

FILED
APRIL 26, 2017
Court of Appeals
Division III
State of Washington

NO. 344410

IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON

DIVISION THREE

STATE OF WASHINGTON,

Respondent,

v.

JOHNATHON WADE KAMPS

Appellant.

ON APPEAL FROM THE SUPERIOR COURT OF THE
STATE OF WASHINGTON FOR ASOTIN COUNTY
The Honorable Scott D. Gallina

APPELLANT'S OPENING BRIEF

TANESHA LA'TRELLE CANZATER
Attorney for Appellant
Post Office Box 29737
Bellingham, Washington 98228-1737
(360) 362-2435

TABLE OF CONTENTS

I. <u>ASSIGNMENTS OF ERROR</u>	1
II. <u>ISSUE PERTAINING TO ASSIGNMENTS OF ERROR</u>	1
III. <u>STATEMENT OF THE CASE</u>	1
IV. <u>ARGUMENT</u>	7
THE TRIAL COURT COMPROMISED MR. KAMPS’S RIGHT TO A FAIR TRIAL WHEN IT DISREGARDED HIS VULNERABLE MENTAL HEALTH AND INSTRUCTED HIS ATTORNEY TO ADVISE HIM OF HIS RIGHTS OVER THE TELEPHONE	7
1. <u>The trial court created an issue of constitutional dimension when it instructed Mr. Kamps’s attorney to consult with him over the telephone about whether he wished to reclaim his right to be present at trial.</u>	8
2. <u>The trial court’s decision to interfere in how Mr. Kamps’s attorney consulted with him affected Mr. Kamps’s right to testify at trial.</u>	11
3. <u>The trial court’s error was not harmless beyond a reasonable doubt.</u>	12
V. <u>CONCLUSION</u>	13

TABLE OF AUTHORITIES

United States Constitution

<u>U.S. Const. amend V</u>	8, 12
<u>U.S. Const. amend VI</u>	8, 12
<u>U.S. Const. amend XIV</u>	8, 12

Washington State Constitution

<u>Wash. Const. art. 1 § 22</u>	8, 12
---------------------------------------	-------

United States Supreme Court Decisions

<u>Chapman v. California, 386 U.S. 18, 24, 87 S.Ct. 824, 17 L.Ed.2d 705 (1967)</u>	8, 13
<u>Illinois v. Allen, 397 U.S. 337, 343, 90 S.Ct. 1057, 25 L.Ed.2d 353 (1970)</u>	10
<u>Rock v. Arkansas, 483 U.S. 44, 51-53, 107 S.Ct. 2704, 97 L.Ed.2d 37 (1987)</u>	11
<u>Taylor v. United States, 414 U.S. 17, 19-20, 94 S.Ct. 194, 195-96, 38 L.Ed.2d 174 (1973)</u>	9
<u>United States v. Gagnon, 470 U.S. 522, 526, 105 S.Ct. 1482, 84 L.Ed.2d 486 (1985)</u>	9

Washington State Supreme Court Decisions

<u>In re Pers. Restraint of Lord, 123 Wash.2d 296, 306, 868 P.2d 835 (1994)</u>	9
<u>State v. Caliguri, 99 Wash.2d 501, 664 P.2d 466 (1983)</u>	12
<u>State v. Chapple, 145 Wash.2d 310, 318, 36 P.3d 1029 (2001)</u>	9, 10, 11
<u>State v. Davis, 175 Wash.2d 287, 344, 290 P.3d 43 (2012)</u>	7
<u>State v. DeWeese, 117 Wash.2d 369, 381, 816 P.2d 1 (1991)</u>	9, 10

