No. 44077-6-II

IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON

DIVISION TWO

STATE OF WASHINGTON,

Respondent,

v.

TYSON MAXWELL,

Appellant.

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

The Honorable Carol Murphy, Judge
Cause No. 12-1-00619-2

SUPPLEMENTAL BRIEF OF RESPONDENT

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A. ISSUES PERTAINING TO ASSIGNMENTS OF ERROR.

1. Whether Maxwell's constitutional right to be present at all critical stages of his trial was violated when peremptory challenges were exercised at the clerk's desk while, presumably, Maxwell sat at another location in the courtroom.

B. STATEMENT OF THE CASE.

The State accepts Maxwell's statement of the case contained in his Supplemental Brief.

C. ARGUMENT.

1. Maxwell's right to be present at trial was not violated when his counsel performed peremptory challenges at the clerk's station and the Court of Appeals should affirm his conviction.

The Due Process clause of the Fourteenth Amendment of the federal constitution protects the right of a defendant to be present "at all critical stages of trial." State v. Irby, 170 Wn.2d 874, at 880, 246 P.3d 796, 799 (2011) (citing Rushen v. Spain, 464 U.S. 114, 117, 104 S.Ct. 453 (1983)). Article 1 section 22 of the state constitution protects the right of a defendant to be present, in person or by counsel, at trial "when his substantial rights may be affected." Id. at 885 (citing State v. Shutzler, 82 Wn. 365, 367, 133 P. 284 (1914)).

Maxwell argues that peremptory challenges are a critical stage of trial during which his substantive rights may be affected

and that, under both federal and state constitutional provisions, his right to be present at trial was violated when his counsel exercised peremptory challenges at the clerk's station. Appellant's Supplemental Brief at 3. The State does not contest that peremptory challenges are a critical portion of trial or that Maxwell has a right to be present while peremptory challenges are exercised; it contests, however, Maxwell's proposition that presence at trial means immediate physical presence at the clerk's station and real-time interaction with counsel as counsel identifies jurors for peremptory challenges.

Maxwell does not dispute his physical presence in the courtroom as his counsel stood at the clerk's station to identify for the prosecutor, clerk, and judge which potential jurors would be stricken from the venire list. Although Maxwell identifies that there is no record of Maxwell engaging with counsel immediately prior to peremptory challenges, Maxwell does not contest his ability to confer with counsel throughout *voir dire* proceedings. Appellant's Supplemental Brief at 5-6. He does not contest his ability to interact with counsel up until counsel identified the jurors or his presence when the court announced the jury panel. Finally, there is no record that Maxwell or his counsel requested that Maxwell

come to the clerk's station or that Maxwell help as counsel worked with the judge, prosecutor, and clerk to dismiss selected jurors. His position, therefore, must be that the right to be present at trial requires a defendant's immediate presence and real-time input at the clerk's station as potential jurors are identified for dismissal.

The State contests this interpretation. Although Maxwell offers authority showing that the right to be present at trial is violated when a defendant is physically absent and unable to interact with counsel during portions of *voir dire*, (i) Maxwell provides no Washington state or federal authority indicating that the right to be present at trial guarantees not only a defendant's physical presence and the ability to communicate with counsel throughout *voir dire* proceedings, but also requires that a defendant be immediately present and engage in real-time input at the clerk's station, but (ii) the experience of other jurisdictions suggests that a defendant is present for peremptory challenges so long as he is physically present and able to communicate with counsel up until and immediately after challenges are exercised. Interpreting controlling jurisprudence that does exist, the State argues that (iii) a defendant is present during peremptory challenges when he is physically present in the courtroom and able to interact with

counsel throughout the entire *voir dire* process, thus preserving for the defendant the opportunity, unused as it may be, to request immediate presence if he so wishes. (iv) Maxwell's right to be present at trial was not violated when Maxwell was present in the courtroom, able to confer with counsel throughout *voir dire*, and in the courtroom while his counsel was at the clerk's station. (v) Even if it were error for Maxwell to have stayed at the defense table while his counsel was at the clerk's station, that error was harmless.

Whether an accused's right to be present at trial has been violated is a question of law, reviewed *de novo*. Irby, 170 Wn.2d at 880 (citing State v. Strode, 167 Wn.2d 222, 225, 217 P.3d 310 (2009)).

i. Maxwell provides no Washington state or federal authority indicating that the right to be present at trial guarantees not only a defendant's physical presence and the ability to communicate with counsel throughout *voir dire* proceedings, but also requires that a defendant be immediately present and engage in real-time input at the clerk's station.

