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STATE OF WASHINGTON

IN THE SUPREME COURT OF THE
STATE OF WASHINGTON

STATE OF WASHINGTON

Respondent/Cross-Appellant

v.

TERRANCE J. IRBY,

Appellant/Cross-Respondent.

ON APPEAL FROM THE SUPERIOR COURT OF THE
STATE OF WASHINGTON, FOR SKAGIT COUNTY

The Honorable John M. Meyer, Judge

PETITION FOR REVIEW

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ORIGINAL

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I. IDENTITY OF PETITIONER

The Petitioner, State of Washington, the Respondent/Cross-Appellant below, by and through Erik Pedersen, Senior Deputy Prosecuting Attorney for Skagit County, asks this Court to review the decisions of the Court of Appeals referred to in Section II.

II. COURT OF APPEALS DECISION

Petitioner seeks review of the unpublished decision of the Court of Appeals decision in State v. Terrance J. Irby; No. 57941-8-1, reversing convictions of Terrance Irby for First Degree Murder and First Degree Burglary filed October 20, 2008, and of the denial of a motion for reconsideration from that decision filed on November 14, 2008. The decision and the denial of reconsideration are attached hereto as appendices A and B respectively.

The defendant was not present during an e-mail exchange between the trial court and counsel regarding excusing some jurors by agreement. The Court of Appeals improperly presumed prejudice for a claimed violation of the defendant's right to presence.

III. ISSUES PRESENTED FOR REVIEW

- 1. Did the Court of Appeals improperly presume prejudice in a claim of a violation of the right to be present contrary to Washington case law?**
- 2. When an e-mail exchange occurred between the court and counsel and a defendant was not present was there a violation of the defendant's right to be present?**
- 3. Where the defense counsel agreed to excuse the jurors that the trial court had suggested be released in an e-mail exchange with counsel was any error in violation of the defendant's right to presence harmless?**

IV. STATEMENT OF THE CASE

Terrance Irby was convicted by a jury of Aggravated First Degree Murder and First Degree Burglary for the bludgeoning death of James Rock.

On October 20, 2008, the Court of Appeals issued an unpublished opinion finding that Irby's right to be present had been violated by the trial court's actions in excusing seven jurors in an e-mail exchange between the trial court and counsel prior to voire dire being conducted on the record. See Appendix A.

On November 14, 2008, the Court of Appeals entered an order denying reconsideration of that decision. See Appendix B.

Given the murder charge, the jury selection process was more extensive than in a typical case. On December 27, 2006, the parties discussed the jury selection process. 12/27/06 RP 14-16, 19-20, 29-31. The parties were to submit a questionnaire to the jury on Tuesday, January 2, 2007. 12/27/06 RP 30. seventy to ninety jurors were to be called. 12/27/06 RP 15, 30. The judge said that since the jurors were just going to be completing the questionnaires the first day and then be sent home, questioning by counsel would start the next day. 12/27/06 RP 15, 30. The judge said that Irby, both his counsel and the prosecutor need not be present when the questionnaires were being completed. 12/27/06 RP 30. Defense counsel responded that he "thought that was a good procedure." 12/27/06 RP 30.

On January 2, 2007, 92 jurors reported. CP 1239. The jurors completed a questionnaire. CP 1234-6, 1239. That questionnaire had questions about whether the jurors or family had been victims of crime and whether they had feelings regarding murder that would prevent them from being fair and impartial. CP 1234-6.

After the responses were completed, the judge inquired by e-mail of defense and the State whether the parties would agree to

excuse ten jurors. CP 1279-80. See Appendix C. Those juror numbers were 7¹, 17, 23, 36, 42, 48, 49, 53, 59 and 77. The judge stated the reasons in the e-mail. Jurors 7, 23, 42 and 52 had already been approved by the court administrator to limit the period of service to one week. Juror 17² home schooled. Juror 77 had a business hardship. CP 1279-80. Jurors 36, 48, 49 and 53 had a parent who had been murdered. CP 1280.

The initial e-mail was sent by the trial court at 1:02 p.m. on January 2, 2007. CP 1280. At 1:53 p.m., Irby's counsel responded agreeing to release the jurors at the court's discretion. By 1:59 p.m., the prosecutor responded agreeing to release all but three jurors. At 2:01 p.m. the judge sent an e-mail indicating they would release all but the three jurors objected to by the State. CP 1280. This allowed the court to notify those jurors that they need not appear the next day.

