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Court of Appeals
Division III
State of Washington

34002-3-III

COURT OF APPEALS

DIVISION III

OF THE STATE OF WASHINGTON

STATE OF WASHINGTON, RESPONDENT

v.

EARL THOMAS CLAPPER, APPELLANT

APPEAL FROM THE SUPERIOR COURT

OF SPOKANE COUNTY

BRIEF OF RESPONDENT

LAWRENCE H. HASKELL
Prosecuting Attorney

Gretchen E. Verhoef
Deputy Prosecuting Attorney
Attorneys for Respondent

County-City Public Safety Building
West 1100 Mallon
Spokane, Washington 99260
(509) 477-3662

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I. APPELLANT'S ASSIGNMENTS OF ERROR

1. The State presented insufficient evidence to convict Mr. Clapper of attempting to elude a police vehicle.

2. No rational jury could have found beyond a reasonable doubt that Mr. Clapper was the driver of the car at issue.

3. The court violated Mr. Clapper's WASH. CONST. art. I, § 22, right to appear and defend in person.

4. The court violated Mr. Clapper's constitutional right by holding a hearing when his substantial rights were at stake without his presence.

5. The court violated Mr. Clapper's Sixth and Fourteenth Amendment right to be present during all critical stages of his trial.

6. The Court of Appeals should decline to impose appellate costs should Respondent substantially prevail and request such costs.

II. ISSUES PRESENTED

1. Whether the evidence presented at trial was sufficient to prove that the defendant was the driver of the fleeing vehicle?

2. Whether the defendant has demonstrated the court violated his right to be present at trial by addressing a jury question via a three-way telephone call where the defendant has failed to demonstrate that he was, in fact, absent from this communication?

3. Whether a conference between the trial court and counsel regarding how to respond to a jury inquiry implicates a defendant's right to be present and defend where the court addresses only a matter of law and the presence of the defendant does not have a reasonably substantial relationship to his opportunity to defend?

4. Whether the trial court commits manifest constitutional error when it confers with trial counsel, but not the defendant, on how to respond, if at all, to an inquiry by a deliberating jury?

5. Whether the trial court's response to the jury's inquiries, "rely on the instructions, your memories and your notes," is neutral and therefore, if error, was harmless?

6. Whether this court should impose appellate costs if the State is the substantially prevailing party on appeal?

III. STATEMENT OF THE CASE

Earl Clapper was charged in Spokane County Superior Court with one count of attempt to elude a police vehicle, occurring on or about March 28, 2015. CP 1. Mr. Clapper was found guilty as charged by a jury on October 14, 2015. CP 19. His offender score was calculated to be a "12," as he had 9 prior adult felony convictions (including one prior count of attempt to elude), two prior juvenile felony convictions, one misdemeanor conviction for DUI, and was on community custody at the time of the

offense. CP 31-32. The trial court sentenced the defendant to a high-end, standard range sentence of 29 months. CP 34.

On March 28, 2015, Spokane Police Officer Paul Gorman was on duty with his K-9 partner, Axel; they were in Gorman's fully marked police car, and Gorman was dressed in full police uniform. RP 75, 81, 102. The two were heading home at approximately 3:30 a.m. when Officer Gorman saw a car heading towards him on Maple, driving on the wrong side of the road. RP 79. He flashed his lights on and off, hoping the other driver would realize he was driving the wrong way. RP 80.

The vehicle turned westbound, and drove at a high rate of speed down an alleyway, causing the vehicle to "jump." RP 80. The officer did not want to pursue the vehicle down the alleyway, for fear that pursuit at that rate of speed in an unpaved alley would cause damage to his patrol vehicle. RP 80. The officer took an alternate route and continued to pursue the vehicle with his lights and siren activated; the fleeing vehicle was then travelling 60 to 70 miles per hour the wrong way on Ash Street. RP 82. Officer Gorman's older patrol car had trouble keeping up with the 2011 Toyota as it turned down a residential street and continued travelling between 60 and 80 miles per hour. RP 83. The suspect's vehicle ran a stop sign at Monroe Street, which made Gorman begin to reevaluate whether it was safe to continue the pursuit. RP 84, 102. Pursuant to department policy,

Officer Gorman turned off his lights and siren, and pulled over to the side of the road, coming to a complete stop, in order to terminate the pursuit. RP 84.

After doing so, Officer Gorman again attempted to locate the vehicle, and was able to see the vehicle's brake lights "way down" the street. RP 85. The same vehicle then doubled back, and appeared behind Officer Gorman. RP 86. The vehicle again drove off without its headlights on, travelling approximately 60 to 80 miles per hour. RP 86. Officer Gorman did not engage in a high speed pursuit in that area because it was a residential neighborhood near a school. RP 86.