<u>State v. Gordon, 172 Wash.2d 671, 676, 260 P.3d 884 (2011)</u>	7
<u>State v. Irby, 170 Wash.2d 874, 885-86, 246 P.3d 796 (2011)</u>	12
<u>State v. Lamar, 180 Wash.2d 576, 582, 327 P.3d 46, 49-50 (2014)</u>	7, 8
<u>State v. McFarland, 127 Wash.2d 322, 333, 899 P.2d 1251(1995)</u>	8
<u>State v. O’Hara, 167 Wash.2d 91, 99, 217 P.3d 756 (2009)</u>	7, 8
<u>State v. Rice, 110 Wash.2d 577, 619, 757 P.2d 889 (1988)</u>	9
<u>State v. Robinson, 138 Wash.2d 753, 758, 982 P.2d 590 (1999)</u>	11
<u>State v. Scott, 110 Wash.2d 682, 686, 757 P.2d 492 (1988)</u>	7
<u>State v. Slert, 186 Wash.2d 869, 875, 383 P.3d 466, 469-70 (2016)</u>	9
<u>State v. Thomas, 128 Wash.2d 553, 558, 910 P.2d 475 (1996)</u>	12
<u>State v. Thomson, 123 Wash.2d 877, 880, 872 P.2d 1097 (1994)</u>	9
<u>State v. Thurlby, 184 Wash.2d 618, 624-25, 359 P.3d 793, 796 (2015)</u>	9

Washington State Court of Appeals Decisions

<u>State v. Lynn, 67 Wash. App. 339, 345, 835 P.2d 251 (1992)</u>	8
<u>State v. Grimes, 165 Wash. App. 172, 185-86, 267 P.3d 454, 461-62 (2011)</u>	8
<u>State v. Thompson, 190 Wash. App. 838, 843, 360 P.3d 988, 991 (2015), review denied, 185 Wash.2d 1012, 367 P.3d 1083 (2016)</u>	10

Rule of Appellate Procedure

<u>RAP 2.5(a)</u>	7
<u>RAP 2.5(a)(3)</u>	7, 8

Criminal Court Rules

<u>CrR 3.4(b)</u>	9
-------------------	---

BLANK PAGE

I. ASSIGNMENTS OF ERROR

1. The trial court erred when it found the defendant refused to participate further in trial proceedings.

2. The trial court violated the defendant's right to a fair trial, when it infringed on his ability to reclaim the opportunity to be present at trial and, to testify in his own defense.

II. ISSUE PERTAINING TO ASSIGNMENTS OF ERROR

Whether the trial court compromised the defendant's right to a fair trial when it disregarded his vulnerable mental health and instructed his attorney to advise him of his rights over the telephone, and not in person? (Assignments of Error 1 & 2)

III. STATEMENT OF THE CASE

The state charged Johnathon Wade Kamps with one count first-degree burglary with a domestic violence component, and one count violation of a domestic violence court order, when he appeared at his estranged wife's house drunk and fell asleep on her bed. CP 14-15; 12/21/15 RP 12; 5/9/16 RP 102. Mr. Kamps's wife told the court she got the restraining order because his behavior was so out of order their nine-year-old son and four-year-old daughter were afraid of him. 5/9/16 RP 65. "Johnathon has something wrong with his head... I just wish it was fixed." 5/9/16 RP 81.

Mr. Kamps pleaded not guilty to the charges and invoked his right to a jury trial. 12/21/15 RP 13. Initially, over Mr. Kamps's objection, his attorney sought to establish an insanity defense. CP 24-25; CP 29-30; 12/21/15 RP 19. His attorney later abandoned the idea. 4/4/16 RP 35. Although an insanity defense was off the table, Mr. Kamps's behavior suggested he was mentally unwell. At pretrial, Mr. Kamps rambled on

incoherently about posturing witnesses and dot coms, so much so the court had to caution him about his behavior.

COURT: Mr. Kamps, it has not escaped my attention that you are animated in your defense and I can certainly appreciate a zealous defense on all levels, including one's defense of one's self, but I do want to caution you that when we have trial, it's important that we do so in an orderly fashion regardless of how excitable you may be, I'm going to caution you not to take up yelling, screaming, throwing things around and demonstrating that way. If you do become disruptive during the trial, as always with anybody who's disruptive during a trial, we can take measures to make sure that that is quelled which could include having you removed and having trial go forward in absentia, or without you present, so--I don't anticipate any of those problems, but I just wanted to let you know up front since there's been a concerned voice [inaudible]--...

5/2/16 RP 42.

