

No. 34441-0-III

IN THE COURT OF THE APPEALS
OF THE STATE OF WASHINGTON

DIVISION III

THE STATE OF WASHINGTON, Respondent

v.

JOHNATHON W. KAMPS, Appellant.

BRIEF OF RESPONDENT

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I. SUMMARY OF ISSUES

1. DID THE APPELLANT IRREVOCABLY WAIVE HIS RIGHT TO APPEAL WHEN HE THRICE BECAME A FUGITIVE FROM THE COURT DURING PENDENCY OF THIS APPEAL?

2. SHOULD THIS COURT CONSIDER THE ISSUE RAISED BY THE APPELLANT CONCERNING COMMUNICATIONS WITH COUNSEL WHERE HE FAILED TO PRESERVE THE ISSUE BELOW, WHERE ANY SUCH ERROR WAS INVITED, AND THE APPELLANT WAIVED HIS RIGHT AND VOLUNTARILY ABSENTED HIMSELF?

3. SHOULD THIS COURT REVERSE THE APPELLANT'S CONVICTION AND SENTENCE WHERE ANY ALLEGED ERROR WAS HARMLESS BEYOND A REASONABLE DOUBT?

II. SUMMARY OF ARGUMENT

1. THE APPELLANT IRREVOCABLY WAIVED HIS RIGHT TO APPEAL WHEN HE THRICE BECAME A FUGITIVE FROM THE COURT DURING PENDENCY OF THIS APPEAL AND THE APPEAL SHOULD THEREFORE BE DISMISSED.
2. THIS COURT SHOULD DECLINE TO REVIEW THE ISSUE RAISED BY THE APPELLANT CONCERNING COMMUNICATIONS WITH COUNSEL WHERE IT WAS UNPRESERVED, AND INVITED, AND WHERE HE WAIVED HIS RIGHT AND VOLUNTARILY ABSENTED HIMSELF FROM HIS TRIAL.
3. ANY ALLEGED ERROR WAS HARMLESS BEYOND A REASONABLE DOUBT AND THE JUDGEMENT AND SENTENCE SHOULD BE AFFIRMED.

III. STATEMENT OF THE CASE

The Appellant's recitation of facts is wholly incomplete and conclusorily suggests that the Appellant was lacking in mental capacity during the pendency of this action. The Appellant further fails to provide any information pertinent to the underlying crimes. For these reasons the State offers the following recitation of facts, both substantive and procedural, for this Court's consideration.

The victim, Sheila Messenger, was married to the Appellant, Johnathon W. Kamps in 2010, and had two children with him. Report of Proceedings (RP) 63-64. The marriage broke down due to physical abuse by the Appellant, and Ms Messenger obtained a domestic violence order of protection against the Appellant in and around July of 2015. RP 64-66, 68. The order precluded the Appellant from having contact with Ms Messenger or the children, or coming within five hundred feet of her residence. RP 67. Ms Messenger had advised her neighbor, Paul Hein, to call the police if the Appellant came to the house. RP 71.

On the night of December 15, 2015, after Ms Messenger had gone to bed, the Appellant came to the residence. RP 72. Without knocking, he entered the house. RP 73. Ms Messenger had locked the door and believed that the Appellant gained entry with a spare key that had gone missing. RP 73-74. The Appellant had been drinking heavily and she described him as "drunk." RP 74. Ms Messenger

recognized that the Appellant was intoxicated and told him to leave but he refused. RP 74-75. Instead, he crawled into the bed and fell asleep. RP 74-75. Ms Messenger hoped he would “sleep . . . it off” and then “just leave.” RP 74. Ms Messenger testified that she didn’t call the police because she didn’t want him to get arrested but she just wanted him to leave. RP 76. She further expressed concerns for how this situation would affect the children. RP 76.

A couple hours later, the Appellant awoke and began urinating in a shelf in the bedroom and giggling. RP 77. She began repeatedly telling him to leave. RP 77. She told him if he didn’t leave, Paul Hein would be calling the police. RP 80. At one point, the Appellant came at her with his fists raised.¹ RP 77. While he was standing over her with his fists raised, deputies from the sheriff’s office arrived and entered the house. RP 79. Mr. Hein had, in fact, called the police after hearing the Appellant’s voice and Ms Messenger sounding upset. RP 138.

Upon arrival at the residence, Deputy Levi Frary heard a female screaming from inside the residence. RP 123. He and another deputy entered the residence and contacted the Appellant on the stairway inside the residence. RP 121-122. The Appellant was then arrested. RP 126. He was charged with Burglary in the First

¹The Appellant is approximately six foot two inches tall and two hundred fifty pounds. RP 124.

Degree and Domestic Violence Court Order Violation (Felony), both predicated on the Appellant assaulting Ms Messenger. CP 14-15. Each charge further alleged that it was domestic violence crime, committed against a family or household member. CP 14-15.

