No. 40333-1-II

COURT OF APPEALS, DIVISION II
OF THE STATE OF WASHINGTON

STATE OF WASHINGTON,

Respondent,

vs.

Kenneth Slert,

Appellant.

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

The Honorable Judge James Lawler

Appellant's Supplemental Brief Following Remand

Jodi R. Backlund
Manek R. Mistry
Attorneys for Appellant

BACKLUND & MISTRY
P.O. Box 6490
Olympia, WA 98507
(360) 339-4870
backlundmistry@gmail.com

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STATEMENT OF THE ISSUE ON REMAND[1]

Was the violation of Mr. Slert's right to be present harmless beyond a reasonable doubt?

SUPPLEMENTAL FACTS AND PRIOR PROCEEDINGS

In October of 2000, Kenneth Slert met John Benson while both were hunting on national forest land. RP 491-492, 548. They became intoxicated together, argued, and fought. RP 153-154, 405, 492, 548-550, 616, 764-769. Mr. Slert shot and killed Benson. RP 492, 517. Mr. Slert contacted a forest ranger for help. RP 176-178. He told the ranger that he'd acted in self defense, that he'd been afraid the other man would choke him to death, and that he'd feared for his life.[2] RP 179, 187, 215, 217.

Over the course of the next four years, Mr. Slert consistently maintained that he'd acted in self defense. He had a poor recollection of the details of the incident, and repeatedly engaged Lewis County Sheriff's Detective Kurt Wetzold in conversation about the shooting. Wetzold told

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[1] The issue statement is paraphrased from the Supreme Court's plurality opinion. *State v. Slert*, 334 P.3d 1088, 1093 (Wash. 2014) (Slert I).

[2] The state asserts now, for the first time, that it was an "execution style" killing, but there are no facts that support this new theory. See State Supp. Brief, p. 2. In fact, the evidence showed that the two were highly intoxicated, they struggled with each other before the shooting. RP 153-154, 405, 492-495, 513, 517, 548-550, 616, 764-769.

him that his recollection didn't match the physical evidence; this caused Mr. Slert to continue calling Wetzold to puzzle over what had happened. Wetzold made no record of these conversations. RP (11/8/09) 89-102, 175-222; RP (1/27/10) 483-521; RP (1/28/10) 528-611.

By 2004, Wetzold had extracted materially inconsistent statements. RP (11/8/09) 89-102, 175-222; RP (1/27/10) 483-521; RP (1/28/10) 528-611. The state charged Mr. Slert with second-degree murder. CP 1-3. After two successful appeals, Mr. Slert was tried a third time in 2010. CP 25-37, 48-66.

At the start of his 2010 trial, prospective jurors were summoned to court and completed a questionnaire to determine their fitness to serve. CP 359-361.

The trial judge excused four prospective jurors during a pretrial conference held in chambers. CP 194-197. The court disclosed this just prior to the start of *voir dire*:

> THE COURT: 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 that we'll be using today.
> RP 5.

Mr. Slert was not present for this pretrial conference in chambers, and the record does not show that his attorney consulted with him before the four prospective jurors were dismissed. RP 5.

Shortly thereafter, defense counsel suggested individual counseling for 15 additional jurors "that responded that they knew something about the case based on the publicity." RP 10. In making this request, counsel made the following statements:

> My concern is none of them – well, none of the ones other than the ones The Court has already pulled have indicated knowledge of any prior court trials. I don't know that that necessarily means they don't have that knowledge. And I'm concerned that I would want to have those 15 interviewed in chambers[3] individually.
> RP 10-11.

The jury convicted, and Mr. Slert appealed. CP 13.

During the course of the appeal, the parties learned that the completed jury questionnaires had been destroyed by the clerk without notice. *State v. Slert*, 169 Wn. App. 766, 769, 282 P.3d 101 (2012) *review granted in part,* 176 Wn.2d 1031, 299 P.3d 20 (2013) (Slert II). The trial judge had retained a draft copy of the blank questionnaire; however, it was unclear what changes were made before the questionnaire was given to prospective jurors. CP 359-361.