KAMPS: No. I--I would love to be more than involved. My behavior will be completely societal norm. A roster--a roster list, if that's possible, to see who goes first. And I assure you I won't object to any of these proceedings. I'm well aware the investigations in line and very curious on how it will go forward.

5/2/16 RP 42.

Despite his assurances to the court, Mr. Kamps could not control his behavior. He tried to ask prospective jurors questions during voir dire. When the state objected, the court explained to Mr. Kamps if he needed to ask a question, he had to write it down, and submit it to his attorney. 5/9/16 RP 53. Mr. Kamps told the court that would not be a problem, but as proceedings progressed, he could not curtail his behavior. He continued to talk about probable cause, the fact his wife could not positively identify him as the person who broke in her house and fell asleep on her bed, and forensic science, albeit out of the jury's presence. The court finally had to stop and remind him when the jury came in, he had to restrain his behavior. 5/9/16 RP 54; 5/9/16 RP 59.

But Mr. Kamps continued to make outbursts during the state's case. His behavior

became so disruptive the prosecutor moved the court to admonish him. The court reminded Mr. Kamps again about what they talked about during pre-trial proceedings. “I can’t have you mouthing things to the jury or doing things that are trying to interject yourself--.” Mr. Kamps apologized. Then, in a moment that further questioned his mental wellness, Mr. Kamps asked if he could eat lunch “across the road” or, if he had to go back to jail. 5/9/16 RP 85.

When court resumed after lunch, Mr. Kamps moved for new counsel.

KAMPS: Your Honor, I’d like to make a motion to not go forward at this time since defense hasn’t started and I would like to seek new counsel.

COURT: I’m going to deny that request, Mr. Kamps. Go ahead and have a seat.

KAMPS: But Your Honor, I’ve--I haven’t given a defense. I’m--I’m entitled to a defense, Your Honor.

COURT: Yes, Sir. That’s why you were appointed counsel. As you indicated, the defense has not yet started.

KAMPS: I’ve asked three times now for inefficient--[inaudible] counsel. He hasn’t given me no information. He hasn’t given me any watch guard, any medical issues, any nothing. Your Honor, I’ve called the police department and 911 jillions of times. This is--this is ridiculous that this is happening this much with that Protection Order in pla--I understand that you’re dealing with a double-standard issue, but I am a caring father and I’m trying to do what I can. I’ve talked to *the prosecutor* [emphasis added] out there when the--on the corner when I was--when I seen how the house looked on the inside. I’ve--I--there’s nothing else I can do. And he hasn’t helped me at all. He hasn’t given me anyIV testimonies, any electronics, nothing. And if there’s possible other information out there that isn’t on the docket, I would like to seek forth.

5/9/16 RP 86.

COURT: Mr. Kamps, the information that you're talking about; a) to the best I can discern does not go to a legal defense, it goes to concerns that you have about conditions in the home, not a defense as to whether or not you violated a Restraining Order in a manner that constituted the violation of a law. So all those things may be important to you, from an emotional standpoint, from a security standpoint, for your family, they don't constitute a defense to what it is that you're charged with.

KAMPS: Well then I'll go ahead and leave and you guys can continue these proceedings without me. And I'll go back to the jail. I'm sorry, I can't do it without--I can't do it without other counsel. He's given me nothing, Your Honor.

5/9/16 RP 87.

Mr. Kamps and the court continued back and forth, and at some point, during the colloquy, Mr. Kamps upgraded his request and asked to proceed pro se.

COURT: Okay. Let's take things in order. Mr. Kamps, your request to get rid of *your attorney* [emphasis added] at this point and continue the trial is denied. It's untimely made. We've already begun trial. The jury has been seated—

KAMPS: Oh, well, can I go ahead and make a motion now for pretrial motions?

COURT: Trial's already started. You can't un-ring the bell.

KAMPS: I--I know, but in regards to no motion was ever filed and we didn't discuss co-counsel as well, it--it's just a-- continued outbursts. It's just more of my behavior rather than my seeking for further assistance.

COURT: There's nothing I can do about what has been done to date. Those are complaints that you have that are valid post-trial. I'm not going to stop these proceedings at this point to allow discovery to go forward and to continue on with additional preparation. This is the day for trial.