Officer Gorman called more officers into the area in an effort to locate the vehicle by boxing it in. RP 86-87. Approximately five to seven minutes later, Officer Gorman found the same vehicle pulled "all the way up in a driveway" next to a house. RP 87. The officer recalled that when he saw the vehicle earlier, he noticed it had front end damage. The vehicle in the driveway also had front end damage, was "very, very hot" from being driven at a high rate of speed, and smelled of burning brake oil; it was obvious to Officer Gorman that the vehicle in the driveway was the same vehicle he had chased. RP 88. The driver's seat of the vehicle was "pushed all the way back and leaned all the way down" indicating that someone of very large stature must have been driving it. RP 142.

Officer Gorman's K-9 partner, Axel, was trained in tracking human scent. RP 89. Officer Gorman focused Axel on the area by the driver's door and gave him the command to track. RP 91-92. Before beginning the track, Officer Gorman gave loud commands to the suspect that he was being tracked by a police dog, in order to give the suspect an opportunity to surrender. RP 95. Axel then tracked a scent from the driver's door past a garage, and then over a cement wall.¹ RP 92-93. Based on that track, Officer Gorman knew that the suspect was in the next yard or had gone into the next yard. RP 93. Officer Gorman and Axel began to enter that yard, when Gorman heard other officers giving commands to someone who had come out from the other side of the same yard. RP 94. Officer Gorman testified that he heard the suspect say, "it's me you're looking for, I give up, don't hurt me." RP 96.

Once the individual, Mr. Clapper, was detained, Officer Gorman and Axel completed the track for confirmation that the correct person was in custody. RP 97. The confirmation track led the pair through a few yards to the same point where Mr. Clapper surrendered. RP 97.

The owner of the residence and driveway where the Toyota was parked confirmed that the vehicle did not belong to him or in his driveway.

¹ Officer Gorman testified the conditions of the tracking environment on March 28, 2015 (temperature, moisture, etc.) were favorable to a successful track. RP 119. "I would say very high [percentage of accuracy]; I would probable say in the 90s." RP 119.

RP 98. None of the officers on scene saw any other individuals who were potential suspects. RP 98-99, 130.

Mr. Clapper, who was sweating profusely, told Gorman he had been staying in a nearby hotel and was monitoring a police scanner, when he heard that police were chasing his girlfriend's car, claiming he heard the license plate number aired over the radio.² RP 99, 101, 141. Officer Gorman knew this story was impossible because he had never relayed the license plate of the fleeing vehicle over the radio; he confronted Mr. Clapper with this information. RP 99. Mr. Clapper then changed his story, and claimed that "he knew his girlfriend's car was being driven around," and assumed it was her car that was involved in the police chase. RP 100. Although Mr. Clapper denied ever being in the car, he asked to retrieve his backpack from it. RP 100, 140.

Officer Gorman confirmed the vehicle belonged to Tracy Varner, the defendant's claimed girlfriend. RP 100-101. Ms. Varner testified on behalf of the defendant, and stated that she was not his girlfriend, but rather that he was a friend of a friend. RP 147. She testified that on the evening of the incident, Mr. Clapper was at her house drinking with some other individuals. RP 149. When Ms. Varner decided to go to bed, she offered

² The defendant also stated, prior to being informed by law enforcement that he was being detained as a suspect in an eluding incident that "I was never in any car, and I never ran from you guys." RP 140.

to those individuals who remained at the party that “if anyone feels they can drive, [she didn’t] care if [they] took her car.” RP 151. According to her, however, she did not make this offer to Mr. Clapper. RP 151. Ms. Varner did not know who drove her car away from her house. RP 151. However, she testified that her car was an economy car, and that her 6’1” 290-pound father “attempted to move her car out of the driveway, and he was squished all the way back. It is not made for big men.”³ RP 148-149. She testified that she did not believe Mr. Clapper drove her car that evening. RP 153.

After the guilty verdict was read, and the jurors were polled and discharged, RP 191-194, the court put on the record that during its deliberations, the jury had submitted questions to the court in writing and that the court had filed those questions and its response for the record. RP 196; CP 18. The jury’s questions were: (1) Was the driver’s seat reclined? (2) Was Clapper charged with Reckless Driving or DUI? (3) Do we know the position of front passenger seat? (4) Did police follow up on hotel and scanner? and (5) Where does Clapper live? CP 18.

³ While the jury could potentially see Mr. Clapper’s size while he sat through trial, his exact weight and height were never introduced as evidence. The only references to his height and weight were made by counsel during closing argument. RP at *passim*. The defendant cites to the demographical information contained within the criminal information, CP 1, as evidence of his height and weight. Appellant’s Br. at 4. There is *no* indication that the jury received a copy of the criminal information, or considered this specific information in its deliberations. And, the jury was instructed that it was to *only* consider as evidence the testimony at trial and the exhibits admitted by the court, and to disregard statements made by the lawyers that were unsupported by the evidence. CP 3-4.

The Court indicated that when the jury submitted its questions, the court's judicial assistant placed a three-way phone call to counsel and it was agreed that the court would respond to each of the questions by directing the jury to rely upon the instructions, their notes, and memories, and that nothing more should be said. RP 196; CP 18. The court gave counsel the opportunity to comment on what had occurred, and neither party took that opportunity. RP 197.

