

COA 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

SUPPLEMENTAL BRIEF OF APPELLANT

CASEY GRANNIS
Attorney for Appellant

NIELSEN, BROMAN & KOCH, PLLC
1908 East Madison
Seattle, WA 98122
(206) 623-2373

TABLE OF CONTENTS

	Page
A. <u>SUPPLEMENTAL ASSIGNMENT OF ERROR</u>	1
<u>Issue Pertaining To Assignment Of Error</u>	1
B. <u>STATEMENT OF THE CASE</u>	1
C. <u>ARGUMENT</u>	2
1. THE COURT VIOLATED MAXWELL'S RIGHT TO BE PRESENT AT ALL CRITICAL STAGES WHEN PEREMPTORY CHALLENGES WERE EXERCISED AT THE CLERK'S DESK.	2
a. <u>Due Process</u>	3
b. <u>Article I, Section 22</u>	6
c. <u>This Constitutional Error Is Not Harmless Beyond A Reasonable Doubt</u>	7
D. <u>CONCLUSION</u>	8

TABLE OF AUTHORITIES

	Page
<u>WASHINGTON CASES</u>	
<u>State v. Bennett</u> , 168 Wn. App. 197, 275 P.3d 1224 (2012).....	4
<u>State v. Evans</u> , 100 Wn. App. 757, 998 P.2d 373 (2000).....	4
<u>State v. Irby</u> , 170 Wn.2d 874, 246 P.3d 796 (2011).....	2-7
<u>State v. Shutzler</u> , 82 Wn. 365, 144 P. 284 (1914).....	7
 <u>FEDERAL CASES</u>	
<u>Gomez v. United States</u> , 490 U.S. 858, 109 S. Ct. 2237, 104 L. Ed. 2d 923 (1989), <u>overruled on other grounds by</u> <u>Malloy v. Hogan</u> , 378 U.S. 1, 84 S. Ct. 1489, 12 L. Ed. 2d 653 (1964).....	3
<u>Kentucky v. Stincer</u> , 482 U.S. 730, 107 S. Ct. 2658, 96 L. Ed. 2d 631 (1987).....	2
<u>Lewis v. United States</u> , 146 U.S. 370, 13 S. Ct. 136, 36 L. Ed. 1011 (1892).....	5
<u>Snyder v. Massachusetts</u> , 291 U.S. 97, 54 S. Ct. 330, 78 L. Ed. 2d 674 (1934).....	3, 4
<u>United States v. Annigoni</u> , 96 F.3d 1132 (9th Cir. 1996)	4

TABLE OF AUTHORITIES

Page

OTHER STATE CASES

People v. Williams,
858 N.Y.S.2d 147, 52 A.D.3d 94, 96-97 (N.Y. App. Div. 2008)..... 5

RULES, STATUTES AND OTHER AUTHORITIES

U.S. Const. amend. XIV 1, 2, 6

Wash. Const. art. I, § 3 1, 2, 6

Wash. Const. art. I, § 22 1, 2, 6, 7

A. SUPPLEMENTAL ASSIGNMENT OF ERROR

Appellant was denied his constitutional right to be present at all critical stages of trial.

Issue Pertaining to Supplemental Assignment of Error

Jury selection is a critical stage of trial and appellant had a constitutional right to attend and participate. When the court conducted peremptory challenges at the clerk's station, only defense counsel and the prosecuting attorney participated in the process. There is no indication appellant was present or consulted in any way. Did this violate appellant's right to due process under the Fourteenth Amendment of the United States Constitution and article I, section 3 of the Washington Constitution, as well as appellant's right to appear and defend under article I, section 22 of the Washington Constitution?

B. STATEMENT OF THE CASE

Jury selection took place on September 26, 2012. 1RP. The venire panel was publicly questioned on the record in the courtroom and excusals for cause were made. 1RP 11-131. The court then told the jury how the remaining portion of jury selection would take place:

The next step in this process, ladies and gentlemen, is the part where we actually choose the jurors in this case. During that process, *the lawyers will be having a discussion with the clerk to my left*, and some of those discussions are going to involve maybe looking out at your numbers and

indicating their preferences and some discussions that the whole idea is that you don't hear what's going on. So I'm going to ask you please to not try to hear what's going on up here at the clerk's station. And to aid in that process, you may have discussions amongst yourselves about anything unrelated to this case . . . I would ask that you generally remaining your places, although you may stand if that's more comfortable for you. After we've had these discussions up here, I will get your attention, and then we will seat our jury.

1RP 131-32 (emphasis added).