KAMPS: Oh well how about in regards to us--us seeking assistance for Gregory Wilson and he doesn't even have him on our docket or shown as a witness.

COURT: I can't speak to any of those things, Mr. Kamps. That's between you and your attorney.

5/9/16 RP 94.

KAMPS: Alright. Then I'll go ahead and remove myself. I'm sorry guys.

KAMPS: The Defense hasn't started and I'm removing myself.

Mr. Kamps went on after some confusion about whether he wanted the court to appoint him a different attorney or whether he just wanted to proceed pro se. Mr. Kamps confirmed for the court, "I want to fire my attorney. And it duly, noted. And proceed pro se. 5/9/16 RP 96.

COURT: I understand your request. That request to proceed pro se is denied at this time and you have elected in lieu of participating further with *your attorney* [emphasis added] that you simply want to be absented from these proceedings. Is that correct?

KAMPS: Yep.

The court allowed Mr. Kamps to return to jail, but told him if he wanted to return to trial, all he had to do was let the court know and he'd be brought back. 5/9/16 RP 95. Trial continued in Mr. Kamps's absence. When it came time for the defense to present its theory to the jury, Mr. Kamps's attorney asked if he could go to the jail to find out if Mr. Kamps still wanted to be present to testify. 5/9/16 RP 97. The court requested he do that by phone. "I don't want to keep these people hanging around while you and Mr. Kamps slug it out at the jail." 5/9/16 RP 97.

Counsel reported back to the court, “I can simply advise the court that I inquired--oh--inquired telephonically if Mr. Kamps wished to testify. He advised me telephonically that he did not know that it was actually me, his attorney, talking to him and proceeded to hang up the phone. So, I don’t have any instruction from Mr. Kamps as to how he wishes to proceed. 5/9/16 RP 147. With that, the court found Mr. Kamps voluntarily absented himself from proceedings and refused to participate further. The court added, “We’re not going to forestall these proceedings based on his intransigence.” 5/9/16 RP 148.

Both sides presented closing arguments and the jury left to deliberate. While the jury was out, Mr. Kamps’s attorney told the court he would try to consult with Mr. Kamps at the jail. 5/9/16 RP 206-207. The court did not request counsel to do so over the over the phone, this time. The bailiff notified the court the jury reached a verdict. The court asked Mr. Kamps’s attorney if he had the opportunity to confer with Mr. Kamps. Counsel responded, “Yes, I did, Your Honor. I advised him that the trial was concluded and asked if he wanted to be present for the verdict and he indicated that he did not want to be present.” 5/9/16 RP 207.

The jury found Mr. Kamps not guilty of first-degree burglary and not guilty of felony violation of a domestic violence court order. The jury found Mr. Kamps guilty of residential burglary, the lesser crime of first-degree burglary, and of violation of a domestic court order gross misdemeanor, the lesser crime of felony violation of a domestic violence court order. 5/9/16 RP 208; CP 97-99. The court sentenced Mr. Kamps to be incarcerated for seven months, and to be supervised for twenty-four-months. when he’s released to the community. CP 107-115. This appeal followed. CP 120-134.

IV. ARGUMENT

THE TRIAL COURT COMPROMISED MR. KAMPS'S RIGHT TO A FAIR TRIAL WHEN IT DISREGARDED HIS VULNERABLE MENTAL HEALTH AND INSTRUCTED HIS ATTORNEY TO ADVISE HIM OF HIS RIGHTS OVER THE TELEPHONE.

Standard of review

Under Rule of Appellate Procedure (RAP) 2.5(a)(3), an “appellate court may refuse to review any claim of error which was not raised in the trial court,” but there are exceptions to this general rule. One exception is that “a party may raise ... manifest error affecting a constitutional right” for the first time on appellate review. Id. This exception recognizes that “[c]onstitutional errors are treated specially, because they often result in serious injustice to the accused.” State v. Scott, 110 Wash.2d 682, 686, 757 P.2d 492 (1988); State v. Lamar, 180 Wash. 2d 576, 582, 327 P.3d 46, 49–50 (2014).