Maxwell uses State v. Irby in support of his position that the right to be present at trial requires immediate presence at the clerk's station and contemporaneous contribution to the identification of jurors for dismissal. Appellant's Supplemental Brief at 3. This was not the Court's holding in Irby, however.

In Irby, the State Supreme Court considered whether for cause challenges, hardship dismissals and court rulings conducted while Irby was physically absent and in his jail cell violated his right to be present during trial. Irby, 170 Wn.2d at 877-880. Before trial, both prosecution and defense agreed that neither needed to attend the first day of jury selection because the potential jurors were only scheduled to fill out questionnaires and take the necessary oath. Id. The parties agreed to appear the second day, and there was no suggestion that jurors would be eliminated from the panel on the first day. Id. On the first day however, after the questionnaires were completed, the judge sent out an email to the prosecution and defense, recommending certain potential jurors be removed from the panel for cause, hardship, and other reasons. Id. After a short exchange, an agreement was reached and jurors were stricken. Id.. Irby was absent as this agreement was made. Id. Further, it was highly unlikely that Irby's counsel had conferred with Irby because the judge sent his email at 1:02 p.m., counsel replied at 1:53 p.m., and Irby was in custody in his jail cell. Id. at 884. The Court found that Irby's right to be present at trial had been violated and upheld the reversal of Irby's conviction because "[Irby] was in

his jail cell," and it was "unlikely that the attorneys spoke to Irby...." Id..

The Court's ruling in Irby stands for the unexceptional proposition that both federal and state constitutional provisions uphold a defendant's right to be physically present and able to influence decisions made during critical stages of *voir dire*, or at least be able to communicate with counsel at critical stages of *voir dire*. The Court upheld the reversal of Irby's conviction, first, because Irby was not physically present in the courtroom; he did not see potential jurors and was unable to ask questions or voice opinions to counsel even if he had wanted to. The Court upheld the reversal of Irby's conviction, second, because it was actually very unlikely that Irby had had a chance to voice any input that he might have wanted to express to his counsel. The Irby Court upheld the federal and state constitutions' mandate that a defendant be physically present at trial; it did make a new rule that presence at trial during challenges requires immediate presence adjacent to counsel as decisions are being made in real-time.

Maxwell also offers State v. Bennett, 168 Wn. App. 197, 203, 275 P.3d 1224 (2012), which states that a defendant has a right to "actively contribute" to jury selection, to support his argument.

Appellant's Supplemental Brief at 4. The State agrees that a defendant has the right to actively contribute to his defense; it does not, however, take the additional step to conclude that "active contribution" means immediate presence and real-time interaction all the time.

Maxwell provides no Washington State or federal authority indicating that presence at trial requires immediate presence adjacent to counsel and contemporaneous contribution as counsel strikes names from the juror list.

ii. The experience of other jurisdictions suggests that a defendant is present for peremptory challenges so long as he is physically present and able to communicate with counsel up until and immediately after challenges are exercised.

In the absence of direct federal or state authority, the example of other jurisdictions may be instructive. The State can find only a handful of decisions from other jurisdictions that address whether the right to be present at trial is violated if the defendant is positively excluded or not immediately present during peremptory challenges at side-bar, in chambers, or outside the courtroom. This in itself suggests that a majority of states have not developed a requirement that the defendant be immediately present. Still, the

cases that exist are helpful commentary on the scope and extent of a defendant's right to be present at trial.

Reversals on the ground that the defendant was not present during peremptory challenges appear most often where the defendant was completely absent from the challenges. Francis v. State, 413 So. 2d 1175 (Fla. 1982) (receded from on other grounds by Muhammad v. State, 782 So.2d 343, 26 Fl. L. Weekly S37 (2001)) (reversal when, while defendant was using the restroom, his counsel, the prosecutor, the judge and the court reporter retired to chambers to perform jury selection and the defendant was left in the courtroom until the jury was ultimately announced); State v. Carver, 94 Idaho 677, 496 P.2d 676 (1972) (reversal when defendants were brought into the courtroom only after jurors were examined, challenges exercised, and the panel sworn); Brooks v. State, 271 Ga. 456, 519 S.E.2d 907 (1999) (reversal when defendant was excluded from in-chamber conferences during which the judge, prosecutor and counsel struck jurors); State v. Muse, 967 S.W.2d 764 (1998) (reversal when defendant was completely absent during entire *voir dire* proceeding).