The result of the e-mail exchange and information to the court was that defense counsel for Mr. Irby agreed to excuse all ten jurors. CP 1279. The State agreed to excuse all of the jurors except those

¹ The initial reference to Juror 3 in the initial e-mail was meant to be Juror 7. CP 1279-80

² The clerk's minutes reads: *****Note **** In chambers not on the record. Counsel stipulate to excusing the following jurors for cause: # 7, 17, 23, 42, 53, 59, 77. CP 1239. The clerk's minutes on the Judge's List of Jurors also indicates these seven jurors were excused by the court. CP 1273-7.

who had a parent murdered numbered 36, 48 and 49. CP 1279. The following day, the State subsequently agreed to discharge Juror 36.³ CP 1240, 1274, 1/3/07 RP p.m. 48.⁴ Jurors 48 and 49 were never needed since the selection process only reached to juror number 37. CP 1274.

In fact, of the judge's initial e-mail only jurors numbered 7, 17, 23 and 36 were within the range of jurors from which final jury selection occurred. Both parties had agreed to discharge jurors 7, 17 and 23 from the outset and juror 36 was discharged by agreement the following morning.

Since no motion or objection was made at the trial court, there is no further record.

V. REASONS WHY REVIEW SHOULD BE ACCEPTED AND ARGUMENT

1. The Court of Appeals improperly presumed prejudice

³ The transcript reads juror number 48, but this appears to be a typographical error since the clerk's minutes read juror number 36 at multiple locations. CP 1340, 1374-5. There is no discussion on the record about how or why juror 36 was excused for cause. 1/3/07 RP p.m. 48.

⁴ The jury selection process on January 3, 2007, is contained in two transcripts. The first is in the morning regarding Mr. Irby's choice not to wear civilian clothes and be in handcuffs. The second is the *voire dire* on the record which closes at the end of the day with a hearing after jurors were excused in which Irby requested a fresh red jail uniform every day.

in finding an e-mail exchange between the court and counsel was a hearing at which the defendant's presence was required.

In an unpublished opinion the Court of Appeals found the excusal of the seven jurors by e-mail exchange outside the defendant's presence was in violation of the defendant's right to be present. Those seven jurors were excused with the express permission of Irby's counsel. Unpublished opinion at page 7.

The Court of Appeals did not apply the case law standards that require a defendant to establish prejudice. Instead the Court of Appeals presumed prejudice.

The Court's of Appeals opinion herein cited to the standards set forth in State v. Wilson, 141 Wn. App. 597, 171 P.3d 501 (2007) which provide that a defendant has the right under the Confrontation Clause of the Sixth Amendment and the due process clause of the Fourteenth Amendment to be present at all critical stages of the trial.⁵

State v. Wilson, 141 Wn. App. 597, 171 P.3d 501 (2007) goes on to explain: "This right extends to jury voir dire, though the defendant's presence at this stage is only required because it is

⁵ See also Article 1, section 22 of the Washington Constitution that provides, in part: "In criminal prosecutions the accused shall have the right to appear and defend in person, or by counsel ..."

substantially related to the defense and allows the defendant "to give advice or suggestion or even to supersede his lawyers." State v. Wilson, 141 Wn. App. at 604, quoting Snyder v. Massachusetts, 291 U.S. 97, 106, 54 S.Ct. 330, 78 L.Ed. 674, 90 A.L.R. 575 (1934) overruled on other grounds by Malloy v. Hogan, 378 U.S. 1, 84 S.Ct. 1489, 12 L.Ed.2d 653 (1964). The United States Supreme Court precedent relied upon by the court in Wilson provided that the presence at voir dire was more limited than in other portions of trial.

In contrast, the court in Wilson noted that the core of the right is to be present when the evidence is presented. State v. Wilson, 141 Wn. App. at 603. In State v. Wilson, 141 Wn. App. 597, 171 P.3d 501 (2007) the defendant was not present for an in-chambers conference regarding a seated juror.

In Wilson, the court presented the question as whether the defendant "has demonstrated that his presence at the in-chambers conference bore a reasonably substantial relation to the fullness of his opportunity to defend against the charge, or whether a fair and just hearing was thwarted by his absence." State v. Wilson, 141 Wn. App. at 604, citing Snyder v. Massachusetts, 291 U.S. 97, 105-8, 54 S.Ct. 330, United States v. Gagnon, 470 U.S. 522, 526, 105 S.Ct.

1482, 84 L.Ed.2d 486 (1985). The Wilson court concluded: "However, Mr. Wilson must demonstrate how his presence was necessary to secure his due process rights; **prejudice will not be presumed.**" State v. Wilson, 141 Wn. App. at 604 (emphasis added), *citing In Re Personal Restraint of Lord*, 123 Wn.2d 296, 307, 868 P.2d 835 (1994).