To benefit from RAP 2.5(a)'s manifest constitutional error exception, the defendant must identify the constitutional error and show that it actually affected his rights at trial. The defendant must make a plausible showing the error resulted in actual prejudice, which means the claimed error had practical and identifiable consequences in the trial. State v. Davis, 175 Wash.2d 287, 344, 290 P.3d 43 (2012); State v. Gordon, 172 Wash.2d 671, 676, 260 P.3d 884 (2011); State v. O'Hara, 167 Wash.2d 91, 99, 217 P.3d 756 (2009). “[T]o determine whether an error is practical and identifiable, this 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.” O'Hara, 167 Wash.2d at 100, 217 P.3d 756. “If the trial court could not have foreseen the potential error or the record on appeal does not contain sufficient facts to review the claim, the alleged error is not manifest.” Davis, 175 Wash.2d at 344, 290 P.3d 43.

The requirements under RAP 2.5(a)(3) should not be confused with the requirements for establishing an actual violation of a constitutional right or for establishing lack of prejudice under a harmless error analysis if a violation of a constitutional right has occurred. The purpose of the rule is different; RAP 2.5(a)(3) serves a gatekeeping function that will bar review of claimed constitutional errors to which no exception was made unless the record shows that there is a fairly strong likelihood that serious constitutional error occurred. State v. Lamar, 180 Wash. 2d 576, 583, 327 P.3d 46, 50 (2014).

If this court determines the claim raises a manifest constitutional error, the claim may still be subject to a harmless error analysis. State v. McFarland, 127 Wash.2d 322, 333, 899 P.2d 1251 (1995); State v. Lynn, 67 Wash.App. 339, 345, 835 P.2d 251 (1992); State v. O’Hara, 167 Wash. 2d 91, 98, 217 P.3d 756, 760 (2009), as corrected (Jan. 21, 2010). In which case, the burden shifts to the state to prove the error was harmless beyond a reasonable doubt under the Chapman standard. Chapman v. California, 386 U.S. 18, 24, 87 S.Ct. 824, 17 L.Ed.2d 705 (1967); State v. Grimes, 165 Wash. App. 172, 185–86, 267 P.3d 454, 461–62 (2011).

Analysis

1. The trial court created an issue of constitutional dimension when it instructed Mr. Kamps’s attorney to consult with him over the telephone about whether he wished to reclaim his right to be present at trial. The Sixth Amendment and the due process clauses of the Fifth and Fourteenth Amendments to the United States Constitution, and article I, section 22 of our state constitution all guarantee criminal defendants the right to be present at their own trial. U.S. Const. amend. V, VI, and XIV; Wash. Const. art. I, § 22;

See State v. Thomson, 123 Wash.2d 877, 880, 872 P.2d 1097 (1994) (citing United States v. Gagnon, 470 U.S. 522, 526, 105 S.Ct. 1482, 84 L.Ed.2d 486 (1985) (per curiam)).

“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 Lord, 123 Wash.2d 296, 306, 868 P.2d 835 (1994) (citing Gagnon, 470 U.S. at 526, 105 S.Ct. 1482). “Beyond that, the defendant has a ‘right to be present at a proceeding whenever his presence has a relation, reasonably substantial, to the fullness of his opportunity to defend against the charge.’” Id. (internal quotation marks omitted) (quoting Gagnon, 470 U.S. at 526, 105 S.Ct. 1482); State v. Slert, 186 Wash. 2d 869, 875, 383 P.3d 466, 469–70 (2016).

The right to be present during trial is not absolute, however. State v. Chapple, 145 Wash.2d 310, 318, 36 P.3d 1029 (2001) citing, State v. DeWeese, 117 Wash.2d 369, 381, 816 P.2d 1 (1991). A criminal defendant may waive this right. State v. Rice, 110 Wash.2d 577, 619, 757 P.2d 889 (1988).

A defendant can waive this right, if he voluntarily removes himself from proceedings after trial has begun. Rice, 110 Wash.2d at 619, 757 P.2d 889 (citing Taylor v. United States, 414 U.S. 17, 19-20, 94 S.Ct. 194, 195-196, 38 L.Ed.2d 174 (1973) (per curiam)); State v. Thomson, 123 Wash. 2d 877, 880, 872 P.2d 1097, 1099 (1994). In such a situation, our rules of criminal procedure permit the court to continue with trial in the defendant’s voluntary absence. CrR 3.4(b); see also Thomson, 123 Wash.2d at 880–81, 872 P.2d 1097; State v. Thurlby, 184 Wash.2d 618, 624–25, 359 P.3d 793, 796 (2015).

