions. *Slert I*, 2005 WL 1870661 at *1-4. Slert was convicted again on remand; that conviction was overturned because the trial judge violated the appearance of fairness doctrine. *Slert II*, 2009 WL 924893 at *4-5.

In the lead-up to Slert's third trial, Slert's lawyer submitted a jury questionnaire designed to screen the venire for exposure to pretrial publicity. VRP (Jan. 6, 2010) at 3-4. The goal was to remove jurors who were prejudiced from hearing about Slert's previous convictions for the same offense, without tainting the whole panel. *Id.* The parties adjusted the questionnaire's wording to obscure Slert's previous convictions of the crime. VRP (Jan. 21, 2010) at 2-4. Otherwise, it remained as proposed by the defense. *Id.*

The prospective jurors filled out the questionnaire when they appeared for voir dire on the first day of trial. VRP (Jan. 6, 2010) at 14; VRP (Jan. 25, 2010) at 5-6. The trial court and counsel for both parties then reviewed the questionnaires, and the defendant was present to consult

with his attorney for at least a portion, if not all, of this review. *See* VRP (January 25, 2010) at 5-6; CP at 194.[3] At some point, counsel and the judge had an in-chambers conference. CP at 194. The Court then went on the record to address some other matters, *id.*, during which the trial court announced the agreed-upon excusal of four jurors for cause:

> There are a couple other things. We have had the questionnaires that have been filled out. I have already, based on the answers, after consultation with counsel, excused jurors number 19, 36, and 49 from panel two which is our primary panel and I've excused juror number 15 from panel one, the alternate panel.

VRP (Jan. 25, 2010) at 3, 5; CP at 194. Defense counsel commented that those jurors were dismissed because they had knowledge of prior trials. VRP (Jan. 25, 2010) at 11.

Other than agreeing about these four jurors, Slert's counsel noted that the parties had not yet discussed the voir-dire implications of the jury questionnaire. *Id.* at 10 ("[W]e still haven't dealt with the responses to the questionnaire."). Defense counsel identified 15 potential jurors who had heard something about the case, but did not necessarily say they knew about the prior trials. *Id.* at 10-11. He requested in-

[3] The defendant was present as of 9:30 a.m. that morning, when the prospective panel was still going through the questionnaires. VRP (Jan. 25, 2010) at 5-6. The Court did not excuse the four tainted potential jurors until 10:49 a.m. CP at 194. The judge said that they had reviewed the questionnaire answers by then. VRP (Jan. 25, 2010) at 5. Thus, it appears that the defendant was present for the intervening hour and twenty minutes, while the jurors finished responding to the questionnaires and counsel reviewed them.

chambers voir dire of these potential jurors. *Id.* The judge rejected this proposal, requiring individual voir dire to be in open court. VRP (Jan. 25, 2010) at 11-14. The parties conducted individual voir dire of these jurors, *id.* at 14-69, and afterwards conducted general voir dire of the whole panel. *Id.* at 69-124.

The resulting jury heard the trial and convicted Slert for a third time. VRP (Feb. 2, 2010) at 977-79; VRP (Feb. 10, 2010) at 1-13 (sentencing).

Slert timely appealed, arguing that the in-chambers conference regarding the jury questionnaires violated his right to open courts and right to be present. This Court agreed on both issues. *State v. Slert* (*Slert III*), 169 Wn. App. 766, 775-779, 282 P.3d 101 (2012). The Court did not undertake a harmless-error analysis for the right-to-presence issue because the open-courts holding preempted it. *See id.* at 778-79 (holding that the open-courts error was structural, i.e., not subject to harmless-error analysis).

The Supreme Court granted review solely on the open-courts issue. Order Granting Review, No. 87844-7 (Apr. 8, 2013), *reported at* 176 Wn.2d 1031 (2013). In a split opinion, it reversed. *State v. Slert*, ___ Wn.2d___, 334 P.3d 1088 (2014). Four justices found that no closure of the

courtroom occurred from the pre-voir-dire discussion of the jury questionnaires. *Id.* at 1093 (opinion of Gonzalez, J.). One justice opined that Slert was barred from raising his open-courts claim for the first time on appeal. *Id.* at 1095 (Wiggins, J., concurring in result). Because five justices rejected Slert's open-courts claim, the Supreme Court remanded the case to this Court to consider whether the right-to-presence error was harmless. *See* ACORDS "Events" entry of Oct. 16, 2014, No. 87844-7. This Court requested supplemental briefing on the issue. Order Requiring Additional Briefing, No. 40333-1-II (Nov. 6, 2014).