After the defendant was sentenced, this appeal timely followed.

IV. ARGUMENT

A. SUFFICIENT EVIDENCE WAS PRESENTED AT TRIAL TO PROVE THAT MR. CLAPPER WAS THE DRIVER OF THE VEHICLE THAT ATTEMPTED TO ELUDE POLICE.

Mr. Clapper challenges the sufficiency of the evidence supporting his conviction for attempting to elude police. The purpose for sufficiency of the evidence review is "to guarantee the fundamental protection of due process of law." *Jackson v. Virginia*, 443 U.S. 307, 319, 99 S.Ct. 2781, 61 L.Ed.2d 560 (1979). The test for determining the sufficiency of the evidence is whether, after viewing the evidence in the light most favorable to the state, any rational trier of fact could have found guilt beyond a reasonable doubt." *State v. Salinas*, 119 Wn.2d 192, 201, 829 P.2d 1068 (1992). When the sufficiency of the evidence is challenged in a criminal case, *all* reasonable inferences from the evidence must be drawn in favor of

the state and interpreted most strongly against the defendant. *Id.* A claim of insufficiency admits the truth of the State's evidence and all inferences that reasonably can be drawn therefrom. *Id.* In a sufficiency of the evidence challenge, the court is highly deferential to the decision of the jury. *State v. Davis*, 182 Wn.2d 222, 227, 340 P.3d 820 (2014).

Credibility determinations are for the trier of fact and are not subject to review on appeal. *State v. Thomas*, 150 Wn.2d 821, 874, 83 P.3d 970 (2004). The appellate court must defer to the trier of fact on issues of conflicting testimony, credibility of witnesses, and the persuasiveness of the evidence. *Id.*

Our Supreme Court has stated:

It is the province of the jury to weigh the evidence, under proper instructions, and determine the facts. It is the province of the jury to believe, or disbelieve, any witness whose testimony it is called upon to consider. If there is substantial evidence (as distinguished from a scintilla) on both sides of an issue, what the trial court believes after hearing the testimony, and what this court believes after reading the record, is immaterial. The finding of the jury, upon substantial, conflicting evidence properly submitted to it, is final.

State v. Williams, 96 Wn.2d 215, 222, 634 P.2d 868 (1981); *see also, State v. Walton*, 64 Wn. App. 410, 415-16, 824 P.2d 533, *review denied*, 119 Wn.2d 1011 (1992) (the court defers to the jury's determination regarding conflicting testimony, evaluation of witness credibility, and decisions regarding the persuasiveness of evidence).

The crime of attempting to elude a police vehicle is committed by any driver of a motor vehicle who willfully fails or refuses to immediately bring his or her vehicle to a stop and who drives his or her vehicle in a reckless manner while attempting to elude a pursuing vehicle, after being given a visual or audible signal to stop by a police officer who is in uniform and in a vehicle equipped with lights and sirens. RCW 46.61.024.

The only element that the defendant contends was not satisfied beyond a reasonable doubt was the necessary element that the defendant was the driver of the eluding vehicle. However, contrary to the defendant's assertion on appeal, substantial evidence was presented at trial from which the jury could have found that he was, in fact, the driver.

The defendant was at a party that evening with the owner of the vehicle - and law enforcement testified that Mr. Clapper claimed the owner of the vehicle was his girlfriend. RP 99, 101, 149. Ms. Varner testified that she offered her vehicle to the party-goers, although she did not offer it to Mr. Clapper. RP 151. Thus, Mr. Clapper had access to the vehicle, even if he did not have express permission to take it.

Additionally, the defendant's backpack was located in the vehicle even though he claimed he had never been inside the vehicle. RP 100, 140. The driver's seat of the vehicle was pushed all the way back and was leaned all the way down so as to accommodate a very large person, and apparently,

Mr. Clapper is a very large person. RP 142. From this information, the jury could properly infer that Mr. Clapper not only had access to the vehicle, but was also the driver.

Furthermore, the K-9, was successful in tracking a scent from the driver's side door of the vehicle through a backyard and to the precise location where Mr. Clapper surrendered to law enforcement. RP 97. Officer Gorman heard Mr. Clapper say "it's me you are looking for ... don't hurt me" when he surrendered. RP 96. Mr. Clapper was sweating profusely, a fact from which the jury could infer that he had been involved in physical or psychological stress, such as climbing a cement wall, or attempting to elude police by driving at 60 to 80 miles per hour in a residential neighborhood. RP 86, 92-93, 99. Law enforcement did not see any other potential suspects in the area of the vehicle. RP 98-99, 130. These are additional corroborating facts which would support the jury's finding that the defendant was the fleeing driver of the vehicle.

Additionally, Mr. Clapper's story to law enforcement made no logical sense - he told Officer Gorman that he had heard his girlfriend's license plate number aired over police radio and that is why he came to the scene, but Officer Gorman was never able to get the license plate of the vehicle, and therefore, the plate number never was aired over the radio. When confronted with this inconsistency, the defendant changed his story.