Both the United States Supreme Court and our Supreme Court have held a defendant can also voluntarily waive this right, if he displays persistent, disruptive

conduct during proceedings. State v. DeWeese, 117 Wash.2d 369, 381, 816 P.2d 1 (1991). If a defendant is removed from the courtroom during his trial because he is disruptive, he must be allowed to reclaim his right to be present if he assures the court his conduct will improve. Illinois v. Allen. 397 U.S. 337, 343, 90 S. Ct. 1057, 25 L.Ed. 2d 353 (1970); State v. Thompson, 190 Wash.App. 838, 843, 360 P.3d 988, 991 (2015), *review denied*, 185 Wash. 2d 1012, 367 P.3d 1083 (2016).

Our Supreme Court adopted this basic guideline in State v. Chapple, 145 Wash. 2d 310, 313, 36 P.3d 1025, 1026 (2001), to assist trial courts exercise their discretion and to ensure trial courts exercise their discretion in a manner that affords defendants a fair trial and maintains the safety and decorum of the proceedings. 145 Wash.2d at 320, 36 P.3d 1025.

In Chapple, the trial court removed the defendant from the courtroom because of his disruptive and dangerous conduct. The court sent defense counsel to ask whether the defendant wanted to return and, if so, to ask if he could conduct himself appropriately. Chapple, 145 Wash.2d at 324. Defense counsel reported back, on the record, the defendant would not agree to behave differently if allowed to return. Chapple, 145 Wash.2d at 324. Our Supreme Court held this to be adequate advisement. Chapple, 145 Wash.2d at 326.

Although Chapple reinforced a trial court must offer a defendant ejected from trial the opportunity to reclaim the right to be present, the trial court, here, extended the opportunity to Mr. Kamps, after he removed himself from proceedings. 5/9/16 RP 95-96. But, unlike the trial court in Chapple that sent defense counsel to ask whether he wanted to return, the trial court here told Mr. Kamps's attorney to consult with him over the

telephone. Chapple, 145 Wash.2d at 324. This approach was not only contrary to what Chapple prescribed, it proved ineffective given Mr. Kamps's mental state.

Mr. Kamps's attorney sought to establish an insanity defense before trial, but later abandoned the idea. CP 24-25; CP 29-30. Even though Mr. Kamps's sanity was not an issue before the court, he displayed behavior that suggested he suffered from some cognitive disability. 5/9/16 RP 85. At pretrial, Mr. Kamps rambled on incoherently about posturing witnesses and dot coms, so much so the court had to caution him about his behavior. 5/9/16 RP 42. He tried to ask prospective jurors questions during voir dire. 5/9/16 RP 53. And he talked about probable cause, the fact his wife could not positively identify him as the person who broke in her house and fell asleep on her bed, and forensic science during the state's case. 5/9/16 RP 54; 5/9/16 RP 59. He even asked the court if he could have lunch "across the road" or, if he had to go back to jail. 5/9/16 RP 85.

So, when counsel spoke to Mr. Kamps over the phone to ask whether he wanted to return to court, it was not out of character that Mr. Kamps became suspicious, questioned whether it was indeed his attorney talking to him, and hung up the phone. 5/9/16 RP 147.

2. The trial court's decision to interfere in how Mr. Kamps's attorney consulted with him affected Mr. Kamps's right to testify at trial. In addition to the right to be present at his trial, Mr. Kamps had the right to testify in his own defense. Rock v. Arkansas, 483 U.S. 44, 51-53, 107 S. Ct. 2704, 97 L.Ed. 2d 37 (1987). This fundamental right cannot be abrogated by counsel or the court. State v. Robinson, 138 Wash.2d 753, 758, 982 P.2d 590 (1999). On a federal level, the right to testify is implicitly based in the Fifth, Sixth, and Fourteenth Amendments to the United States Constitution. Id. at 759.