Peremptory challenges were then exercised off the record. 1RP 132. After the challenges took place, the court went back on the record and announced those who would serve as jurors for the trial. 1RP 132-34. A jury was subsequently sworn in. 1RP 135.

C. ARGUMENT

1. THE COURT VIOLATED MAXWELL'S RIGHT TO BE PRESENT AT ALL CRITICAL STAGES WHEN PEREMPTORY CHALLENGES WERE EXERCISED AT THE CLERK'S DESK.

Every criminal defendant has a fundamental due process right to be present at all critical stages of a trial. State v. Irby, 170 Wn.2d 874, 880, 246 P.3d 796 (2011); Kentucky v. Stincer, 482 U.S. 730, 745, 107 S. Ct. 2658, 96 L. Ed. 2d 631 (1987); U.S. Const. amend. XIV; Wash. Const. art. 1, § 3. In addition, the Washington Constitution specifically provides for the right to "appear and defend in person." Wash. Const. art. 1, § 22.

Maxwell was not present at the clerk's station where peremptory challenges were exercised. His right to be present at this critical stage of proceedings was violated under the due process provisions of the federal and state constitutions as well as under article I, section 22 of the Washington Constitution.

a. Due Process

Whether a defendant's constitutional right to be present has been violated is a question of law de novo. Irby, 170 Wn.2d at 880. Jury selection is a critical stage of the proceedings, and criminal defendants accordingly have the constitutional right to be present for that process. Id. at 883, 885; Gomez v. United States, 490 U.S. 858, 873, 109 S. Ct. 2237, 104 L. Ed. 2d 923 (1989), overruled on other grounds by Malloy v. Hogan, 378 U.S. 1, 84 S. Ct. 1489, 12 L. Ed. 2d 653 (1964)).

Under the United States Constitution, "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." Irby, 170 Wn.2d at 881 (quoting Snyder v. Massachusetts, 291 U.S. 97, 107-108, 54 S. Ct. 330, 78 L. Ed. 2d 674 (1934)). Jury selection is "the primary means by which a court may enforce a defendant's right to be tried by a jury free from ethnic, racial, or political prejudice, or predisposition about the defendant's culpability." Irby, 170 Wn.2d at 884 (quoting Gomez, 490 U.S. at 873).

"[A] defendant's presence at jury selection 'bears, or may fairly be assumed to bear, a relation, reasonably substantial, to his opportunity to defend' because 'it will be in his power, if present, to give advice or suggestion or even to supersede his lawyers altogether.'" Irby, 170 Wn.2d at 883 (quoting Snyder, 291 U.S. at 105-06).

"The defendant's right to be present encompasses situations in which he may *actively* contribute to his own defense, such as offering his input to his counsel during jury selection and the exercise of preemptory challenges." State v. Bennett, 168 Wn. App. 197, 203, 275 P.3d 1224 (2012). Indeed, it is difficult to imagine a portion of jury selection more appropriate for the input of an accused than during the exercise of preemptory challenges. Such challenges are "a tool that may be wielded in a highly subjective and seemingly arbitrary fashion, based upon mere impressions and hunches." State v. Evans, 100 Wn. App. 757, 774, 998 P.2d 373 (2000) (quoting United States v. Annigoni, 96 F.3d 1132, 1144-45 (9th Cir. 1996)).

Defendants have "the right to be present during the entire jury selection process." Irby, 170 Wn.2d at 877. For example, Irby held a defendant's right to be present was violated where potential jurors were excused via email without the defendant's participation in the process. Id. at 878-79, 87.

Whether the right to be present is violated does not strictly turn on whether a defendant is physically present in court. The exclusion of a juror at a sidebar conference — without a knowing, intelligent, and voluntary waiver of the defendant's right to be present at that sidebar — violates the right to be present even when the defendant is sitting there in court. People v. Williams, 858 N.Y.S.2d 147, 149-51, 52 A.D.3d 94, 96-97 (N.Y. App. Div. 2008).

In Maxwell's case, defense counsel exercised peremptory challenges at the clerk's station, and there is no indication Maxwell was present at the clerk's station or permitted to participate. 1RP 131-32. The court indicated *the lawyers* would be conducting peremptory challenges at the clerk's station. 1RP 131. Nothing was said about Maxwell joining them. "[W]here . . . personal presence is necessary in point of law, the record must show the fact." Irby, 170 Wn.2d at 884 (quoting Lewis v. United States, 146 U.S. 370, 372, 13 S. Ct. 136, 36 L. Ed. 1011 (1892)); see also Williams, 52 A.D.3d at 96-97 (exclusion of defendant from sidebar conference where jurors excused violates right to be present; court refuses to speculate that defendant could overhear sidebar conversation in which jurors were excused).