RP 99-101. The jury was able to weigh the credibility of the defendant's story to law enforcement at the time of his arrest.

A rational trier of fact would be able to find, and did so find, beyond a reasonable doubt that Mr. Clapper was the driver of the fleeing vehicle. This court does not re-weigh the facts, nor does it substitute its judgment for the jury's, or pass judgment on the credibility of the witnesses. The defendant's sufficiency of the evidence claim fails because substantial evidence existed which placed him directly in the driver's seat of the fleeing vehicle.

B. THIS COURT SHOULD NOT ENTERTAIN THE DEFENDANT'S ARGUMENT REGARDING HIS RIGHT TO BE PRESENT ON THE MERITS BECAUSE HE HAS FAILED TO DEMONSTRATE THAT HE WAS NOT ACTUALLY PRESENT FOR THIS PORTION OF THE PROCEEDINGS.

The defendant claims that the trial court violated his rights under the Sixth Amendment to the United States Constitution, the due process clause of the Fourteenth Amendment, and article 1, section 22 of the Washington Constitution by responding to jury inquiries without his personal presence. The defendant's argument fails because he has not demonstrated that he was actually absent from the communication between the trial court and counsel during which appropriate responses to the jury's inquiries were discussed.

It is a well-established principle of appellate jurisprudence that:

[O]n a partial or incomplete record, the appellate court will presume any conceivable state of facts within the scope of the pleadings and not inconsistent with the record which will sustain and support the ruling or decision complained of; but it will not, for the purpose of finding reversible error, presume the existence of facts as to which the record is silent.

State v. Jasper, 174 Wn.2d 96, 123-124, 271 P.3d 876 (2012) citing *Barker v. Weeks*, 182 Wash. 384, 391, 47 P.2d 1 (1935).

In *Jasper*, the only fact supporting the defendant's contention that neither he nor his counsel were present during the court's consideration of the jury inquiries were the eight minutes that elapsed between the jury's inquiry and the court's response. 174 Wn.2d at 124. The Washington Supreme Court found that on those facts, the defendant failed to "shoulder his burden to demonstrate a constitutional violation." *Id.* The Court noted that such evidence did not establish that Jasper and his lawyer were not contacted, or were not present. *Id.* The Court recognized the possibility that the defendant was present, because he was out of custody during the trial. *Id.* And, the Court recognized that the trial court's own paperwork indicated that it had "contacted the parties" before responding to the jury's inquiry. *Id.*, see also *State v. Stacy*, 181 Wn. App. 553, 576, 326 P.3d 136 (2014), review denied, 181 Wn.2d 1008, 335 P.3d 940 (2014); *State v. Rienks*, 46 Wn. App. 537, 731 P.2d 1116 (1987) (matters not in the record

will not be considered by the court on appeal and defendant failed to provide any evidence enabling the court to reach the merits of his claim that the court erred in communicating with the jury outside of his presence).

The facts here establish an even greater likelihood that the defendant was present than those of *Jasper*. The trial court stated on the record that it placed a three-way telephone call to counsel to address how to respond to the jury's inquiries at about 9:40 a.m. RP 196. Thus, unlike in *Jasper*, the court can be assured that at a minimum, defense counsel was consulted. Additionally, as in *Jasper*, Mr. Clapper was out of custody and was awaiting a verdict.⁴ RP 198-199. It is entirely feasible that while awaiting a verdict, he was allowed to stay at his trial counsel's office, so as to be near to the courthouse and able to quickly respond to a decision by the jury.⁵ This is a conceivable fact that this court should presume in order to support the decision of the court below.

Furthermore, when defense counsel was invited to comment on the record regarding the three-way phone conference, she was silent. RP 197.

⁴ After the verdict was accepted by the court, the prosecutor requested that the defendant be taken into custody pending sentencing. The defense attorney opposed this motion, arguing, "[w]e obviously would ask that the Court not detain Mr. Clapper. He has been out on a five-thousand-dollar bond on this case. As you have seen, he has been here and ready for trial." RP 199.

⁵ The court could also presume that trial counsel was in electronic contact with her client, such that she could have sent him a text message advising him of the jury's inquiries, and her proposed response.

Surely any competent felony defense attorney would know to put on the record any concerns she had on her client's behalf regarding his right to be present if he had, in fact, been absent; however, the defendant has not claimed ineffective assistance of counsel for failing to protect his right to be present and defend. This Court should decline to address this issue because, as in *Jasper*, Mr. Clapper has failed to "shoulder his burden" of proving a constitutional violation.

C. THE DEFENDANT DOES NOT HAVE A FEDERAL OR STATE CONSTITUTIONAL RIGHT TO BE PRESENT WHEN THE TRIAL COURT CONSULTS COUNSEL ABOUT HOW TO RESPOND TO THE JURY'S INQUIRIES ON FACTUAL OR LEGAL ISSUES.