On December 21, 2015, the Appellant was arraigned on these charges. RP 10-17. During his arraignment, the Appellant was coherent and responded appropriately to the court's inquiries. RP 10-13. At a later hearing, counsel stated his belief that the Appellant was competent. RP 19-20.

While Appellate counsel suggests that there may have been reason to question his competency, the record does not support this. Throughout the proceedings, the Appellant demonstrated an affinity for verbosity and used his expansive vocabulary in an effort to communicate superior intelligence for the purposes of obtaining and maintaining control of the proceedings. RP *et al.* His misuse of the terminology often revealed his lack of precise comprehension of the definitions of the words he chose. At one particular hearing, he made a joking demand for a million dollars,² not realizing the microphone was on. RP 19. At a later hearing, the Appellant referred to his

²The Appellant was referencing the 1997 Michael Myers movie, "Austin Powers, International Man of Mystery" which lampoons the James Bond movies. In the Austin Powers film, the villain, Dr. Evil, after being frozen for nearly thirty years, threatens to detonate a nuclear weapon if the United Nations doesn't pay him a ransom of "one million dollars." The humor comes from Dr. Evil's ignorance of the fact that, in the modern international economy, a million dollars is a fairly small amount to demand to prevent the destruction of the Earth.

attorney as “co-counsel” and insisted on protecting his constitutional rights. RP 22. Later in that hearing, he expressed concerns with “contingency issues” with his attorney which could result in the need for a new attorney, and made further inquiry concerning CrR 3.5. RP 23. At a hearing held February 29, 2016, he complained concerning his speedy trial and demanding to be provided with discovery. RP 29. In response to the State’s expression of frustration concerning his attempt at “hybrid representation,” he offered to provide a memorandum concerning the omnibus application’s provision for suppression of identification. RP 30, CP 32. The Appellant then complaining that counsel had obtained funding for an evaluation that he didn’t request and characterized this as “misappropriations.” RP 30. At an April 4, 2016 hearing, the Appellant recognized that his federal taxes would soon be due and asked the court for assistance. RP 37. After being advised that the court could not advise him of such matters, he acknowledged that receiving tax advice from the court would exceed the “privilege.” RP 37. At the trial readiness conference, he expressing eagerness to impeach the “crucial posturing witnesses .” RP 40. Later, in his own peculiar way, he promised the court he would behave himself at trial, stating, “My behavior will be completely societal norm.” RP 42. At the commencement of trial and for the purposes of seeking dismissal of the charges, the Appellant attempted to seize upon his mistaken

belief that the court had not previously found probable cause. RP 54. His belief was due to the fact that the defenses' copy of the affidavit of probable cause had not being signed by a judge. RP 54. Later, the Appellant inquired concerning a motion to exclude testimony based upon spousal privilege. RP 57. Finally, he inquired concerning forensic evidence. RP 58. The Appellant was referring to the State's erroneous inclusion of a forensic scientist in the list of witnesses in the State's Response to omnibus. RP 58-59, CP 39. These specific examples demonstrate that, while clearly a difficult and demanding client with a need to control the proceedings, he was not incompetent.

Early on during the pretrial litigation, counsel, having filed notice of the affirmative defense, reaffirmed his intent to pursue a plea of "not guilty by reason of insanity." CP 24-25, RP 22. Counsel moved the court for funds to hire an expert concerning any mental health issues and potential defenses. CP 26-28. At the February 29, 2016 hearing, counsel indicated that he was discussing with the retained expert concerning whether competency was an issue. RP 31. Pursuant to the motion for expert and in pursuit of possible legal defenses, the Appellant was evaluated by Dr. Gregory Wilson. RP 35. The report was received by defense³ and thereafter, the Appellant, through counsel, abandoned an insanity defense. RP 35.

³A copy of this report was never provided to the State or filed with the court so it's contents are not a part of the record, but presumably, it was not helpful to the Appellant.

After announcement by counsel that the defense would not rely upon insanity, the Appellant seemed satisfied and only expressed concern regarding his speedy trial clock of sixty days. RP 35.

At the pretrial conference on May 2, 2016, the State confirmed with defense counsel that there weren't any competency concerns. RP 41. Counsel confirmed that there were none and referenced the prior evaluation by Dr. Wilson. RP 41. At this hearing, the State requested admonition against disruption. RP 42. The Appellant confirmed he would comport his behavior. RP 42.

Trial commenced on May 9, 2016 and the matter was tried to a jury. RP 45. The Appellant, having disrupted the proceedings during jury selection, was again admonished not to disrupt the proceedings and to utilize his attorney for questioning witnesses or otherwise communicating with the jury through the appropriate process. RP 53-54.