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[3] Counsel later suggested that questioning happen in the courtroom "rather than doing it in chambers." RP 11. The court agreed. RP 12.

The Court of Appeals reversed his conviction on two related grounds. The court held (1) that Mr. Slert's right to be present had been violated by the trial court's *in camera* dismissal of four prospective jurors, and (2) that Mr. Slert's right to a public trial had been violated by the *in camera* proceeding. *Slert* II, 169 Wn. App. at 769, 774-75 .

The state petitioned for review, asking the Supreme Court to review both the public trial issue and the right to be present issue. The Supreme Court granted review "only on the public trial issue." Order (April 8, 2013). After argument, the Supreme Court affirmed the Court of Appeals on the issue of the public trial right. The Court remanded for the Court of Appeals to "decide whether the violation of Slert's right to be present is harmless beyond a reasonable doubt." *Slert* I, 334 P.3d 1088, 1093 (Wash. 2014).

ARGUMENT

THE STATE CANNOT PROVE BEYOND A REASONABLE DOUBT THAT THE VIOLATION OF MR. SLERT'S RIGHT TO BE PRESENT WAS HARMLESS.

A. Standard of Review

Constitutional error is presumed prejudicial. *State v. Franklin*, 180 Wn.2d 371, 382, 325 P.3d 159 (2014). The presumption of prejudice is

overcome only when the state proves harmlessness beyond a reasonable doubt. *State v. Irby*, 170 Wn.2d 874, 884, 246 P.3d 796 (2011).

The prosecution erroneously suggests that Mr. Slert "must raise the possibility of prejudice" before the error can be considered. State's Supplemental Brief re: Harmless Error (filed December 3, 2014), p. 9 (citing *State v. Caliguri*, 99 Wn.2d 501, 664 P.2d 466 (1983)) and *State v. Bourgeois*, 133 Wn.2d 389, 945 P.2d 1120 (1997). Respondent's suggestion is incorrect.

The state seeks to burden Mr. Slert with a requirement that applies only to cases involving *ex parte* communication between judge and jury.[4] This was the subject of *Caliguri, Bourgeois*, and the cases upon which both relied. *See Caliguri* ,99 Wn.2d at 509 (citing *United States v. Ford,* 632 F.2d 1354, 1379 n. 28 (9th Cir.1980)[5] and *State v. Smith*, 85 Wn.2d 840, 853, 540 P.2d 424 (1975)); *see also Bourgeois,* 133 Wn.2d at 407[6] (citing *Caliguri* and *Rushen v. Spain*, 464 U.S. 114, 118, 104 S.Ct. 453, 78 L.Ed.2d 267 (1983)).

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[4] Such communications comprise a subset of cases involving the right to be present. No such communication is alleged in this case.

[5] Overruled on other grounds by *United States v. De Bright*, 730 F.2d 1255, 1259 (9th Cir. 1984).

[6] Respondent erroneously cites to Justice Sanders's dissent. Supplemental Respondent's Brief, p. 9.

There is no requirement that Mr. Slert show a possibility of prejudice. Furthermore, as in *Irby,* the prejudice is clear from the record. *Irby*, 170 Wn.2d at 884.

B. The state has never asserted and cannot establish beyond a reasonable doubt that the violation of Mr. Slert's right to be present was harmless.

Violation of the right to be present during a portion of jury selection is harmless only when any prospective jurors excused "had no chance to sit on [the] jury." *Id.* at 886. Prospective jurors have no chance of sitting on the jury if they are outside "the range of jurors who ultimately comprised the jury." The only other way the state can meet its burden is by showing that the jurors' "alleged inability to serve" was "tested by questioning in [the defendant's] presence." *Id.*

In all of its prior pleadings, the state has made no attempt to show that the violation of Mr. Slert's right to be present was harmless beyond a reasonable doubt. *See* Brief of Respondent, Respondent's Supplemental Brief (filed October 3, 2011), Supplemental Response Brief (filed November 15, 2011), Petition for Review.[7] Nor could the state make such a showing.