A defendant has a due process right under the State and Federal Constitutions to be present to defend himself against criminal charges. U.S. CONST. amend. VI, XIV; *Kentucky v. Stincer*, 482 U.S. 730, 745, 107 S. Ct. 2658, 96 L. Ed. 2d 631 (1987); WASH. CONST. art. I, §§ 3, 22; *State v. Rice*, 110 Wn.2d 577, 757 P.2d 889 (1988) (applying *Stincer*). The core right is the right to be present when evidence is presented. *United States v. Gagnon*, 470 U.S. 522, 526, 105 S. Ct. 1482, 84 L. Ed. 2d 486 (1985); *In re Personal Restraint of Lord*, 123 Wn.2d 296, 306, 868 P.2d 835 (1994). The right also attaches whenever the defendant's presence has a reasonably substantial relationship to the fullness of his opportunity to defend. *Stincer*, 482 U.S. at 745; *Lord*, 123 Wn.2d at 306. The right is not

guaranteed when the defendant's presence would be useless or "the benefit but a shadow," but is limited to those times when a fair hearing would be thwarted by the defendant's absence or to those critical stages where the defendant's presence would contribute to the fairness of the proceedings. *Stincer*, 482 U.S. at 745; *Snyder v. Massachusetts*, 291 U.S. 97, 105-106, 54 S.Ct. 330, 78 L.Ed. 674 (1934) *overruled in part on other grounds*.

The Washington Supreme Court has most recently addressed the issue in *State v. Irby*, a right to be present and defend case arising from the defendant's exclusion from email correspondence between the court and counsel regarding jury voir dire. 170 Wn.2d 874, 246 P.3d 796 (2011). Finding Irby's case differed from its other jurisprudence on the subject, the Court held that in *jury selection cases*, a defendant's presence "does bear or may be fairly assumed to bear, a relation, reasonably substantial, to his opportunity to defend because it would be in his power, if present, to give advice or suggestion or even to supercede his lawyers altogether." *Irby*, 170 Wn.2d at 883. However, *Irby* did not overrule any other jurisprudence dealing with a defendant's right to be present at jury instruction conferences or other hearings in which only matters of law are addressed. *See, Lord*, 123 Wn.2d 296 (defendant does not have a right to be present at in chambers or bench conferences between the court and counsel on legal matters); *In Re Personal Restraint of Pirtle*, 136 Wn.2d 467, 965 P.2d 593 (1998)

(defendant has no right to be present at in chambers conferences between counsel and the court in which legal matters, such as the wording of jury instructions, or ministerial matters are discussed); *In Re Personal Restraint of Benn*, 134 Wn.2d 868, 920, 952 P.2d 116 (1998) (defendant has no right to be present at a hearing on a motion for a continuance); *see also United States v. Williams*, 455 F.2d 361, 365 (9th Cir. 1972) (the presence of defendant's attorney during bench conferences established the defendant's "presence" in court where defense counsel was performing his agency duties for his client); *United States v. Alper*, 449 F.2d 1223, 1232 (3rd Cir. 1971) ("Trial counsel must be assumed to have implied authority to receive notice of a conference respecting inquiries from the jury. The court was entitled to rely upon counsels' performance of their agency duties and to assume appellants' absence was voluntary"); *State v. McCarthy*, 178 Wn. App. 90, 312 P.3d 1027 (2014) (defendant did not have a right to be present or of notice when trial court gave tape measure and masking tape to jury during deliberations, and distinguishing that case from *State v. Caliguri*, 99 Wn.2d 501, 664 P.2d 466 (1983), in which the court held that replaying critical trial evidence for the jury was a substantive communication implicating the defendant's right to be present); *State v. Bremer*, 98 Wn. App. 832, 991 P.2d 118 (2000) (defendant did not have the right to be present during discussion on proposed jury instructions, as the

defendant's presence would not have made a difference because he was fully represented by counsel and jury instructions involve the resolution of legal issues, not factual issues).

Questions from the jury during its deliberations are governed by CrR 6.15(f)(1) which is found within the court rule provisions on jury instructions. It provides:

The jury shall be instructed that any question it wishes to ask the court about the instructions or evidence should be signed, dated and submitted in writing to the bailiff. The court shall notify the parties of the contents of the questions and provide them an opportunity to comment upon an appropriate response. Written questions from the jury, the court's response and any objections thereto shall be made a part of the record. The court shall respond to all questions from a deliberating jury in open court or in writing. In its discretion, the court may grant a jury's request to rehear or replay evidence, but should do so in a way that is least likely to be seen as a comment on the evidence, in a way that is not unfairly prejudicial and in a way that minimizes the possibility that jurors will give undue weight to such evidence. Any additional instruction upon any point of law shall be given in writing.

The question presented by Mr. Clapper's case is more akin to those Washington cases in which the trial court has communication with a jury on a purely legal issue, rather than a substantive or evidentiary issue. Defendant fails to acknowledge this distinction in his appeal. While the jury's inquiries may have been intended to obtain additional factual information or testimony, the court's decision to answer those questions is a discretionary

matter, *see* CrR 6.15(f), that rests with the trial court, much like whether or not to grant a continuance, or whether to give a particular jury instruction.