III. LEGAL STANDARD

A violation of the defendant's right to be present may be harmless error. *State v. Caliguri*, 99 Wn.2d 501, 509, 664 P.2d 466 (1983). First, the defense must raise the possibility of prejudice. *Id.*; *accord State v. Bourgeois*, 133 Wn.2d 389, 414, 945 P.2d 1120 (1997). If raised, the State must disprove it beyond a reasonable doubt. *Caliguri,* 99 Wn.2d at 509*; accord State v. Irby*, 170 Wn.2d 874, 903, 246 P.3d 796, 810 (2011).

IV. ARGUMENT

A. THE DISMISSAL OF FOUR JURORS WHO HAD HEARD ABOUT SLERT'S PRIOR CONVICTIONS FOR THE SAME OFFENSE WAS HARMLESS BECAUSE IT INURED TO SLERT'S BENEFIT AND WOULD HAVE OCCURRED REGARDLESS OF SLERT'S PRESENCE OR INPUT.

The four jurors who were dismissed by agreement in this case had no chance to sit on Slert's jury—even his trial counsel agreed that these jurors knew too much about Slert's prior trials to be allowed to serve. Consequently, Slert has not raised any possibility of prejudice from his absence when they were excused. Had Slert objected, the jurors would still have had to be excused to ensure a fair trial. Because excusing these jurors inured to Slert's benefit and would have happened regardless of whether he had been present in chambers, the error was harmless. The Court should affirm Slert's conviction.

1. Slert Has Not Raised Even The Possibility Of Prejudice From His Absence During The Dismissal Of The Jurors.

At no point in any of the briefing in this matter has the defense suggested that the four excused potential jurors in this case *should* have been on the jury. *See* Appellant's Opening Brief, No. 40333-1-II, at 63-65 (arguing error but not prejudice); Appellant's Reply Brief, No. 4033-1-II, at 32-33

(arguing error under *Irby* and alleging that the State can't prove harmlessness, but proffering no purported prejudice).

This is true because the dismissed jurors could not realistically have served on Slert's jury. The whole point of the questionnaire was to screen out jurors who had heard that Slert was convicted at his prior trials for the same crime, which would be extremely prejudicial to Slert. VRP (Jan. 6, 2010) at 3-4. The record shows that after a review of the questionnaire answers, Slert's attorney consented to these four jurors' dismissal because they had heard about Slert's prior trials. VRP (Jan. 25, 2010) at 3, 5, 11; CP at 194. In contrast, Slert's attorney wished to question other potential jurors' whose knowledge of the prior convictions was not apparent from the questionnaires. *Id.* at 10-11. Thus, the four dismissed jurors were so obviously prejudiced by their knowledge of Slert's case that everyone knew, without further questioning, that they could not sit on the jury.

It is not as if this process was a secret to Slert, who sat by his counsel's side during at least a portion of the review of questionnaires,[4] during the announcement of the four jurors' dismissal,[5] during his counsel's request for in-

[4] Please see footnote 3, above, for the explanation of why the record supports this conclusion.

[5] VRP (Jan. 25, 2010) at 3, 5; CP at 194.

chambers voir dire of other jurors,[6] and during both the individual and general voir dire.[7] At no point did he object, raise concerns, or otherwise indicate that his attorney's actions were contrary to his interests. Slert's silence when his attorney argued for in-chambers voir dire suggests that he agreed with his attorney's efforts to secure him a fair jury in this manner. Consequently, the defense has not and cannot raise any claim of prejudice to Slert from his absence when the four jurors at issue were excused. The Court should hold the error harmless beyond a reasonable doubt and affirm Slert's conviction.

2. **To The Extent That A Citation To *Irby* Is Enough To Raise A Claim Of Prejudice, The Record Disproves The Claim Beyond A Reasonable Doubt.**

Although the defense never raised any possibility of prejudice from the right-to-presence violation, Slert's reply brief did cite *Irby* and argue that the error was not harmless. Appellant's Reply Brief, No. 4033-1-II, at 32-33. To the extent that the Court believes this citation is enough to raise a claim of prejudice, the record shows that the error was harmless beyond a reasonable doubt.