[7] The state's supplemental brief in the Supreme Court addressed only the public trial issue. The state did not suggest that any violation of the right to be present was harmless. State's Supplemental Brief (filed June 7, 2013).

In this case, the court violated Mr. Slert's right to be present by excusing four prospective jurors in his absence. RP 5. Three of the four had some chance of sitting on the jury.[8] They were within the range of prospective jurors who were ultimately selected to serve on the jury. Although some or all of them may have had familiarity with the case, their alleged inability to serve was never tested by questioning in Mr. Slert's presence. RP 5; CP 194-197.

Under the rules set forth in *Irby,* the state cannot show harmlessness beyond a reasonable doubt. *Irby,* 170 Wn.2d at 886-887. Mr. Slert's case is controlled by *Irby.* The violation of his due process right to be present and his state constitutional right to "appear and defend" prejudiced him.[9] *Id.* The Court of Appeals should reaffirm its earlier decision and remand Mr. Slert's case for a new trial. *Id.*

C. The state's harmless error argument rests on unwarranted assumptions that are not supported by the record.

Respondent's harmless error argument is premised on an unsupported inference: that the excused jurors knew that Mr. Slert had

[8] One of those excused belonged to a second panel of prospective jurors. The court did not draw any jurors from this second panel. CP 194-197.

[9] The state constitutional right to "appear and defend" guaranteed by art. I, § 22 is broader than the federal right, and "is triggered at any time during trial that a defendant's substantial rights may be affected." *State v. Jones*, 175 Wn. App. 87, 107, 303 P.3d 1084 (2013).

previously been convicted.[10] Respondent draws this inference from the nature of the questionnaire and from comments made by defense counsel after the jurors had been excused. State's Supplemental Brief re: Harmless Error, pp. 3, 4.

The record cannot be stretched to support Respondent's assumptions. First, the completed questionnaires have been destroyed; it is impossible to directly determine how each excused juror responded. *Slert*, 169 Wn. App. at 769.

Second, the record does not establish the text of the questionnaire. Only the judge's copy of a draft questionnaire survives. CP 359-361. Without even knowing the questions asked, a reviewing court cannot guess at prospective jurors' answers.

Third, counsel's comment implies (at most) that the excused jurors had "knowledge of any prior court trials." RP 10-11. Jurors may have believed that these prior trials ended without conviction, necessitating retrial. Jurors who lacked understanding of the double jeopardy clause may have believed that prior trials ended in acquittal

[10] *See* State's Supplemental Brief re: Harmless Error, pp. 1 ("they had heard Slert was previously convicted of the murder"), 7 ("four jurors who had heard about Slert's prior convictions"), 8 ("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"), 10 ("they had knowledge that he had previously been convicted of the crime"), 11 ("potential jurors who had heard Slert was previously convicted at a prior trial of the same murder").

Fourth, the excused jurors may well have been mistaken when they claimed prior knowledge. Questioning in Mr. Slert's presence could have exposed that one or more of the jurors answered the questionnaire while thinking about a different case, unrelated to Mr. Slert's.

The factual assumptions underpinning Respondent's harmless error argument do not withstand scrutiny. The violation of Mr. Slert's right to be present was not harmless. Absent proof—not mere speculation—that the excused jurors had no chance of serving on the jury, the court must grant Mr. Slert a new trial. *Irby,* 170 Wn.2d at 886-887.

D. *Miller* does not control this case.

To support its argument, Respondent erroneously relies on *State v. Miller*, No. 44837-8-II, 2014 WL 6679180 (Wash. Ct. App. Nov. 25, 2014). State's Supplemental Briefing re: Harmless Error, p. 11. *Miller* differs significantly from Mr. Slert's case.