The defendant has not demonstrated an “extraordinary circumstance” where his presence for the three-way telephone call “would have made a difference” to the fairness of his proceedings. *Bremer*, 98 Wn. App. at 835. As such, Mr. Clapper’s presence had no relation to the opportunity to defend against the charge of attempting to elude a police officer, and his claimed absence from the telephone conference did not violate his constitutional rights under either the Federal or State Constitution.

D. EVEN ASSUMING THE DEFENDANT WAS NOT PRESENT FOR THE TELEPHONE CALL IN QUESTION, THE ISSUE WAS NOT PRESERVED AND IS NOT A MANIFEST CONSTITUTIONAL ERROR.

It is a fundamental principle of appellate jurisprudence in that a party may not assert on appeal a claim that was not first raised at trial. *State v. Strine*, 176 Wn.2d 742, 749, 293 P.3d 1177 (2013). This principle is embodied in Washington under RAP 2.5.

RAP 2.5 is principled as it “affords the trial court an opportunity to rule correctly upon a matter before it can be presented on appeal.” *State v. Strine*, 176 Wn.2d at 749, quoting *New Meadows Holding Co. v. Wash. Water Power Co.*, 102 Wn.2d 495, 498, 687 P.2d 212 (1984). This rule

supports a basic sense of fairness, perhaps best expressed in *Strine*, where the court noted the rule requiring objections helps prevent abuse of the appellate process:

[I]t serves the goal of judicial economy by enabling trial courts to correct mistakes and thereby obviate the needless expense of appellate review and further trials, facilitates appellate review by ensuring that a complete record of the issues will be available, ensures that attorneys will act in good faith by discouraging them from “riding the verdict” by purposefully refraining from objecting and saving the issue for appeal in the event of an adverse verdict, and prevents adversarial unfairness by ensuring that the prevailing party is not deprived of victory by claimed errors that he had no opportunity to address.

BENNETT L. GERSHMAN, TRIAL ERROR AND MISCONDUCT § 6-2(b), at 472-73 (2d ed. 2007) (footnotes omitted).

Strine, 176 Wn.2d at 749-50.

Under RAP 2.5(a), a party may not raise a claim of error on appeal that was not first raised at trial unless the claim involves a manifest error affecting a constitutional right.⁶ Specifically regarding RAP 2.5(a)(3), our courts have indicated that “the constitutional error exception is not intended to afford criminal defendants a means for obtaining new trials whenever they can ‘identify a constitutional issue not litigated below.’” *State v. Scott*, 110 Wn.2d 682, 687, 757 P.2d 492 (1988).

⁶ An issue may also be raised for the first time on appeal if it involves trial court jurisdiction or failure to establish facts upon which relief can be granted. RAP 2.5(a)(1) and (2).

Here, defendant alleges that the trial court erred by considering and answering the jury's written inquiries without his presence. Because defense counsel did not assert this violation at trial, when given the opportunity to do so, RP 197, it is not reviewable on appeal without a showing that the alleged error is both constitutional and manifest. *See, e.g., State v. Kindell*, 181 Wn. App. 844, 326 P.3d 876 (2014) (holding that the defendant did not object to the trial court's response to the jury question, and thus, review could be declined under RAP 2.5, but exercising its discretion to consider the issue because the defendant had raised the same issue at a different time during trial.)

As discussed above, a criminal defendant has the right to be present or the right to appear and defend under the Federal and State Constitutions in those cases where his presence has a reasonably substantial relationship to the fullness of his opportunity to defend. *Stincer*, 482 U.S. at 745. And, as argued above, no constitutional error exists where a defendant is not present for those proceedings that have little or no bearing on the fullness of his opportunity to defend, such as this.

However, even assuming this were an issue of constitutional magnitude, the defendant must establish that the error is "manifest" in order to raise the error for the first time on appeal. Here, any error relating to the trial court's consideration of the jury's inquiries was not "manifest."

In order to ensure the actual prejudice and harmless error analyses are separate, the focus of the actual prejudice must be on whether the error is *so obvious on the record* that the error warrants appellate review. See *Harclaon*, 56 Wn.2d at 597, 354 P.2d 928; *McFarland*, 127 Wn.2d at 333, 899 P.2d 1251. It is not the role of an appellate court on direct appeal to address claims where the trial court could not have foreseen the potential error or where the prosecutor or trial counsel could have been justified in their actions or failure to object. Thus, to determine whether an error is practical and identifiable, the appellate court must place itself in the shoes of the trial court to ascertain whether, given what the trial court knew at that time, the court could have corrected the error.

State v. O'Hara, 167 Wn.2d 91, 99-100, 217 P.3d 756 (2009), *as corrected* (Jan. 21, 2010) (footnote omitted) (emphasis added).