The Court of Appeals herein relied on Irby's contention that a presumption of prejudice is sufficient. Both Wilson and Lord, hold that prejudice will not be presumed.

The Court of Appeals issued a decision in conflict with prior Court of Appeals and Washington Supreme Court precedent by presuming prejudice and not applying the full test provided by White.

The United States and Washington State Supreme Court decisions, referenced by this Court's opinion and prior briefing provide further examples of the scope of the right to presence.

i. United States Supreme Court and Federal cases.

In Snyder v. Massachusetts, a defendant claimed that his failure to be present at a view of the scene by jurors was a violation of his right to be present at trial. In deciding that there was no violation of the defendant's right to be present the Snyder court set forth a test.

We assume in aid of the petitioner that in a prosecution for a felony the defendant has the privilege under the Fourteenth Amendment **to be present in his own person whenever his presence has a relation, reasonably substantial, to the fullness of his opportunity to defend against the charge.** Thus, the privilege to confront one's accusers and cross-examine them face to face is assured to a defendant by the Sixth Amendment in prosecutions in the federal courts (Gaines v. Washington, supra, at page 85 of 277 U.S., 48 S.Ct. 468, 72 L.Ed. 793), and in prosecutions in the state courts is assured very often by the Constitutions of the states.

Snyder v. Massachusetts, 291 U.S. at 105-6 (emphasis added). This highlighted test from Snyder is the test Washington courts apply.

The court in Snyder went on to hold that the view of the scene by the jurors which included comments by the trial judge did not violate the defendant's Fourteenth Amendment due process rights.⁶

In United States v. Gagnon, 470 U.S. 522, 105 S.Ct. 1482, 84 L.Ed.2d 486 (1985), one of four defendants was drawing sketches of the jurors during trial. The defense was concerned about the juror being prejudiced against the defendant. The judge conducted a chambers conference with the juror without the defendant present.

⁶ In so holding the court noted:

There is danger that the criminal law will be brought into contempt—that discredit will even touch the great immunities assured by the Fourteenth Amendment—if gossamer possibilities of prejudice to a defendant are to nullify a sentence pronounced by a court of competent jurisdiction in obedience to local law, and set the guilty free.

The Supreme Court held that attendance of the defendants or their counsel "at the in-camera discussion was not required to ensure fundamental fairness or a 'reasonably substantial ... opportunity to defend against the charge.'" United States v. Gagnon, 470 U.S. at 527, quoting Snyder v. Massachusetts, 291 U.S. 97, 105-06, 54 S.Ct. 330, 332, 78 L.Ed. 674, 90 A.L.R. 575 (1934) overruled on other grounds by Malloy v. Hogan, 378 U.S. 1, 84 S.Ct. 1489, 12 L.Ed.2d 653 (1964).

One of the few published cases involving absence of a defendant at just the jury selection stage is U.S. v. Gordon, 829 F.2d 119 (C.A.D.C. 1987). In Gordon the defendant was entirely absent from the entire jury selection process.

That Gordon's presence at voir dire was substantially related to his defense is indicated by the fact that he had no opportunity "to give advise or suggestion[s] ... to ... his lawyers." Snyder, 291 U.S. at 106, 54 S.Ct. at 332. During voir dire, for example, "what may be irrelevant when heard or seen by [defendant's] lawyer may tap a memory or association of the defendant's which in turn may be of some use to his defense" Boone v. United States, 483 A.2d 1135, 1137-38 (D.C.App.1984). See also United States v. Washington, 705 F.2d at 497.

A defendant's presence at jury selection is also necessary so that he may effectively exercise his peremptory challenges. Washington, 705 F.2d at 497.

Snyder v. Massachusetts, 291 U.S. at 122.

The process of peremptory challenges is essential to an impartial trial. Lewis v. United States, 146 U.S. at 378, 13 S.Ct. at 139. As Blackstone points out, "how necessary it is that a prisoner ... should have a good opinion of his jury the want of which might totally disconcert him; the law wills not that he should be tried by any one man against whom he has conceived a prejudice even without being able to assign a reason for his dislike." 4 W. Blackstone, Commentaries, quoted in, Lewis v. United States, 146 U.S. at 376, 13 S.Ct. at 138.

U.S. v. Gordon, 829 F.2d at 124. In contrast, Irby was only not present when the e-mail exchanged occurred. He was otherwise present throughout voir dire. Irby and his counsel had all the information reasonably needed to act on the trial court's question. Jurors had already completed the questionnaires which were available for counsel and the defendant to review.

ii. Washington case law.