In *Miller,* the court excused a prospective juror who observed preliminary matters in the courtroom. These preliminary proceedings included discussions about shackling, security, and the presence of guards during trial. *Miller,* --- Wn. App. at ___. Following a recess, the court announced that the juror had been excused. Both attorneys had been alerted to the problem and consented. *Id.* Even so, the court asked if

either party objected. *Id.* The *Miller* juror had not been sworn in, and had not "completed a case-specific juror questionnaire." *Id.*

Here, by contrast, the court excused three jurors after they had been sworn and completed a case-specific questionnaire. RP 5; CP 194-195. The court did not ask if anyone objected to the procedure. RP 5.

Furthermore, in *Miller,* the need to excuse the prospective juror arose in the defendant's presence. The defendant observed the same preliminary matters observed by the prospective juror, and thus had a clear understanding of the facts underlying the dismissal. *Id.* The record does not show that Mr. Slert had a similar understanding of the underlying facts resulting in the court's decision in this case.[11] RP 5; CP 194-195.

Miller is not "on point." State's Supplemental Brief re: Harmless Error, p. 11. The facts allowing the Court of Appeals to find harmless error are not present in this case. Mr. Slert's case must be remanded for a new trial. *Irby*, 170 Wn.2d at 884.

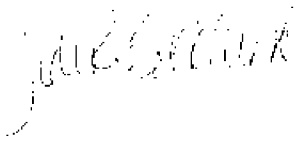
[11] Respondent erroneously suggests that Mr. Slert was continuously present in the courtroom from 9:30 a.m. (when some jurors observed him being escorted by jail staff) and 10:49 a.m., when court started. State's Supplemental Brief re: Harmless Error, p. 4 n. 3. The record does not support this claim. It is equally possible that Mr. Slert was returned to the jail because proceedings were delayed. *See* RP 5-6 ("It's come to my understanding that...the defendant was brought up from the jail at the normal time at 9:30 because the jail was not notified that we were delayed.")

CONCLUSION

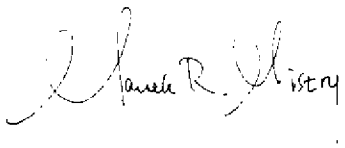
The violation of Mr. Slert's constitutional right to be present prejudiced Mr. Slert. His case must be remanded for a new trial. The Court of Appeals should reaffirm its earlier decision.

Respectfully submitted on December 8, 2014.

BACKLUND AND MISTRY



Jodi R. Backlund, WSBA No. 22917
Attorney for the Appellant



Manek R. Mistry, WSBA No. 22922
Attorney for the Appellant

CERTIFICATE OF SERVICE

I certify that on today's date, I mailed a copy of Appellant's Supplemental Brief, postage prepaid, to:

Kenneth Slert, DOC #872135
Coyote Ridge Corrections Center
P.O. Box 769
Connell, WA 99326

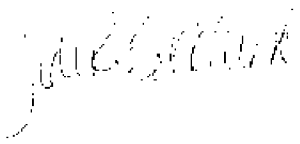
With the permission of the recipient, I delivered an electronic version of the brief, using the Court's filing portal, to:

Lewis County Prosecuting Attorney
sara.beigh@lewiscountywa.gov
appeals@lewiscountywa.gov

I filed the Appellant's Supplemental Brief electronically with the Court of Appeals, Division II, through the Court's online filing system.

I CERTIFY UNDER PENALTY OF PERJURY UNDER THE LAWS OF THE STATE OF WASHINGTON THAT THE FOREGOING IS TRUE AND CORRECT.

Signed at Olympia, Washington on December 8, 2014.



Jodi R. Backlund, WSBA No. 22917
Attorney for the Appellant

BACKLUND & MISTRY

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appeals@lewiscountywa.gov
sara.beigh@lewiscountywa.gov
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