The State opened testimony with Ms Messenger. RP 62-83. After the State had concluded direct examination of Ms Messenger, the trial recessed for lunch.⁴ RP 83, 85. Upon returning from the

⁴Prior to breaking for lunch, the Appellant requested that he be allowed to eat lunch "across the street." Not revealed by the record is the fact that defense counsel shared office space with another attorney whose office is located across the street from the Asotin County Courthouse. The Asotin County Jail is located five miles north in the city of Clarkston. Appellate counsel seems to suggest that this statement somehow evidences his mental impairment, but in light of the actual, non-speculative facts, this was actually a reasonable request from the Appellant to remain in Asotin to utilize the lunch hour to confer with counsel.

lunch break, the Appellant expressed frustration with his attorney and the defense and requested to absent himself from the proceedings. RP 87. During the discussion, the Appellant hastily offered that he wanted to proceed without counsel. RP 90. In light of the Appellant's outburst and the likelihood that he would ultimately engage in disrupting behaviors which would result in his removal, the Court declined to disqualify trial counsel and allow, at this very late juncture, the Appellant to go forward *pro se*. RP 91-95.

During the exchange, the court advised the Appellant concerning his right to be present during trial and the Appellant reaffirmed his intention to waive his presence and wouldn't follow the rules. RP 88, 91. The court offered to allow the Appellant to observe and listen to the proceedings through a closed circuit feed available at the jail and he declined the offer. RP 92. After further discussion and complaints concerning counsel's failure to file certain motions, the Appellant again requested to remove himself. RP 95. The State's attorney again confirmed that the Appellant had a constitutional right to be present at all parts of the trial and confirmed that he desired to waive this right. RP 95. The Appellant again confirmed his desire to absent himself from the trial. RP 95. The Appellant was further advised that he can reclaim his place at the trial and rejoin the proceedings and all he would have to do is let someone know he wanted to come back. RP 95. After confirmation of his desire, the

court allowed him to leave the courtroom for the remainder of the proceedings. RP 96. At that time, trial counsel expressed that he may wish additional time at the close of the State's case, to go to the jail and discuss the Appellant's desire to return and testify. RP 97. The trial court suggested to counsel that, when the time comes, he do so by telephone to avoid delaying the proceeds. RP 97.

The State called Sgt. Tammy Leavitt of the Asotin County Sheriff's Office to testify concerning service of the order for protection. RP 111-114. The State also called Mr. Hein and Deputy Frary prior to resting. RP 117-146. When State rested, counsel requested a ten minute recess to contact the Appellant. RP 146. Counsel did not ask for leave to travel to the Asotin County Jail to speak with the Appellant. RP 146. After the recess, counsel reported to the court that the Appellant hung up on him after stating that he did not know if it was actually counsel calling. RP 147. Counsel did not request that he be given leave to speak to the Appellant face to face or otherwise express that such an exercise might be more effective. RP 147. No objection was made to the Court's suggestion concerning telephonic conference, either when the court gave the suggestion, or at any time during the trial process. RP 97, 147.

In response, the State requested that the record be clarified that the Appellant was continuing to be voluntarily absent, and that he had been previously advised of his right to participate, including the

right to testify on his own behalf. RP 147. Counsel confirmed that, through previous discussions with him, the Appellant was aware of his right to testify. RP 147. The trial court again found that the Appellant was voluntarily absenting himself from the trial. RP 148.

The case then proceeded to closing arguments, and after deliberating, the jury returned verdicts of guilty on lesser included charges of Residential Burglary and Domestic Violence Court Order Violation (Gross Misdemeanor), and returned special verdicts finding that these were crimes of domestic violence. RP167-204, 207-211; CP 97, 98, 99. Prior to the reading of the verdict, counsel again contacted the Appellant and inquired whether he wished to be present for the verdict. RP 207. The Appellant refused to appear for the verdict. RP 207.

On May 16, 2016, the Appellant was sentenced seven months in jail on the charge of Residential Burglary and three hundred sixty-four days on the charge of Domestic Violence Court Order Violation (Gross Misdemeanor), with all time on that count suspended, on probationary conditions. CP 107-115. Included in the probationary conditions was the requirement that the Appellant obtain an evaluation for domestic violence and mental health and comply with the recommendations. CP 115. At the time of sentencing, the Appellant was provided with an Acknowledgment of Advice of Rights on Appeal which was signed by the Appellant, acknowledging that he

had reviewed and understood the rights listed therein. RP 222, CP 119. Therein, the Appellant acknowledged *inter alia*:

That if I fail to report to serve my sentence, fail to report to the Department of Corrections or otherwise become a fugitive from justice during the pendency of my appeal, the right to appeal is irrevocably waived;

The Appellant almost immediately filed notice of appeal from the conviction and sentence. CP 120.