There is nothing in defendant's claim that is plain and indisputable, or so apparent on review that it amounts to a complete disregard of the controlling law or the credible evidence in the record, such that the trial judge should have realized that it was error to consider the inquiries without the defendant being present. The fact that there is Washington case law that finds no error where a defendant is absent from jury instruction conferences or jury inquiry conferences demonstrates that the trial court's actions in this case, if error, were not obvious or flagrant as is required by RAP 2.5 for this court to grant review absent preservation of the issue for appeal by timely objection at trial.

In *State v. Stacy*, *supra*, Division One also addressed the issue. In that case, the trial court responded to a jury question inquiring when the

defendant hired counsel by directing the jury to rely on the evidence presented at trial. 181 Wn. App. at 574. Division One held that the defendant did not have a right to be present during an in chambers conference between the court and counsel on legal matters, citing *Lord, supra*, “[t]he crux of the constitutional right to be present is the right to be present when evidence is being presented” and stating that the defendant’s presence in that instance did not have a reasonably substantial relationship to the fullness of his opportunity to defend against the charge. *Id.* at 576, citing *In Re Lord*, 123 Wn.2d at 306; *In re Benn*, 134 Wn.2d at 920.

The *Stacy* court also observed, as the Supreme Court did in *Jasper*, that the defendant failed to establish a violation of his right to be present because nothing in the record indicated whether the defendant was present when the court considered the question from the jury. *Stacy*, 181 Wn. App. at 576. The fact that *Stacy* is a more recent case than either *Burdette* or *Ratliff*, cited by defendant and discussed below, also leads to the conclusion that the trial court did not disregard controlling law, as it proceeded in the manner condoned in *Stacy*. The holdings of *Stacy*, *Lord*, *Benn*, *Bremer*, and others which Washington courts have held that a defendant does not have a right to be present for jury instructions and jury inquiry answers support the actions of the trial court in this case; thus, error, if any, in the manner in which the court proceeded below, is not “manifest.” Absent an objection,

especially where, as here, the defendant and his attorney were given the opportunity to voice such an objection,⁷ this court should decline to review this unpreserved error.

1. The cases cited by defendant, namely *Burdette* and *Ratliff*, are distinguishable from the present case.

While *State v. Burdette* and *State v. Ratliff*, cited by defendant in support of his argument, ostensibly stand for the proposition that a defendant has a right to be present for the discussion between the court and counsel on jury inquiries, they differ factually in significant ways. *Burdette* involved whether a defendant has a right to be present for a discussion on how the court should respond to a jury inquiry regarding how to proceed if deadlocked. 178 Wn. App. 183, 201, 313 P.3d 1235 (2013). This is clearly different from the facts of this case, where the jury asked the court to provide factual answers regarding testimony (or lack of testimony) at trial. CP 18. The *Burdette* court was very clear that a defendant has a right to be present for a jury question regarding deadlock, because some defendants may wish for a quick mistrial, and some may wish the jury to deliberate longer in order to reach a unanimous verdict of acquittal. *Id.* “Much is at stake at this stage and a defendant may wish to actively participate ... and

⁷ Furthermore, because the defense attorney agreed to the court’s response to the jury’s questions, the error (if error) was invited by the defendant. *See State v. Studd*, 137 Wn.2d 533, 973 P.2d 1049 (1999).

a defendant's presence has a direct relation to the fullness of his opportunity to defense against the charge." *Id.*

The same cannot be said of jury questions not involving deadlock, but rather, involving the jury's desire to have additional information about the *facts* of the case. Only in rare circumstances, if ever, could a judge actually give direct answers to the questions that the jury posed here, without violating the Washington Constitution's prohibition on judicial commentary on evidence. WASH. CONST. Art. IV, § 16. Questions involving deadlock, however, are different because the defendant might actually be able to have some degree of control over the court's response to the jury inquiry. It is for that reason that in deadlock inquiries a defendant has a right to be present and defend.

The defendant also cites *State v. Ratliff* to support his proposition. 121 Wn. App. 642, 90 P.3d 79 (2004). *Ratliff* differs from this case for a number of reasons. First, in *Ratliff*, the State conceded that the trial court erred by not notifying the parties of the jury's questions. *Id.* at 646. The State makes no such concession here, as it is evident that the trial court conferred, at a minimum, with defense counsel, if not the defendant as well.

Second, the *Ratliff* opinion is unclear as to whether the trial court failed to notify the defendant of the questions or failed to notify both the defendant and his counsel of the questions, as required by former CrR 6.15,

and conduct the jury into open court to provide answers in the presence of the parties or after such notification occurred.⁸ In any event, former CrR 6.15 significantly differs from the current version of the rule, as the former rule did not provide (1) that answers may be given in writing, but required the answers to be given in open court and (2) the answers to the inquiries were required to be given in the presence of, or after notice to the parties or counsel. The current rule only requires that the parties be given notice of the jury's questions and an opportunity to comment on the appropriate response. CrR 6.15(f)(1)(2016).

Third, in *Ratliff*, the court *actually* gave answers to three of the five questions asked by the jury, and the appellate court was also faced with deciding whether those answers were an improper comment on the evidence. A defendant's rights are more likely to be implicated in instances where a judge decides to answer a jury's inquiries with a substantive answer, rather than give a neutral response such as that given by the trial court here and agreed to by counsel for the defendant.