The Washington Courts apply the same tests as federal courts. In In Re Personal Restraint of Lord, 123 Wn.2d 296, 868 P.2d 835 (1994), the defendant claimed that he did not waive his presence at numerous unspecified in-chambers hearings and sidebar conferences. In Re Personal Restraint of Lord, 123 Wn.2d at 305-6.

The core of the constitutional right to be present is the right to be present when evidence is being presented. United States v. Gagnon, 470 U.S. 522, 526, 105 S.Ct. 1482, 84 L.Ed.2d 4 (1985) (per

curiam). 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....' " Gagnon, 470 U.S. at 526, 105 S.Ct. at 1484 (quoting Snyder v. Massachusetts, 291 U.S. 97, 54 S.Ct. 330, 78 L.Ed. 674, 90 A.L.R. 575 (1934)).

In Re Personal Restraint of Lord, 123 Wn.2d 296, 306, 868 P.2d 835 (94) (emphasis added) . The Lord court went on to indicate that prejudice cannot be presumed and that "Lord does not explain how his absence affected the outcome of any of the challenged proceedings or conferences, nor can we find any prejudice." In Re Personal Restraint of Lord, 123 Wn.2d at 307 citing, Rushen v. Spain, 464 U.S. at 117-20.

In In Re Personal Restraint of Benn, 134 Wn.2d 868, 952 P.2d 116 (1998), the defendant claimed the trial court erred by granting a continuance in his absence. The court held that defendant's absence at the hearing did not affect his opportunity to defend the charge since there was no presentation of evidence, and no motion regarding legal matters. In Re Personal Restraint of Benn, 134

Wn.2d at 920.⁷ Benn attempted to argue that his absence constituted "structural error" which could never be held harmless. However the Benn court held that the absence of the defendant can be "trial error" rather than "structural error" and thus is subject to harmless error analysis. Id at 921. Most crucially to the present case however, the Benn court noted that the same considerations that go in to whether a defendant has the opportunity to defend the charge exist in a harmless error analysis.

The same factors which support the conclusion that the defendant had no right to be present at the hearing also compel us to conclude that, if any such right existed, his absence was harmless.

In Re Personal Restraint of Benn, 134 Wn.2d at 921.

The same situation exists in the present case as in Benn; the defendant's absence did not affect his ability to defend against the charge and under a similar analysis any error was harmless.⁸

⁷ See also, State v. White, 74 Wn.2d 386, 444 P.2d 661 (1968) (passing out of jury orientation handbook did not amount to a stage in the proceedings at which the defendant's presence is required).

⁸ See also, In Re Personal Restraint of Woods, 154 Wn.2d 400, 114 P.3d 607 (2005) (defendant's absence at chambers conference regarding juror misconduct and side bars not necessary to defend against charge), State v. Bremer, 98 Wn. App. 832, 991 P.2d 118 (2000) (absence at discussion of jury instructions did not have relation to the opportunity to defend against the charge), State v. Thorpe, 51 Wn. App. 582, 754 P.2d 1050 (1988) (defendant's illness preventing him from attending closing argument would have not have advanced the argument of his counsel).

Contrary to the case law of Lord and Benn, the Court of Appeals concluded that the error was structural and presumed prejudice as a result. The tests of Lord and Benn require that the defendant establish prejudice. Without the presumption that the Court of Appeals improperly applied, Irby cannot establish prejudice.

The decision of the Court of Appeals is in conflict with other decisions of the Court of Appeals and Supreme Court. RAP 13.4 (b) (1), (2).

2. In the context of the case as a whole and where the parties agreed to excuse the jurors, Irby did not establish prejudice.

Although the jury selection process does generally require the presence of the defendant, it is not within the constitutional core of presence when evidence is presented.⁹ Here the traditional jury selection process of questioning of jurors was not occurring.

"The exclusion of a defendant from a ... proceeding should be considered in light of the whole record." United States v. Gagnon, 470 U.S. 522, 526-7, 105 S.Ct. 1482, 84 L.Ed.2d 486 (1985). The

⁹ The core of the constitutional right to be present 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).

defendant need not be present " 'when presence would be useless, or the benefit but a shadow.' " State v. Rice, 110 Wn.2d 577, 616, 757 P.2d 889 (1988) (quoting Snyder v. Massachusetts, 291 U.S. 97, 106-07, 54 S.Ct. 330, 78 L.Ed. 674 (1934)).