On July 11, 2016, the court held a hearing to review the evaluations and treatment progress which was continued to August 1, 2016. CP 145. The Appellant failed to appear at that time, and a warrant was issued for his arrest. CP 145-146. The Appellant was subsequently arrested and found in violation of his probation on August 15, 2016 based upon his failure to obtain his evaluations and his failure to appear on August 1, 2016 for review. CP 147-148.

On December 14, 2016, the court issued yet another warrant for the Appellant's arrest, after a series of failed reviews, when the Appellant failed to comply with the court's directives concerning obtaining his evaluations. CP 149-151. On December 19, 2016, the Appellant again failed to appear. CP 152. As the warrant issued December 14, 2016 was still outstanding, the court merely noted the failure to appear without issuing another warrant. CP 152.

While this second warrant was outstanding, on December 29, 2016, the State filed a motion with this court to dismiss his appeal,

based upon the “fugitive disentitlement doctrine,” therein arguing that, due to the Appellant’s fugitive status, he had waived his right to appeal. Respondent’s Motion to Dismiss Appeal. Through counsel, the Appellant responded claiming that he wasn’t aware that his right to appeal could be lost if he failed to appear, because the sentencing court didn’t orally advise him on the record. Response to Motion to Dismiss Appeal and Amended Response to Motion to Dismiss Appeal. A commissioner from this court initially denied the State’s motion but then, after a motion to modify was filed by the State, withdrew the prior order denying the motion and submitted the issue to the panel for consideration with all other issues raised by the Appellant. Notation Ruling of January 31, 2017, Motion to Modify Commissioner’s Ruling, Commissioner’s Ruling of February 27, 2017, and Commissioner’s Ruling of March 16, 2017.

The Appellant was subsequently arrested on the December 14 warrant, and on January 23, 2017, again found in violation of his probation and sanctioned. CP 158-159.

On February 27, 2017, another hearing was scheduled for March 13, 2017 for the Appellant to appear and again review the evaluations. CP 156. On March 13, 2017, the Appellant again failed to appear and a warrant was issued for his arrest. CP 155-157. After

his arrest thereon, on April 3, 2017, the Appellant was found in violation and again sanctioned. CP 160-161.⁵

IV. DISCUSSION

The Appellant challenges his convictions herein, claiming that the trial court improperly interfered with his right to be present for trial when it requested that counsel utilize the telephone to contact the Appellant once the State rested. The Appellant intimates that, due to mental issues, the court should have taken extra precautions with him and perhaps, tolerated more of his impulsive and controlling behavior. While the Appellant colors his arguments with claims of mental shortcomings, it should be noted that the Appellant does not claim that the trial court should have declared him incompetent, nor does he claim that he was, in fact incompetent. To the extent that his brief can be read to argue that his competency was impaired, there is no evidence in the record to support these claims, and despite ample opportunity to assert incompetency below, which included a mental evaluation by a retained expert, no claim was made in the trial court. It would therefore be improper for the Appellant, even implicitly, to entice this Court to determine an issue of fact not properly raised

⁵The Appellant is currently under show cause for new crimes where it is alleged that, while serving the incarceration sanction imposed on April 3, 2017, he twice violated the Domestic Violence Order of Protection entered herein as part of the Judgement and Sentence by sending letters to the victim and protected party. CP 162-168, 169.

below. See State v. Rafay, 168 Wn. App. 734, 843, 285 P.3d 83 (Div. I, 2012).

Because, the Appellant irrevocably waived his right to appeal by, now, three times becoming a fugitive by failing to appear for hearings, his appeal should be summarily dismissed. Further, because the Appellant failed to preserve the issue raised in his appeal, this Court should decline review. Assuming this Court overlooks these procedural barriers and reviews the substantive claims, any claim of error was invited and the Appellant waived his appearance at trial by demanding to leave. Finally, even if the trial court's statement could be construed as a improper limitation upon trial counsel's contact with the Appellant, any error is clearly harmless beyond a reasonable doubt. For these reasons, this Court should deny this appeal and affirm the conviction and sentence entered below.

1. THE APPELLANT IRREVOCABLY WAIVED HIS RIGHT TO APPEAL WHEN HE THRICE BECAME A FUGITIVE FROM THE COURT DURING PENDENCY OF THIS APPEAL AND THE APPEAL SHOULD THEREFORE BE DISMISSED.