Maxwell offers People v. Williams, 52 A.D.3d 94, 858 N.Y.S.2d 147 (2008), from the First Department of the New York

Appellate Division as an example of when a defendant was considered absent from side-bar proceedings despite being physically present in the courtroom. Appellant's Supplemental Brief at 5. But that decision involved an active assertion and denial of a defendant's right, propounded in People v. Antommarchi, 80 N.Y.2d 247, 590 N.Y.S.2d 33 (1992), to be immediately present at side-bars during juror questioning. Williams, 52 A.D.3d at 95. Three years later the same division had an opportunity apply the People v. Antommarchi rule to a defendant's right to be present at trial during peremptory challenges conducted at side-bar. It concluded that a defendant had no such right. People v. Quintana, 80 A.D.3d 499, 914 N.Y.S.2d 630 (2011), *leave to appeal denied*, 17 N.Y.3d 799, 952 N.E.2d 1102 (2011). While recommending a practice that would permit defendants to be immediately present if they requested it, the court held that the right to be present at trial did not extend to include immediate presence at side-bars during peremptory challenges:

> The court did not deprive defendant of his right to be present at all material stages of his trial... when it excluded him from sidebar conferences at which counsel exercised peremptory challenges. All questioning of prospective jurors took place in open

> court, and there is nothing in the record to suggest that defendant lacked suitable opportunities to consult with his attorney.

Id. at 1 (citations omitted).

Florida seems to have developed a waiver system, where a defendant must knowingly waive his right to be immediately present when peremptory challenges are held at side-bar. It appears undecided, however, whether this is a mandate, or a right that can be waived. See: Anderson v. State, 697 S. 2d 878, 22 Fla. L. Weekly D1480 (Fla. Dist. Ct. App. 1997) (holding that failure of the judge to ascertain whether defendant knowingly waived presence at side-bar required reversal); Lee v. State, 695 So.2d 1314 (holding that failure to obtain waiver cannot be raised on appeal unless objected to at trial).

The State has found many cases in which a defendant was found present at trial during side-bar peremptory challenges when it appeared that the defendant was physically present and able to engage with counsel all throughout *voir dire*—and sometimes even where the defendant was present only up until and immediately after peremptory challenges but actually absent for the brief period during which challenges were actually exercised. United States v.

Gayles, 1 F.3d 735 (8th Cir. 1993) (finding that defendant was sufficiently present at all stages of trial when he was present for juror questioning and present when the clerk read off the names of the jurors to be impaneled); Cohen v. Senkowski, 290 F.3d 485 (2nd Cir. 2002) (finding that criminal defendant was sufficiently present at trial when he had an opportunity to express his opinion to counsel during juror questioning and, after an in-chambers conference, when the jury was empanelled); United States v. Bascaro, 742 F.2d 1335 (11th Cir. 1984) (abrogated on a different issue by United States v. Lewis, 492 F.3d 1219 (11th Cir. 2007) (finding that defendants were sufficiently present despite their lawyers' conference outside the courtroom before peremptory challenges because the defendants could confer with their lawyers before and after this conference); Montgomery v. State, 461 S.W.2d 844 (Mo. 1971) (finding that the defendant's absence from his attorney's work of identifying the names of the jurors to be peremptorily stricken did not violate defendant's right to be present).

These decisions from other jurisdictions do not suggest that the right to be present at trial requires a defendant's immediate presence at the clerk's station or real-time interaction as the

attorney identifies jurors for peremptory challenges. Instead, they suggest that a defendant is present at trial as long as he is physically present in the courtroom and able to voice his opinion and ask questions throughout the *voir dire* process.

iii. A defendant is present during peremptory challenges when he is physically present in the courtroom and able to interact with counsel throughout the entire *voir dire* process, thus preserving for the defendant the opportunity, unused as it may be, to request immediate presence if he so wishes.

The State can find no state or federal authority to control whether or not the right to be present at trial requires that a defendant be immediately present at the clerk's station to provide real-time help to counsel, prosecution, judge and clerk for peremptory challenges. The principles at the heart of a defendant's right to be present at trial are clear, however. From these principles the State argues that a defendant's right to be present at trial is preserved when counsel is at the clerk's station so long as the defendant is physically present and able to communicate with counsel throughout *voir dire*, thus preserving for him the opportunity, unused as the case may be, to at any time request immediate presence and real-time interaction with counsel at the clerk's station or sidebar as the case may be.