The purpose of voir dire is to allow parties to gain information, which enables them to challenge jurors for cause or to use peremptory challenges. State v. Frederiksen, 40 Wn. App. 749, 752, 700 P.2d 369, *rev. denied*, 104 Wn.2d 1013 (1985). '[T]he defendant should be permitted to examine prospective jurors carefully, 'and to an extent which will afford him every reasonable protection.'" Frederiksen, 40 Wn. App. at 752 (quoting State v. Laureano, 101 Wn.2d 745, 758, 682 P.2d 889 (1984) (alterations in original) (citations omitted)). But the trial court has wide latitude and the scope of voir dire is a matter of trial court discretion. State v. Robinson, 75 Wn.2d 230, 231, 450 P.2d 180 (1969); State v. Tharp, 42 Wn.2d 494, 256 P.2d 482 (1953). "Absent an abuse of discretion and a showing that the accused's rights have been substantially prejudiced thereby, the trial judge's ruling as to the scope and content of voir dire will not be disturbed on appeal." Frederiksen, 40 Wn. App. at 752-53.

Additionally, the defendant's counsel was part of the

discussion regarding excusing the jurors and in fact consented to doing so. See U.S. v. Stratton, 649 F.2d 1066, 1080-81 (5th Cir.1981) (recognizing that defendant's attorney's presence is relevant to whether defendant was prejudiced by absence from proceeding), see also U.S. v. Walls, 577 F.2d 690 (9th Cir.), *cert. denied*, 439 U.S. 893, 99 S.Ct. 251, 58 L.Ed.2d 239 (1978); U.S. v. Toliver, 541 F.2d 958 (2d Cir. 1976). Trial counsel's decisions regarding how to proceed with voir dire are subject to the standard of review for effective assistance of trial counsel. State v. Donald, 68 Wn. App 543, 550, 844 P.2d 447 (1993).

All of the seven jurors excused by the trial court were excused with the express permission of Irby's counsel. CP 1279. Defense counsel had sufficient time to contact Irby to consult him regarding excusing some of the jurors if they chose to do so.

The seven jurors for which the Court of Appeals presumed error were excused for valid reasons by the trial court. Four were excused because they had received a commitment from the court administrator that their period of service was limited to one week. One had a business hardship. One home schooled a child. And one was excused by agreement because a parent had been murdered.

The trial court was properly evaluating the ability of jurors to serve.¹⁰

Of the seven jurors released, only jurors numbered 7, 17 and 23 had the potential to sit on the jury because the parties never went past juror number 37. Of those three jurors, all had indicated to the trial court that they had a time conflict for trial. Jurors 7 and 23 had received a commitment from the Court Administrator that their service was limited to one week and juror 17 home schooled a child.

In the context of the record of the jury selection process, Irby's presence at the point when the trial court questioned counsel about excusing jurors for the reasons given was not a hearing at which Irby's presence had a relation, reasonably substantial, to the fullness of his opportunity to defend against the charge.

3. Since the test for evaluating whether a defendant is required to be present involves whether the defendant's presence is reasonably necessary, the Court of Appeals erred in failing to consider the

¹⁰ Because "a juror's competency to serve impartially" is a credibility determination that the trial court is necessarily in the best position to make, this court applies a deferential standard of review and will reverse the trial court's determination only if the court has manifestly abused its discretion. State v. Rupe, 108 Wn.2d 734, 749, 743 P.2d 210 (1987); Witt, 469 U.S. at 428-29, 105 S.Ct. 844; Brown, 132 Wn.2d at 601-02, 940 P.2d 546; Uttecht v. Brown, 551 U.S. ---, 127 S.Ct. 2218, 2224, 167 L.Ed.2d 1014 (2007) ("Deference to the trial court is appropriate because it is in a position to assess the demeanor of the venire, and of the individuals who compose it, a factor of critical importance in assessing the attitude and qualifications of potential jurors."). State v. Yates, 161 Wn.2d 714, 743, 168 P.3d 359 (2007).

similar test of harmless error.

The Court of Appeals suggested in the unpublished opinion that the finding of a violation of the defendant's right to be present could have been harmless error. The Court stated since the State had not argued there was not harmless error, the Court would not consider that issue.¹¹

Under the standards set forth for analyzing whether there was a violation of the defendant's right to presence, the same factors which go into a harmless error analysis exist. In Re Personal Restraint of Benn, 134 Wn.2d at 921. The determination that the e-mails exchange was a critical stage of the proceedings necessarily required a court to consider whether the defendant's "presence has a relation, reasonably substantial, to the fullness of his opportunity to defend against the charge." United States v. Gagnon, 470 U.S. 522, 526, 105 S.Ct. 1482, 84 L.Ed.2d 486 (1985).

The determination necessarily requires a court to evaluate whether, if a person is not present at a "hearing" he would have contributed to the proceedings. Thus if the person would not have contributed, the absence would be harmless error.