This Court should summarily dismiss this appeal because the Appellant has, three times now, become a fugitive from justice, during the pendency of this appeal. The Washington Constitution expressly guarantees a defendant the right to appeal a criminal conviction. See

City of Seattle v. Klein, 161 Wn.2d 554, 565, 166 P.3d 1149 (2007); Wash Const. Art. I, §22. However, this right may be waived by conduct under certain circumstances, including failure to appear or comply with probationary conditions, such as in this case. See *id.* A defendant can lose that right only when the State shows that he voluntarily, knowingly, and intelligently waived the right. *Id.* at 560. A defendant knowingly waives the right when the court notifies him that certain proscribed conduct could cause him to lose it. State v. Hoa Van Tran, 149 Wn.App. 144, 145, 202 P.3d 969 (Div. III, 2009). When the appealing defendant flees the jurisdiction of the court pending an appeal, the defendant waives the right to prosecute the appeal. State v. Koloske, 100 Wn.2d 889, 676 P.2d 456 (1984); State v. Mosley, 84 Wn.2d 608, 528 P.2d 986 (1974). Defendants who affirmatively avoid the court's jurisdiction waive their appeal and cannot claim a violation of Const. art. I, § 22. State v. Sweet, 90 Wn.2d 282, 581 P.2d 579 (1978).

Here, the Appellant was advised, in writing, that, should he become a fugitive from justice, his right to appeal would be “irrevocably waived.” The Appellant complains that the written advisement alone is insufficient to demonstrate his knowledge of the possibility that his right to appeal could be waived by failing to appear. In his response to the State’s motion to dismiss his appeal, he

complained that the record fails to show that he was orally advised by the court or that these admonishments or that he understood them. However, if a written plea form is *prima facie* evidence of the knowing, intelligent, and voluntary waiver of the right to trial, jury, appeal, etc., then his signed acknowledgment of his rights on appeal should likewise be sufficient to demonstrate his knowledge. See e.g. State v. Lujan, 38 Wn. App. 735, 688 P.2d 548 (Div. II, 1984), *review denied*, 103 Wn.2d 1014 (1985)(*recognizing that the written statement on plea of guilty form itself is sufficient to establish that the plea was voluntary*). He signed the written document advising him of his rights concerning appeal and the limitations thereto. Further, he did so with the assistance of counsel. There has been no argument forwarded that counsel failed to discuss the document with him or was otherwise ineffective in explaining it to him. The Appellant was given sufficient notice at the time of sentencing that he would forfeit his right to appeal if he failed to appear and became a fugitive from the courts.

Having been so advised, not once, not twice, but three times thereafter he has become a fugitive by virtue of his failure to comply and appear for hearings. He therefore waived his right to appeal. The Appellant may argue that his reappearance would revive his right to appeal. However, as noted by the Supreme Court, "Once the right to appeal has been waived, as here, it is forfeited. It cannot be

reactivated by an appearance subsequent to waiver.” State v. Johnson, 105 Wn.2d 92, 97-98, 711 P.2d 1017 (1986). The Appellant, by conduct, waived his right to appeal on August 1, 2016 when, after being advised of the consequences, he failed to appear. His reappearance after arrest on the warrant did not revive his right to appeal. Further, his subsequent failure to comply and failure to appear in December further demonstrates this waiver. Finally, on March 13, 2017, he yet again fled the court’s jurisdiction and failed to appear. In his response to the State’s Motion to Dismiss, the Appellant claimed that he didn’t read the advisement of rights at the time of sentencing and was otherwise unaware that his appeal right could be lost. Response to Motion to Dismiss Appeal, p. 5. He might be able to argue that with regard to his first two warrants. However, once the State filed a motion to dismiss his appeal, he was certainly aware, and despite this, the Appellant failed to heed the warning and yet again failed to appear on March 13th.

The Appellant cannot avoid the court’s jurisdiction while seeking the benefits thereof. As stated by Justice Frankfurter:

When he withdraws himself from the power of the Court to enforce its judgment, he also withdraws the questions which he had submitted to the Court’s adjudication.

Eisler v. United States, 338 U.S. 189, 192, 93 L.Ed. 1897, 69 S.Ct. 1453 (1949).

The Appellant has, on three separate occasions, become a fugitive and has, therefore waived his right to appeal threefold. Even if he was confused about the potential for loss of his right to appeal between sentencing and his first two warrants, the motion by the State to dismiss his appeal would certainly have disabused him of any notion that he could fail to appear and still pursue his appeal. His subsequent and third failure to appear should therefore, in any event, result in a finding of waiver of his right to appeal. The appeal should therefore be summarily dismissed.

2. THIS COURT SHOULD DECLINE TO REVIEW THE ISSUE RAISED BY THE APPELLANT CONCERNING COMMUNICATIONS WITH COUNSEL WHERE IT WAS UNPRESERVED, AND INVITED, AND WHERE HE WAIVED HIS RIGHT AND VOLUNTARILY ABSENTED HIMSELF FROM HIS TRIAL.