The record does not affirmatively show Maxwell and his attorney consulted on which jurors to challenge as part of the peremptory process.

On the contrary, the court segued from for cause questioning into the peremptory challenge process without a recess. 1RP 131-32. Importantly, the defense selection of which jurors to challenge using the peremptory method could be impacted by which jurors the prosecutor chose to challenge using that method — a fluid process that occurred at the clerk's station without Maxwell being present to assist his attorney.

The fundamental purpose of a defendant's right to be present during jury selection, including the exercise of peremptory challenges, is to allow him to give advice or suggestions to counsel or even to supersede counsel's decisions. Because Maxwell was not present for this portion of jury selection, he was unable to exercise that right as required by due process. U.S. Const. amend. XIV; Wash. Const. art. 1, § 3.

b. Article I, Section 22

Even if no federal due process violation occurred, a violation still remains under article I, section 22 of the Washington Constitution. "Unlike the United States Constitution, article I, section 22 of the Washington Constitution provides an explicit guaranty of the right to be present: 'In criminal prosecutions the accused shall have the right to appear and defend in person, or by counsel.'" Irby, 170 Wn.2d at 884-85 (quoting Wash. Const. art. I, § 22).

The Washington Supreme Court has interpreted the right to "appear and defend" independently of federal due process jurisprudence. Irby, 170 Wn.2d at 885. Under article I, section 22 Washington Constitution, the defendant must be present to participate "*at every stage of the trial when his substantial rights may be affected.*" Irby, 170 Wn.2d at 885 (quoting State v. Shutzler, 82 Wn. 365, 367, 144 P. 284 (1914)). Unlike Snyder, the Washington Supreme Court's decision in Shutzler did not condition the right to "appear and defend" at a particular "stage of trial" on "what a defendant might do or gain by attending . . . but rather on the chance that a defendant's 'substantial rights may be affected' at that stage of trial." Irby, 170 Wn.2d at 885. Maxwell's absence from the peremptory challenge process violated his right to "appear and defend in person" under article I, section 22 because "[j]ury selection is unquestionably a 'stage of the trial' at which a defendant's 'substantial rights may be affected.'" Id.

c. This Constitutional Error Is Not Harmless Beyond A Reasonable Doubt.

A violation of the right to be present requires reversal unless the State can prove beyond a reasonable doubt that the error is harmless. Id. at 885-86. The only way in which to accomplish that task is to show that a juror excused in violation of the defendant's right to be present had no

chance to sit on the jury. Id. at 886. If the prospective juror in question fell within the range of jurors who ultimately comprised the jury, reversal is required. Id.

The State cannot make the necessary showing in this case. The prospective jurors challenged and stricken using the peremptory method fell within the range of jurors who ultimately comprised the jury in Maxwell's case. 1RP 133; Supp. CP __ (sub no. 55, Jury Roll Call, 9/26/12); Supp CP __ (sub no. 61, Jury Panel, 9/28/12). The State therefore cannot show Maxwell's absence during this critical stage was harmless beyond a reasonable doubt. Reversal of the convictions is required.

D. CONCLUSION

For the reasons set forth, Maxwell requests reversal of the convictions.

DATED this 14th day of August 2013

Respectfully Submitted,

NIELSEN, BROMAN & KOCH, PLLC.



CASEY GRANNIS
WSBA No. 37301
Office ID No. 91051
Attorneys for Appellant

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COA NO. 440747-6-II

DECLARATION OF SERVICE

I, PATRICK MAYOVSKY, DECLARE UNDER PENALTY OF PERJURY UNDER THE LAWS OF THE STATE OF WASHINGTON THAT THE FOLLOWING IS TRUE AND CORRECT:

THAT ON THE 14TH DAY OF AUGUST 2013, I CAUSED A TRUE AND CORRECT COPY OF THE SUPPLEMENTAL BRIEF OF APPELLANT TO BE SERVED ON THE PARTY / PARTIES DESIGNATED BELOW BY EMAIL AND/OR DEPOSITING SAID DOCUMENT IN THE UNITED STATES MAIL.

[X] TYSON MAXWELL
DOC NO. 821115
COYOTE RIDGE CORRECTIONS CENTER
P.O. BOX 769
CONNELL, WA 99326

SIGNED IN SEATTLE WASHINGTON, THIS 14TH DAY OF AUGUST 2013.

x Patrick Mayovsky

NIELSEN, BROMAN & KOCH, PLLC

August 14, 2013 - 3:17 PM

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