The Supreme Court has "adopted the general rule that a constitutional error does not automatically require reversal of a conviction ... and has recognized that most constitutional errors can be harmless." Arizona v. Fulminante, 499 U.S. 279, 306, 111 S.Ct. 1246, 113 L.Ed.2d 302 (1991). Automatic reversal due to a constitutional error is required only if this error was a "structural defect" that permeated "[t]he entire conduct of the trial from the beginning to end" or "affect[ed] the framework within which the trial proceeds." Id. at 309-10, 111 S.Ct. 1246.¹²

A number of cases cited previously herein have applied the harmless error analysis or considered it as a function of evaluating the defendant's right to presence. Most of those cases have considered the error harmless. Rushen v. Spain, 464 U.S. 114, 104 S.Ct. 453, 78 L.Ed.2d (1983), In Re Personal Restraint of Woods, 154 Wn.2d 400, 114 P.3d 607 (2005), In Re Personal Restraint of Pirtle, 136 Wn.2d 467, 483, 965 P.2d 593 (1998), In Re Personal

¹¹ The State specifically argued for harmless error in a motion for reconsideration which was denied without comment.

¹² The present case would also be subject to the standards for allowing a defense to raise a claim regarding an error affecting a constitutional right for the first time on appeal. Under RAP 2.5(a) and case law, the error must be "manifest" and a defendant must show how the alleged error actually affect the defendant's rights at trial. State v. WWJ Corp., 138 Wn.2d 595, 602, 980 P.2d 1257 (1999); State v.

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STATE OF WASHINGTON
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of Lord, 123 Wn.2d 296, 868 P.2d 835 (1994), State v. Wilson, 141 Wn. App. 597, 171 P.3d 501 (2007).

This case presents as one of harmless error as well.

VI. CONCLUSION

For the reasons set forth in this petition, this Court should accept review. RAP 13.6.

DATED this 15th day of December, 2008.

Respectfully submitted,

By: *Erik Pedersen*
ERIK PEDERSEN, WSBA#20015
Senior Deputy Prosecuting Attorney
Attorney for Petitioner, State of Washington
Office Identification #91059

DECLARATION OF DELIVERY

I, KAREN R. WALLACE declare as follows:
I sent for delivery by: United States Postal Service; ABC Legal Messenger Service, a true and correct copy of the document to which this declaration is attached, to: David B. Koch, addressed as Neilsen, Broman & Koch, PLLC, 1908 East Madison Street, Seattle, WA 98122. I certify under penalty of perjury under the laws of the State of Washington that the foregoing is true and correct. Executed at Mount Vernon, Washington this 15th day of December, 2008.

Karen R Wallace
DECLARANT

McFarland, 127 Wn.2d 322, 332-33, 899 P.2d 1251 (1995), State v. Scott, 110 Wn.2d 682, 688, 757 P.2d 492 (1988).

APPENDIX A

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PROCEEDINGS ATTORNEY
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IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON

STATE OF WASHINGTON,)	NO. 59741-8-1
)	
Respondent,)	DIVISION ONE
)	
v.)	
)	
TERRANCE JON IRBY,)	UNPUBLISHED OPINION
)	
Appellant.)	
<hr/>		FILED: October 20, 2008

LEACH, J. — Terrance Irby appeals his convictions of aggravated first degree murder, felony murder in the first degree, and burglary in the first degree. He contends that he was denied his right to be present at all critical stages of trial and that he and the public were denied their respective rights to a public trial because of the manner in which the trial court conducted a part of voir dire. Irby also challenges the use of two prior convictions under the Persistent Offender Accountability Act (POAA).¹ The State cross appeals, claiming that the trial court erred by failing to sentence Irby to life in prison for aggravated murder under RCW 10.95.030(1). We agree that Irby was denied his right to be present at a critical stage of trial, reverse his convictions on this basis, and remand for a new

¹ RCW 9.94A.030; former RCW 9.94A.505 (2002); RCW 9.94A.555, .561, .565.

trial. Therefore, we do not reach any of the remaining issues raised by the parties.

Background

On April 15, 2005, Terrance Irby was charged with aggravated murder, first degree felony murder, and first degree burglary.

During pretrial proceedings on December 27, 2006, counsel for both parties agreed that there was no need for them or the defendant to be present on the first day of jury selection; at that time, the court would simply provide prospective jurors with a written questionnaire and give them the necessary oath. The parties would then question the jurors the following morning. On January 2, 2007, all prospective jurors were sworn regarding qualifications and voir dire, after which the court gave jurors the questionnaire. An attorney for each party was present, but the defendant was not. That afternoon, the court sent an e-mail message to counsel, suggesting the removal of certain potential jurors from the panel:

I note that 3, 23, 42 and 59 were excused after one week by the Court Administrator.
17 home schools, and 3 weeks is a long time.
77 has a business hardship.
36, 48, 49, and 53 had a parent murdered.
Any thoughts? If we're going to let any go, I'd like to do it today.