In addition to waiving his right to appeal, the Appellant has failed to preserve the issue of improper interference in his communications with counsel for appeal. This Court ordinarily will not review a claim of error raised for the first time on Appeal. RAP 2.5(a). An exception to this rule exists where the claim is for a manifest error affecting a constitutional right. RAP 2.5(a)(3). The Appellant must demonstrate both that the purported error is of constitutional magnitude and that the error is "manifest." State v. Gordon, 172 Wn.2d 671, 676, 260 P.3d 884 (2011). A "manifest" error is one that

is "so obvious on the record that the error warrants appellate review." State v. O'Hara, 167 Wn.2d 91, 100, 217 P.3d 756 (2009). Once a defendant has identified such an error, it is for the State to establish that the error was harmless beyond a reasonable doubt. Gordon, 172 Wn.2d at 676, RAP 2.5. The Appellant asserts that the issue is clearly one of manifest constitutional error where the claim revolves around his right to a fair trial. However, it is not sufficient when raising a constitutional issue for the first time on appeal to merely identify a constitutional error and then require the State to prove it harmless beyond a reasonable doubt. State v. Lynn, 67 Wn. App. 339, 345, 835 P.2d 251 (Div. I, 1992). Rather, an appellant must first make a showing how, in the context of the trial, the alleged error actually "affected" the defendant's rights. *Id.* Some reasonable showing of a likelihood of actual prejudice is what makes a "manifest error affecting a constitutional right". *Id.*

RAP 2.5(a) affords the trial court an opportunity to rule correctly on a matter before it can be raised on appeal. State v. Strine, 176 Wn.2d 742, 749, 293 P.3d 1177 (2013). There is great potential for abuse when a party does not raise an issue below because a party so could simply lie in the weeds and not allow the trial court to avoid the potential prejudice, gamble on the verdict, and then seek a new trial on appeal. State v. Weber, 159 Wn.2d 252, 271-72, 149 P.3d 646

(2006); State v. Emery, 174 Wn.2d 741, 762, 278 P.3d 653 (2012).

The requirement in RAP 2.5, that the issue be raised below serves the goal of judicial economy. State v. Strine, 176 Wn.2d at 749-50.

The rule enables trial courts to correct mistakes and obviate the need for and expense of appellate review and a subsequent trial and facilitates appellate review by ensuring that a complete record of the issues will be available. *Id.* at 749. The rule further prevents adversarial unfairness by ensuring that the prevailing party is not deprived of victory by claimed errors that he had no opportunity to address. *Id.* 749-750. Here, the Appellant fails to show such “manifest” error and should be precluded from capitalizing on his failure to object.

It is significant at this juncture to clarify the facts of this case that are misrepresented by the Appellant in his brief. First, the Appellant claims that, after the State rested, trial counsel requested to travel to the jail to speak with the Appellant face to face and the court denied his request. Brief of Appellant, p. 5. This is not true. After the State rested, counsel requested a short ten minute recess to contact the Appellant.⁶ RP 146. He didn’t ask to go to the jail. RP 146. The suggestion that counsel may need to meet with the

⁶By merely asking for ten minutes, counsel was clearly not asking to travel to the jail as it would take at least twenty minutes to travel from the courthouse to the jail and back.

Appellant at the jail came in the midst of the testimony of the State's first witness, and immediately after the Appellant was allowed to leave his trial. RP 97. Three more witnesses were called by the State after counsel's suggestion that he may need more time after the State's case to confer with his client. Additionally, Counsel did not request leave to go to the jail. Instead, counsel merely suggested that a lengthier mid-trial recess may be required, once the State had rested. Further, the court did not preclude counsel from going to the jail. Rather, the court requested that counsel do so by telephone to avoid unnecessary delay of the trial. RP 97.

With the true facts in mind, it is clear, even assuming error, it was not preserved. The Appellant did not object to the trial court's suggestion that a telephonic contact would be sufficient. Later, after the State rested, trial counsel requested a recess to call the Appellant. Counsel did not suggest that more than a phone call would be needed. Finally, when the Appellant refused to speak with him on the phone,⁷ counsel did not request to extend the recess to allow him to meet face to face with the Appellant. Certainly trial counsel was in the best position to consider whether face to fact contact would be fruitful.

⁷Appellate counsel suggests that the Appellant's unwillingness to speak with trial counsel on the phone and his statement to the effect that he couldn't be certain that it was trial counsel to whom he was speaking was evidence of mental impairment. To the contrary, this was evidence of his continued obstinance and unwillingness to cooperate with counsel and his desire to either control the proceedings or disrupt them.

Presumably, he determined that such contact would be unavailing and he did not request to do so prior to resting.