In *Irby*, the judge and counsel dismissed jurors for hardship and other reasons by email in advance of the first

[6] VRP (Jan. 25, 2010) at 10-11.
[7] *Id.* at 14-124.

day of trial. *Irby*, 170 Wn.2d at 877-78. Some of the hardship excusals were rather "soft": there was no evidence in the record that the excused jurors were unfit or unable to serve; rather, the clerk or judge had merely opined that it would be inconvenient for them. *Id.* at 886-87. Because reasonable jurors may have different takes on a case, and because the State had not proven that these jurors were unfit or unable to serve, the State could not prove that the error in dismissing them outside of Irby's presence was harmless. *Id.*

Here, unlike in *Irby*, the record shows that the excused jurors were prejudiced against Slert because they had knowledge that he had previously been convicted of the crime. *Compare* VRP (Jan. 25, 2010) at 3, 5, 11 (dismissing these jurors because of that knowledge) *with id.* at 10-11, 14-69 (conducting voir dire of other jurors to assess whether they had prejudicial knowledge). Thus, the four dismissed jurors in this case had no chance to sit on Slert's jury, and their absence had only a salubrious effect on Slert's trial. This is the showing *Irby* required. The error was harmless.[8]

[8] Separately, any error in this case was also harmless because a defendant has the right only to reject, not to select, a particular juror. *Howard v. Kentucky*, 200 U.S. 164, 174, 26 S. Ct. 189, 50 L. Ed. 421 (1906) (quoting *Brown v. New Jersey*, 175 U.S. 172, 20 S. Ct. 77, 44 L. Ed. 119 (1899)); *Irby*, 170 Wn. 2d at 899 (Madsen, J., dissenting). Slert did not lose the opportunity to challenge any juror as a result of the in-chambers conference. On the contrary, his attorney used it to obtain dismissals or individual voir dire of all suspect jurors. Because Slert had no right to be tried by the particular jurors dismissed after in-chambers discussion, any error in the dismissal did not affect his substantive

This Court recently reached a similar result in *State v. Miller*, No. 44837-8-II, ___ Wn. App. ___, (Slip. Op., Nov. 25, 2014). In *Miller,* a prospective juror was present in the courtroom for preliminary matters that jurors are not allowed to see. *Id.* at 2. Discovering this circumstance while on recess, the trial judge dismissed the juror by stipulation of the parties in the defendant's absence. *Id.* at 2-3. The *Miller* opinion reasoned that there was no chance that this juror would have been allowed to sit on the jury, even if Miller had been present to object to her dismissal. *Id.* at 10. So, any error was harmless beyond a reasonable doubt. *Id.*

Miller is on point. It is hard to imagine how a judge could decide *not* to excuse potential jurors who had heard Slert was previously convicted at a prior trial of the same murder. How could a juror disregard that information? Therefore, even if Slert had objected to the jurors' dismissal—which he did not, even though he was present when the judge announced the dismissal, VRP (Jan. 25, 2010) at 3, 5—these four jurors would have been dismissed. The Court should hold that the error was harmless beyond a reasonable doubt and affirm Slert's conviction.

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rights. *Irby*, 170 Wn. 2d at 901 (Madsen, J., dissenting). The State did not sufficiently demonstrate this point in *Irby*, where the propriety of the dismissals was unclear. *Id.* at 886 (Alexander, J., majority opinion). But in this case, where the record indicates that Slert's attorney wished to excuse these jurors because they were tainted by pretrial publicity, harmless error is shown.

V. CONCLUSION

Kenneth Slert seeks to overturn his murder conviction because the judge and the parties agreed, in chambers, that four jurors be dismissed for cause. The defense attorney noted that these jurors knew about Slert's prior trials (at which Slert had been convicted of the same murder). Slert has not and cannot raise any claim of prejudice from this dismissal, which was necessary to make his trial fair. Even if he raised a claim of prejudice, the record proves it harmless beyond a reasonable doubt because there is no chance that these jurors could have served on Slert's jury. The Court should affirm Slert's conviction.

RESPECTFULLY submitted this 2 day of December, 2014.

JONATHAN L. MEYER
Lewis County Prosecuting Attorney

by: _____
ERIC EISENBERG, WSBA 42315
Attorney for Plaintiff

COURT OF APPEALS FOR THE STATE OF WASHINGTON
DIVISION II

STATE OF WASHINGTON, Respondent, vs. KENNETH SLERT, Appellant.	No. 40333-1-II DECLARATION OF SERVICE

Ms. Teri Bryant, paralegal for Eric W. Eisenberg, Deputy Prosecuting Attorney, declares under penalty of perjury under the laws of the State of Washington that the following is true and correct: On December 3, 2014, the appellant was served with a copy of the **State's Supplemental Brief re: Harmless Error** by email via the COA electronic filing portal to Jodi R. Backlund, Backlund & Mistry, attorney for appellant, at the following email addresses: backlundmistry@gmail.com.

DATED this 3rd day of December, 2014, at Chehalis, Washington.

Teri Bryant

Teri Bryant, Paralegal
Lewis County Prosecuting Attorney Office

LEWIS COUNTY PROSECUTOR

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Sender Name: Teresa L Bryant - Email: teri.bryant@lewiscountywa.gov

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