Defense counsel responded, in an e-mail, that he had no objection to releasing some or all of these jurors. A later e-mail from the court indicated that the State objected to releasing jurors 36, 48, and 49. The record does not reflect how the court received this information. The clerk's minutes for January 2, 2007, note, "In chambers not on the record. Counsel stipulate to excusing the following jurors

for cause: # 7, 17, 23, 42, 53, 59 & 77.² The trial court never conducted any proceedings on the record in excusing these seven jurors.

The court began general questioning of the remaining jury pool the following day, in the presence of counsel and Mr. Irby. After a 12-day trial, the jury found Irby guilty of first degree murder, first degree felony murder, and first degree burglary.

Over Irby's objections, the court found that he was a persistent offender because he had two predicate three-strike offenses, a 1976 conviction for statutory rape and a 1984 conviction for second degree assault, before being convicted of two most serious offenses in this case. The court sentenced Irby to life in prison without the possibility of parole.

Discussion

Irby argues that the court's dismissal of seven jurors from the panel via e-mail violated his right to be present during all critical stages of trial. A criminal defendant has a constitutional right under the confrontation clause of the Sixth Amendment and the due process clause of the Fourteenth Amendment to be present during all critical stages of trial, including jury voir dire.³ We review constitutional questions de novo.⁴

A defendant's presence at voir dire is "required because it is substantially related to the defense and allows the defendant to give advice or suggestion or

² The judge's initial e-mail proposed releasing juror 3, but he indicated in a later e-mail that he had intended to propose dismissal of juror 7.

³ State v. Wilson, 141 Wn. App. 597, 603-04, 171 P.3d 501 (2007).

⁴ State v. Castro, 141 Wn. App. 485, 490, 170 P.3d 78 (2007).

even to supersede his lawyers."⁶ Rule of Criminal Procedure 3.4 requires the defendant to be present "at the arraignment, at every stage of the trial including the empaneling of the jury and the return of the verdict, and at the imposition of sentence, except as otherwise provided by these rules, or as excused or excluded by the court for good cause shown."⁶ "[F]or purposes of CrR 3.4 the beginning of trial occurs, at the latest, when the jury panel is sworn for voir dire and before any questioning begins."⁷

Here, trial began on January 2, 2007, when the defendant was not present. At a December 27, 2006 pretrial hearing, in Irby's presence, the court suggested to counsel that neither they nor Irby needed to be present when the jury panel was sworn and given the questionnaire. Although Irby did not object to this procedure, the record contains no discussion that any potential jurors would be excused from the venire, but only that they would be sworn and given a questionnaire. Thus, while we do not decide whether Irby validly waived his right to be present when trial began, the record is clear that Irby was not asked to waive and did not waive his right to be present at the critical stage when the court removed potential jurors from the venire. Yet, the trial court dismissed seven jurors outside of Irby's presence, in violation of his right to be present at all critical

⁵ Wilson, 141 Wn. App. at 604 (quoting Snyder v. Massachusetts, 291 U.S. 97, 106, 54 S. Ct. 330, 78 L. Ed. 674 (1934), overruled on other grounds by Malloy v. Hogan, 378 U.S. 1, 84 S. Ct. 1489, 12 L. Ed. 2d 653 (1964)).

⁶ CrR 3.4(a) (emphasis added).

⁷ State v. Thomson, 70 Wn. App. 200, 211, 852 P.2d 1104 (1993) (emphasis added), aff'd, 123 Wn.2d 877, 872 P.2d 1097 (1994).

stages of trial. The record also does not reflect that Irby was ever advised at any point during his trial that these seven jurors had been dismissed.

The court e-mailed counsel, sua sponte, to suggest the excusal of several jurors. Four jurors were apparently dismissed because they "were excused after one week by the Court Administrator." With no further explanation on the record, it is difficult to discern the exact reason for the dismissal of these four jurors. The record contains no explanation of why the jurors were in the pool for this three-week trial if they were not in fact eligible to be chosen for the jury. It also does not show that the jurors were unwilling to serve if selected for a jury. In addition, two jurors were dismissed due to apparent hardship, and one juror who had "had a parent murdered" was excused, ostensibly for cause. While all of these excusals may have been appropriate had they occurred in open court in Irby's presence, these excusals violated Irby's right to be present and contribute to jury selection.