The Appellant claims the error was “manifest constitutional error,” and therefore did not need to be preserved in order to raise the issue for the first time on appeal. The Appellant claims that his right to a fair trial was impinged. His argument, however, really hinges upon his right to be present at trial. Certainly, the Appellant had a constitutional right to be present during his trial. Under the Sixth Amendment to the United States Constitution and article I, section 22 of the Washington State Constitution, “a criminal defendant is entitled to the assistance of counsel at critical stages in the litigation.” State v. Heddrick, 166 Wn.2d 898, 909-10, 215 P.3d 201 (2009). The State would concede, without the need for legal citation, that jury trial is a “critical stage” in the proceedings. However, like any constitutional right, his right to be present can be waived. See State v. Rice, 110 Wn.2d 577, 619, 757 P.2d 889 (1988).

In general, constitutional rights can be waived by a knowing, voluntary, and intelligent act. State v. Stegall, 124 Wn.2d 719, 724-25, 881 P.2d 979 (1994) (citing City of Bellevue v. Acrey, 103 Wn.2d 203, 208-09, 691 P.2d 957 (1984)). Specifically, the right to be present may be knowingly and voluntarily waived. State v. Thomson, 123 Wn.2d 877, 880, 872 P.2d 1097 (1994). Usually, the

issue of waiver arises in the context of a defendant who fails to appear after trial commences. In that situation, the trial court must make a determination, based upon the circumstances, whether the defendant has voluntarily waived his or her presence at trial. State v. Thomson, 123 Wn.2d at 881. In Thompson, the Court stated:

Under the voluntary waiver approach, the court only need answer one question: whether the defendant's absence is voluntary. A voluntary absence operates as an implied waiver of the right to be present. If the court finds a waiver of the right to be present after trial has begun, the court is free to exercise its discretion to continue the trial without further consideration. Whether a voluntary waiver has occurred is determined by the totality of the circumstances.

Id. Here, there is no question or speculation but that the Appellant unequivocally waived his right to be present. He does not argue otherwise nor does he assert that the Court should not have allowed him to absent himself from the proceedings. The Appellant's argument goes instead to whether the court should have acceded to counsel's initial suggestion that he would need additional time to meet with the Appellant after the State rested its case. The Appellant's argument assumes that the Court had an obligation to follow up and check with the Appellant after he left the trial, to ascertain his wishes.

It is true that the court had an obligation to notify the Appellant of his right to reclaim his place at trial. State v. Chapple, 145 Wn.2d 310, 325, 36 P.3d 1025 (2001). Here, the trial court advised the

Appellant *in person*, prior to his departure, of his right and ability to come back to the trial. RP 95. The Appellant relies on Chapple, where counsel was asked to communicate with the defendant therein, after his removal for disruption, of his ability to return. *Id.* at 324. His reliance is misplaced. The Chapple court determined that the trial court correctly relied on counsel to communicate to the defendant. 145 Wn. 2d at 324. Therein, the defendant argued that the trial court should have made the advisement on the record in the defendant's presence. *Id.* The Appellant's reliance on Chapple is misplaced because exactly what the defendant argued for therein is what occurred here! The Appellant *was* advised on the record and in person of his right to retake his place at trial. The court is under no further obligation to continually take the temperature of the Appellant to determine if he wishes to reclaim his place at trial. Thompson, at 881. As stated in Thompson:

If the court finds a waiver of the right to be present after trial has begun, the court is free to exercise its discretion to continue the trial *without further consideration*.

Id. (*emphasis added*). The Appellant was placed on notice that he could come back if he wished and if he could behave himself. At no time thereafter did the Appellant contact the court or counsel and request to return. The court was under no obligation to direct inquiry later on as to whether he wished to return. Chapple, at 325.

With no requirement to do so, the trial court herein allowed defense counsel an opportunity to confer with the Appellant once the State rested to determine whether the Appellant wished to rejoin the proceedings. The Appellant declined to avail himself of the opportunity. His presence was duly waived and any claimed error, was invited precluding review. Even where constitutional issues are involved, invited error precludes judicial review. State v. Boyer, 91 Wn.2d 342, 345, 588 P.2d 1151 (1979); State v. Henderson, 114 Wn.2d 867, 871, 792 P.2d 514 (1990).

3. ANY ALLEGED ERROR WAS HARMLESS BEYOND A REASONABLE DOUBT AND THE JUDGEMENT AND SENTENCE SHOULD BE AFFIRMED.

Assuming without argument that this would be constitutional error, reversal is unnecessary where, beyond a reasonable doubt, the result would have been the same absent the error. See State v. Brown, 147 Wn.2d 330, 341, 58 P.3d 889 (2002).

The test for harmless error is whether the state has overcome the presumption of prejudice when a constitutional right of the defendant is violated when, from an examination of the record, it appears the error was harmless beyond a reasonable doubt, or whether the evidence against the defendant is so overwhelming that no rational conclusion other than guilt can be reached.