Traditionally, "'the core of the constitutional right to be present is the right to be present when evidence is being presented.'" In re Pers. Restraint of Pirtle, 136 Wn.2d 467, 483, 965 P.2d 593, 604 (1998) (quoting In re Pers. Restraint of Lord, 123 Wn.2d 296, 306, 868 P.2d 835, 844 (1994). Not limited to the ability to contest evidence, the right to be present extends to "proceedings where [the defendant's] presence has a reasonably substantial relation to 'the fullness of his opportunity to defend against the charge....'" Id. Thus, the right to be present safeguards the defendant's ability to personally answer charges levied against him; it does not make personal presence a mandate at every court proceeding: "a defendant does not have a right to be present," for example, "when his or her' presence would be useless....'" Irby 170 Wn.2d at 881 (quoting Snyder v. Massachusetts, 291 U.S. 97, 105-06, 54 S.Ct. 330 (1934)). Thus the Court has held, for example, that a defendant has no right to be present at in-chamber and bench conferences on matters such as jury instructions, announcements of rulings on issues already argued, and the setting of time limits for the testing of evidence because the amount of meaningful input that a defendant could

give to those proceedings would be minimal.[1] In re Pers. Restraint of Lord, 123 Wn.2d 296, In re Pers. Restraint of Pirtle, 136 Wn.2d 467, 484. Ultimately, the right to be present at trial extends and becomes a requirement only so far as a "'fair and just hearing would be thwarted by [the defendant's] absence.'" Irby, 170 Wn.2d at 881 (quoting Snyder, 291 U.S. at 107-108).

The State argues that a "fair and just hearing" is not in any way obstructed by a defendant's remaining at the defense table as his counsel identifies jurors for dismissal at the clerk's station. A defendant who is physically present can see the members of the venire in the courtroom, listen as they interact with one another, and evaluate their characters as they answer attorneys' questions. He can ask questions or express his views to his attorney, usually sitting just next to him at the defense table in the courtroom. He can direct his counsel to ask questions, speak to jurors, and strike those about whom he has misgivings. Anybody with experience watching a criminal proceeding is familiar with the back-and-forth that goes on between counsel and client. The defendant may write

[1] To reach these conclusions, the Court employed the legal or ministerial/factual or adversarial dichotomy analysis abandoned in a different context by the Supreme Court in State v. Sublett, 176 Wn.2d 58, 292 P.3d 715 (2012). The State does not advocate the legal or ministerial/factual or adversarial analysis here. It employs these decisions as illustrations showing how the right to be present at trial has been interpreted in other contexts.

something on a piece of paper, lean over, whisper and gesture. Counsel may write something back, bend forward, or nod. These moments are instances of the kind of proactive involvement that the justice system encourages between defendant and counsel, but which, ultimately, the defendant must take responsibility for. The right to be present at trial safeguards the willing defendant's ability to proactively engage with the system that has brought charges against him. The work of a trial attorney during peremptory challenges has been likened to "messenger service," Montgomery v. State, 461 S.W.2d 844, 847 (1971), and this is the ideal role of an attorney during peremptory challenges. If the record does not reflect a defendant's request to be together with counsel at the clerk's station, it is reasonable to conclude that the defendant either trusted counsel's judgment or trusted counsel's fidelity to the defendant's wishes. Either possibility is an appropriate way for a defendant to employ counsel to answer the charges against him.

It is unnecessary for a defendant to be brought to the clerk's station when he does not request it. The Ninth Circuit found so much on at least one occasion in United States v. Sherwood, 98 F. 3d 402, 408 (9th Cir. 1996) where, recognizing a defendant's right to be present at an attorney-conducted sidebar, the court found that

the defendant's silence had waived the opportunity: "[the defendant] waived his right to be present by failing to indicate to the district court that he wished to be present at side bar." It is sufficient, the Ninth Circuit recognized in Sherwood, that the defendant be engaged throughout the entire process and direct his counsel from the sidelines of the defense table. Physical presence in the courtroom and throughout *voir dire* is necessary to give the accused the opportunity to fully answer the charges against him. It is unnecessary, however, to require that the accused be immediately present at the clerk's station for the execution of peremptory challenges. The State maintains that a defendant is present at trial during peremptory challenges so long as the defendant is physically present and able to confer with counsel throughout *voir dire*, and physically present in the courtroom while counsel is at the clerk's station exercising challenges.[2]

iv. Maxwell's right to be present at trial was not violated when Maxwell was present in the courtroom, able to confer with counsel throughout *voir dire*, and in the courtroom while his counsel was at the clerk's station.