⁸ Former CrR 6.15(f)(1)(2002) provided:

After retirement for deliberation, if the jury desires to be informed on any point of law, the judge may require the officer having them in charge to conduct them in to court. Upon the jury being brought into court, the information, if given, shall be given in the presence of, or after notice to the parties or their counsel.

2. Assuming the court erred by addressing the jury's inquiries without the defendant present, any error is harmless.

It is within the trial court's discretion whether to give further instruction to a deliberating jury. CrR 6.15; *State v. Becklin*, 163 Wn.2d 519, 529, 182 P.3d 944 (2008). Where no objection is made to the answers given to a jury, the court does not review for abuse of discretion, "but rather a defendant must demonstrate actual prejudice caused by a constitutional error." *State v. Sublett*, 176 Wn.2d 58, 82-83, 292 P.3d 715 (2012), *citing O'Hara, supra*.

Here, the defendant has not demonstrate, nor can he demonstrate actual prejudice, and, if error, the answers to the jury's questions were harmless beyond a reasonable doubt. Where a trial court's answers to jury questions convey no affirmative information, and are negative in nature, such answers are not prejudicial, and therefore, are not reversible error. *See State v. Russell*, 25 Wn. App. 933, 948, 611 P.2d 1320 (1980) (holding that judge's statement in response to a jury's question was "entirely neutral" and thus, was not reversible error); *State v. Allen*, 50 Wn. App. 412, 419-420, 749 P.2d 702 (1988) (response to jury inquiry directing jury to refer to the previous instructions was harmless error, noting that even if counsel had been present, he could not have required the court to answer the jury's

specific inquiry, since whether to give further instructions is within the trial court's discretion).

Defendant is unable to demonstrate prejudice with regards to the non-answers the trial court gave to the jury's inquiries. The answers given by the court were neutral answers and conveyed no affirmative information. Thus, under the rule in *Allen and Russell*, the court's answers to the jury, if error, were harmless beyond a reasonable doubt.

E. IF THE STATE IS THE SUBSTANTIALLY PREVAILING PARTY, THIS COURT SHOULD REQUIRE THE DEFENDANT AFFIRMATIVELY ESTABLISH A CLAIM OF INDIGENCY AS SET FORTH IN THIS COURT'S JUNE 10, 2016 ORDER BEFORE THIS COURT DETERMINES WHETHER TO AWARD COSTS AS AUTHORIZED IN RCW 10.73.160 AND RAP 14.2.

If the defendant is unsuccessful in this appeal, the defendant requests this Court decline to impose the appellate costs authorized in RCW 10.73.160 and RAP 14.2.⁹ This Court should require the defendant to provide the requested information as set forth in this Court's General Order dated June 10, 2016, regarding his claim of continued indigency.

V. CONCLUSION

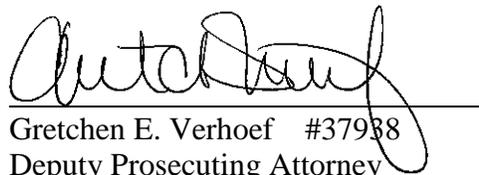
The evidence presented at the defendant's trial established that Mr. Clapper was the driver of the fleeing vehicle. Additionally, the

⁹ It appears this Court has addressed this issue in its General Order dated June 10, 2016, dealing with motions on costs.

defendant has failed to demonstrate that he was denied his right to be present and defend under either the Federal or State Constitution; he has failed to demonstrate that he was not actually present for the three-way telephone call regarding the jury inquiry, and he does not have a right to be present for such a “proceeding” as it does not have a reasonably substantial relationship to the fullness of his opportunity to defend. In any event, the defendant failed to preserve the issue by remaining silent when invited to comment on the court’s procedure upon receiving the jury inquiry, invited the error by agreeing to the court’s proposed response and, because the court’s responses contained no affirmative information, was not prejudiced. If error, the answers to the jury instructions were harmless beyond a reasonable doubt. Therefore, the State respectfully requests that this Court affirm the lower court and jury verdict.

Dated this 16 day of August, 2016.

LAWRENCE H. HASKELL
Prosecuting Attorney


Gretchen E. Verhoef #37938
Deputy Prosecuting Attorney
Attorney for Respondent

IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON
DIVISION III

STATE OF WASHINGTON,

Respondent,

v.

EARL THOMAS CLAPPER,

Appellant.

NO. 34002-3-III

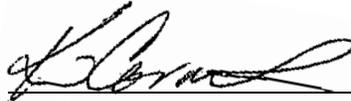
CERTIFICATE OF MAILING

I certify under penalty of perjury under the laws of the State of Washington, that on August 16, 2016, I e-mailed a copy of the Brief of Respondent in this matter, pursuant to the parties' agreement, to:

Skylar T. Brett
sklarbrettlawoffice@gmail.com

8/16/2016
(Date)

Spokane, WA
(Place)


(Signature)