Our state constitution explicitly protects that right. Wash. Const. art. I, § 22. The defendant can waive the right; but the waiver must be knowingly, intelligently, and voluntarily made. State v. Thomas, 128 Wash.2d 553, 558, 910 P.2d 475 (1996).

Here, when Mr. Kamps questioned who his attorney was and hung up the phone, the court found Mr. Kamps refused to participate further. This finding essentially amounted to a finding that Mr. Kamps voluntarily waived the right to testify. 5/9/16 RP 148. Mr. Kamps did not waive the right. Rather the trial court abrogated Mr. Kamps's right to testify when it instructed his attorney to consult with him over the phone about whether he wished to return to court during the defense's case in chief. By so doing, the court discounted Mr. Kamps's mental vulnerability, interfered in attorney-client relations, and circumvented what our Supreme Court, in Chapple, held as adequate advisement.

The trial court could have corrected its error, however. When counsel reported back on how Mr. Kamps responded to the telephone call, the court could have allowed counsel to go to the jail to consult with Mr. Kamps, in person, like it allowed counsel to do when the jury rendered its verdict. 5/9/16 RP 207. But, it did not. And ultimately, Mr. Kamps did not testify.

3. The trial court's error was not harmless beyond a reasonable doubt. A violation of the right to be present at trial, whether anchored in due process or article I, section 22 of our state constitution, is subject to harmless error analysis. State v. Irby, 170 Wash.2d 874, 885–86, 246 P.3d 796 (2011) (citing State v. Caliguri, 99 Wash.2d 501, 664 P.2d 466 (1983)). The effect of the constitutional error should be examined according to the standard provided in Chapman v. California, 386 U.S. 18, 24, 87 S.Ct. 824, 17 L.Ed.2d 705 (1967). Under Chapman, to hold that a constitutional error is

harmless, the court “must be able to declare a belief that it was harmless beyond a reasonable doubt.” 386 U.S. at 24.

Here, the trial court extended to Mr. Kamps the opportunity to reclaim his right to be present at trial after he removed himself from proceedings. But it circumvented the opportunity when it requested his attorney consult with him over the phone. Given Mr. Kamps’s behavior at pre-trial and trial proceedings, the trial should have taken steps to ensure Mr. Kamps understood he could return to trial to testify in his own defense. Instead, the court’s decision forced Mr. Kamps to essentially waive his right to testify.

V. CONCLUSION

The trial court committed an error of constitutional dimension that affected Mr. Kamps’s right to testify, when it instructed his attorney to consult with him over the phone. Under different circumstances, and perhaps, with a client more mentally balanced, this approach to consultation could have proven effective. Instead, the court’s decision to interfere in how Mr. Kamps and his attorney communicated about his rights, essentially forced Mr. Kamps to waive his right to testify. For that reason, we ask this court to reverse his convictions.

Submitted this 26th day of April, 2017.

s/Tanesha L. Canzater
Tanesha La’Trelle Canzater, WSBA# 34341
Attorney for Johnathon Wade Kamps
Post Office Box 29737
Bellingham, WA 98228-1737
(360) 362- 2435 (mobile office)
(703) 329-4082 (fax)
Canz2@aol.com

DECLARATION OF SERVICE

April 26, 2017

Court of Appeals Case No. 344410

Case Name: *State of Washington v. Johnathon Wade Kamps*

I declare under penalty and perjury of the laws of Washington State that on **Wednesday, April 26, 2017**, I filed the attached appellant's opening brief with Division Three Court of Appeals and served copies to:

CURTIS LANE LIEDKIE

cliedkie@co.asotin.wa.us

*The prosecutor's office accepts service via email.

JOHNATHON WADE KAMPS

C/O Asotin County Jail

838 5th Street

Clarkston, WA 99403

s/Tanesha La'Trelle Canzater

Attorney for Johnathon Wade Kamps

Tanesha L. Canzater, WSBA# 34341

Post Office Box 29737

Bellingham, WA 98228-1737

(360) 362-2435 (mobile office)

(703) 329-4082 (fax)

Canz2@aol.com