State v. Clark, 143 Wn.2d 731, 775-76, 24 P.3d 1006 (2001)(*citations omitted*).

Here, even assuming that the trial court overstepped its authority by suggesting that counsel confer with the Appellant telephonically, the result would have been the same. The Appellant, on the strength of his tantrum which resulted from his inability to control every facet of the trial, had voluntarily left his trial. His "refusal" to acknowledge the authenticity of his counsel's self identification and immediately terminating the phone call was merely a continuation of this tantrum. There is nothing in the record to suggest that the Appellant, despite being advised previously that he could do so, had changed his mind. His continued refusal to come to court to receive the verdict is strong evidence of his persisting bent to refuse to participate. As such, the fact that counsel's contact was telephonic instead of in person had absolutely no impact on the outcome of the proceedings. The result would have been the same, even in the absence of the claimed error, was therefore harmless.

Even further assuming that a meeting face to face with the Appellant would have resulted in a change in his attitude and, further assuming he had decided to testify, the evidence of his guilt on the lesser charges was overwhelming. It was undisputed that Appellant was inside the residence. The victim and the neighbor both testified that he was inside the residence. Further, the Appellant was inside the residence when contacted by officers. It was further undisputed

that he was there unlawfully. See State v. Sanchez, 166 Wn. App. 304, 310, 271 P.3d 264 (Div. III, 2012)(“*We hold that the consent of a protected person cannot override a court order excluding a person from the residence.*”). It could not reasonably have been disputed that he was violating the no-contact provision by have in-person contact with Ms Messenger.

As such, the evidence supporting his convictions for Residential Burglary (Domestic Violence)⁸ and Domestic Violence Court Order Violation (Gross Misdemeanor)(Domestic Violence) was overwhelming. Quite frankly, the Appellant’s continued and disruptive presence and testimony at trial probably would have had a negative impact at trial and likely would have increased the likelihood that the jury might convict him of the more serious charged offenses of Burglary First Degree and Domestic Violence Court Order Violation (Felony). In any event, it is clear, beyond a reasonable doubt, that the jury’s verdict would not have turned out better for the Appellant, but for the trial court’s suggestion to confer telephonically. The Appellant cannot show any practical effect on the outcome of his case. To the contrary, the record reveals that the results would have been the same, regardless of whether counsel was given time to travel to the

⁸There was likewise no dispute that the Appellant, while estranged, was married to and had children in common with Ms Messenger rendering these crimes of domestic violence.

jail and meet face to face. It is clear from the record that the Appellant simply was not going to participate in his trial without causing disruption or otherwise inappropriately interjecting. This Court should affirm the Appellant's convictions under the facts of this case.

V. CONCLUSION

The Appellant waived his right to appeal by failing to accede to the jurisdiction of the court and appear as required, and as such, his appeal should be summarily dismissed. Further, the "error" complained of in his appeal was not properly preserved. The trial court did nothing more than suggest that counsel confer telephonically and defense counsel did not object. The Appellant knowingly, voluntarily, and intelligently waived his right to be present, representing that he would not be willing or able to comport his behavior to the requirements of proper courtroom decorum. The court, having advised the Appellant of his right to return and instructing him to simply call and advise if he so wished, was under no further obligation to continually inquire whether he had changed his mind. Any error was invited by the Appellant's refusal to participate. Finally, any claimed error was harmless beyond a reasonable doubt where there is no reason to suggest that the Appellant's behavior or willingness to participate would have been ameliorated by in-person contact with counsel, and where the evidence of guilt was

overwhelming. The State respectfully requests this Court deny this appeal and affirm the convictions and sentence entered below.

Dated this 30th day of May, 2017.

Respectfully submitted,



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**COURT OF APPEALS OF THE STATE OF
WASHINGTON - DIVISION III**

THE STATE OF WASHINGTON,

Respondent,

v.

JOHNATHON W. KAMPS,

Appellant.

Court of Appeals No: 34441-0-III

DECLARATION OF SERVICE

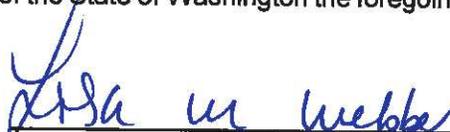
DECLARATION

On May 30, 2017 I electronically mailed, with prior approval from Ms. Canzater a copy of the BRIEF OF RESPONDENT in this matter to:

TANESHA LA TRELLE CANZATER
canz2@aol.com

I declare under penalty of perjury under the laws of the State of Washington the foregoing statement is true and correct.

Signed at Asotin, Washington on May 30, 2017.



LISA M. WEBBER
Office Manager

**DECLARATION
OF SERVICE**

ASOTIN COUNTY PROSECUTOR'S OFFICE

May 30, 2017 - 3:47 PM

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