Our Supreme Court has held that violation of a defendant's right to be present at a critical stage of a criminal proceeding is subject to harmless error analysis.⁸ Irby contends that this error creates a presumption of prejudice, which the State can overcome by proving that the error was harmless beyond a reasonable doubt.⁹ The State fails to address harmless error, relying solely on its

⁸ In re Pers. Restraint of Benn, 134 Wn.2d 868, 920-21, 952 P.2d 116 (1998).

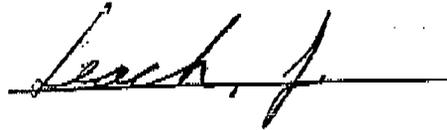
⁹ State v. Rice, 110 Wn.2d 577, 613-14, 757 P.2d 889 (1988); see also Campbell v. Rice, 408 F.3d 1166, 1171-72 (9th Cir. 2005).

argument that Irby's presence was not required. Therefore, we do not consider this issue.¹⁰

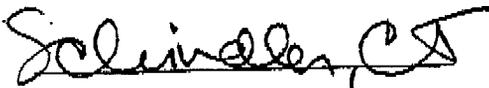
Conclusion

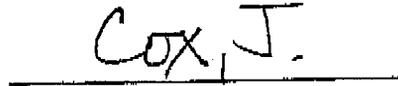
Irby's right to be present at a critical stage of trial was violated when the court dismissed seven potential jurors from the panel via e-mail correspondence with counsel. The State has offered no argument that this error was harmless. Because our resolution of this issue is dispositive, we do not reach any other issue raised by the parties, including those raised by Mr. Irby in his statement of additional authorities.

Reversed and remanded for a new trial.



WE CONCUR:





¹⁰ RAP 12.1(a); see also State v. Olson, 126 Wn.2d 315, 319-21, 893 P.2d 629 (1995).

APPENDIX B

IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON

STATE OF WASHINGTON,
Respondent,
v.
TERRANCE JON IRBY,
Appellant.

)
) NO. 59741-8-1
)
) DIVISION ONE
)
) ORDER DENYING MOTION
) FOR RECONSIDERATION
)
)
)
)

The respondent, State of Washington, having filed a motion for reconsideration herein, and a majority of the panel having determined that the motion should be denied; now, therefore, it is hereby

ORDERED that the motion for reconsideration be, and the same is, hereby denied.

Dated this 14th day of November, 2008.

FOR THE COURT:



Judge

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APPENDIX C

JohnMMeyer

From: JohnMMeyer
Sent: Tuesday, January 02, 2007 2:01 PM
To: JohnMMeyer; KeithTyne; Tom Seguline
Cc: MelissaBeaton; Eric V. Stollwerck; Delilah M. George
Subject: RE: Irby

05-1-276-9

Cops. 7 goes, not 3. OK?

John M. Meyer, Judge
Skagit County Superior Court

From: JohnMMeyer
Sent: Tuesday, January 02, 2007 1:59 PM
To: JohnMMeyer; KeithTyne; Tom Seguline
Cc: MelissaBeaton; Eric V. Stollwerck; Delilah M. George
Subject: RE: Irby

The State objects to letting 36, 48, and 49 go. I will have the others notified this afternoon so that they need not appear tomorrow. Thank you. JMM

John M. Meyer, Judge
Skagit County Superior Court

From: JohnMMeyer
Sent: Tuesday, January 02, 2007 1:55 PM
To: KeithTyne; Tom Seguline
Cc: MelissaBeaton; Eric V. Stollwerck; Delilah M. George
Subject: RE: Irby

If I let all 10 go, we still have 82. That should be plenty. Tom, O.K with you?

John M. Meyer, Judge
Skagit County Superior Court

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From: KeithTyne
Sent: Tuesday, January 02, 2007 1:53 PM
To: JohnMMeyer; Tom Seguline
Cc: MelissaBeaton; Eric V. Stollwerck; Delilah M. George
Subject: RE: Irby

No objection from the defense to letting some or all go.

Keith

From: JohnMMeyer
Sent: Tuesday, January 02, 2007 1:02 PM
To: KeithTyne; Tom Seguline
Cc: MelissaBeaton; Eric V. Stollwerck; Delilah M. George
Subject: Irby

I note that 3,23,42 and 59 were excused after one week by the Court Administrator.

1/2/2007

17 home schools, and 5 weeks is a long time.
77 has a business hardship.
36, 48, 49 and 53 had a parent murdered.

Any thoughts? If we're going to let any go, I'd like to do it today.

John M. Meyer, Judge
Skagit County Superior Court

041

1/2/2007