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2 Whether a defendant who requests to be present at the clerk's station has a right to do so is not before this court and the State does not address the issue.

Maxwell's right to be present at trial was not violated when his counsel exercised challenges at the clerk's station. Maxwell does not claim that he was not present in the courtroom throughout the entire *voir dire* and does not contest his ability to confer with his attorney throughout the process. He was, presumably, physically present while his counsel stood at the clerk's station, and he was present when the court announced the jury panel. It was Maxwell's responsibility to answer the charges against him and it was his prerogative how to employ his attorney to do so. The record does not reflect that Maxwell requested to be at the clerk's station, and it is reasonable to conclude that this reflects that he did not feel a need to do so. Maxwell was present at trial and during peremptory challenges because he was present throughout the entire *voir dire* process.

v. If it was error for Maxwell to be at the defense table while his attorney was at the clerk's station, the error was harmless.

If Maxwell's physical presence, but not immediate presence, at the clerk's station for peremptory challenges violated Maxwell's right to be present at trial, then the error is one of due process and subject to the harmless error standard. Under this standard, the

State can show beyond a reasonable doubt that the error was harmless.

"A violation of the due process right to be present is subject to harmless error analysis." Irby, 170 Wash. 2d at 885 (citing *Rushen,* 464 U.S. at 117–18, 104 S.Ct. 453; *Benn,* 134 Wash.2d at 921, 952 P.2d 116; *Lord,* 123 Wash.2d at 306–07, 868 P.2d 835). Under the harmless error standard, "'the burden of proving harmlessness is on the State...;'" it must do so beyond a reasonable doubt. Id.

In Irby the State failed to meet its burden because the jurors stricken in his complete physical absence might otherwise have been empanelled. These jurors' supposed inability to serve "was never tested by questioning in Irby's presence.... Had [the jurors]... been subjected to questioning in Irby's presence as planned, the questioning might have revealed that one or more of these potential jurors were not prevented by reasons of hardship from participating in Irby's jury." Irby, 170 Wn.2d at 886. Maxwell's case is different. As addressed above, Maxwell was in the courtroom during *voir dire*. He saw the potential jurors and, presumably, conferred with his counsel regarding dismissals. This is unlike the situation in Irby where Irby was physically absent for

the whole of the proceeding and had no input on decisions that were made.

Maxwell was not prejudiced when his counsel stepped to the clerk's station to identify jurors for dismissal. As noted, he could confer with counsel during *voir dire*, and confirm the final panel after counsel returned to the defense table. The fact that neither counsel nor Maxwell requested Maxwell's immediate presence and real-time interaction suggests that neither felt that Maxwell would be prejudiced by Maxwell's presence at the defense table. Maxwell was not prejudiced when his counsel stepped away to exercise peremptory challenges at the clerk's station.

D. CONCLUSION.

Maxwell's right to be present at trial was not violated when his counsel exercised peremptory challenges at the clerk's station. Maxwell contends that the right to be present during peremptory challenges extends to require immediate presence at the clerk's station and contemporaneous input. He provides no state or federal authority indicating such, and in light of the absence of any controlling authority the example of other jurisdictions is instructive. Other jurisdictions seem to find that a defendant's right to be present is preserved when he is present throughout *voir dire* and

when the jury panel is announced. The State argues that a defendant is present so long as he is physically present in the courtroom throughout *voir dire*, able to interact with counsel throughout *voir dire*, and able to request immediate presence if he so wants it. Here, Maxwell appears to have been in the courtroom for the whole of *voir dire* proceedings, and the record does not reflect that he wanted to be at the clerk's station when counsel identified jurors to strike. Maxwell fails to show that his right to be present at trial was violated. The State respectfully asks this court to affirm Maxwell's convictions.

Respectfully submitted this 19th day of September, 2013.

Carol La Verne, WSBA# 19229
Attorney for Respondent

THURSTON COUNTY PROSECUTOR

September 19, 2013 - 3:18 PM

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