

No. 89321-7

No. 41902-5-II

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

STATE OF WASHINGTON,

Respondent,

v.

MARTIN ARTHUR JONES,

Appellant.

ON APPEAL FROM THE SUPERIOR COURT OF
THE STATE OF WASHINGTON FOR PIERCE COUNTY

The Honorable Vicki L. Hogan

REPLY BRIEF OF APPELLANT

THOMAS M. KUMMEROW
Attorney for Appellant

WASHINGTON APPELLATE PROJECT
1511 Third Avenue, Suite 701
Seattle, Washington 98101
(206) 587-2711

TABLE OF CONTENTS

A. ARGUMENT 1

1. MR. JONES' CONSTITUTIONALLY PROTECTED RIGHT TO BE PRESENT DURING THE SELECTION OF THE ALTERNATE JURORS WAS VIOLATED 1

 a. Mr. Jones need not object in order to raise this issue. 1

 b. The selection of the alternate jurors was part of jury selection at which Mr. Jones had the right to be present..... 2

2. MR. JONES' RIGHT TO A PUBLIC TRIAL AND THE PUBLIC'S RIGHT TO OPEN PROCEEDINGS WAS VIOLATED BY THE TRIAL COURT'S PROCEDURE IN SELECTING THE ALTERNATE JURORS 4

3. TROOPER JOHNSON'S IDENTIFICATION OF MR. JONES WAS IMPERMISSIBLY SUGGESTIVE AND WAS NOT OTHERWISE RELIABLE THEREBY VIOLATING MR. JONES' RIGHT TO DUE PROCESS..... 8

 a. The identification procedure was impermissibly suggestive..... 8

 b. The trooper's identification was not otherwise reliable and violated Mr. Jones' right to due process..... 10

 c. There is no "police exception" to the due process requirement..... 11

B. CONCLUSION..... 12

TABLE OF AUTHORITIES

UNITED STATES CONSTITUTIONAL PROVISIONS

U.S. Const. amend. I..... 5

U.S. Const. amend. VI 1

U.S. Const. amend. XIV 1

WASHINGTON CONSTITUTIONAL PROVISIONS

Article I, section 10..... 5

Article I, section 22..... 2, 4

FEDERAL CASES

Gomez v. United States, 490 U.S. 858, 109 S.Ct. 2237, 104 L.Ed.2d 923 (1989)..... 3

Manson v. Brathwaite, 432 U.S. 98, 97 S.Ct. 2243, 53 L.Ed.2d 140 (1977)..... 10

Rushen v. Spain, 464 U.S. 114, 104 S.Ct. 453, 78 L.Ed.2d 267 (1983)..... 1

Stovall v. Denno, 388 U.S. 293, 87 S.Ct. 1967, 18 L.Ed.2d 1199 (1967)..... 11

WASHINGTON CASES

In re the Personal Restraint of Orange, 152 Wn.2d 795, 100 P.3d 291 (2004)..... 5, 6

State v. Bone-Club, 128 Wn.2d 254, 906 P.2d 325 (1995) 5

State v. Easterling, 157 Wn.2d 167, 137 P.3d 825 (2006) 1, 5, 6

State v. Irby, 170 Wn.2d 874, 246 P.3d 796 (2011) 1, 2, 4

State v. Maupin, 63 Wn.App. 887, 822 P.2d 355 (1992) 8

State v. Momah, 167 Wn.2d 140, 217 P.3d 321 (2009) 6, 7

RULES	
RAP 2.5	1

A. ARGUMENT

1. MR. JONES' CONSTITUTIONALLY PROTECTED RIGHT TO BE PRESENT DURING THE SELECTION OF THE ALTERNATE JURORS WAS VIOLATED

a. Mr. Jones need not object in order to raise this issue. The State contends that Mr. Jones' failure to object to the trial court's selection of alternate jurors in his absence waives the right to challenge the issue on appeal. Brief of Respondent at 13-16. The State misunderstands the constitutional right involved which does not require an objection in order to raise the issue for the first time on appeal.

A defendant has a fundamental right to be present at all critical stages of the proceedings. U.S. Const. amends. VI, XIV; Const. art. I, § 22; *Rushen v. Spain*, 464 U.S. 114, 117, 104 S.Ct. 453, 78 L.Ed.2d 267 (1983); *State v. Irby*, 170 Wn.2d 874, 880-81, 246 P.3d 796 (2011). A trial court's actions, or inactions, which constitute a manifest error affecting a constitutional right can be raised for the first time on appeal. RAP 2.5(a)(3). See *State v. Easterling*, 157 Wn.2d 167, 174, 178, 180 n.11, 137 P.3d 825 (2006) (trial court's closure of the courtroom during a pre-trial hearing that solely involved the co-defendant without objection

could be raised for the first time on appeal as manifest constitutional right). Thus, given the fundamental importance of the right to be present and the nature of the violation of that right here, the error by the trial court in proceeding in selecting alternate jurors in the absence of Mr. Jones is a manifest error affecting a constitutional right which may be raised for the first time on appeal. The State's argument to the contrary should be rejected.

b. The selection of the alternate jurors was part of jury selection at which Mr. Jones had the right to be present. The State attempts to recast the issue as merely a ministerial act by the clerk. Brief of Respondent at 16. This argument should be rejected.

Under art. I, § 22 of the Washington Constitution, a defendant has a broader right to be present than under the federal Constitution. *State v. Irby*, 170 Wn.2d 874, 885 fn 6, 246 P.3d 796 (2011). Under the Washington Constitution, the right of the defendant to be present does not turn on whether the hearing is a "critical stage" of the proceedings, but instead whether the defendant's "substantial rights may be affected." *Id.* As opposed to the United States Constitution, this right is not conditioned on what the defendant might do at this hearing or whether his presence

would have aided the defense. *Id.* at 885 fn. 6. The right turns only on whether his “substantial rights may be affected” at that stage of the trial. *Id.*

While the State attempts to cast it differently as merely a ministerial act by the courtroom clerk, the selection of the alternate jurors by the courtroom clerk was part and parcel of the jury selection process in general at which Mr. Jones had a right to be present. Proceeding in his absence affected his substantial right to be present. The State is unable to cite any authority that states that selection of alternate jurors is *not* a part of the jury selection process.

The decision cited by the State, *Gomez v. United States*, 490 U.S. 858, 109 S.Ct. 2237, 104 L.Ed.2d 923 (1989), for the proposition that jury *voir dire* is distinct from the mere “administrative impaneling process,” is completely inapplicable to Mr. Jones’ case. *Gomez* involved the scope and extent of the power of federal magistrate judges, who are non-article III judges, and who are unable to engage in certain activities that infringe on the constitutional rights of a party. Such is not the case here.

Further, the selection of the alternate jurors was not akin to in-chambers and sidebar conferences. Brief of Respondent at 19.

The selection of the alternate jurors affected the substantial rights of Mr. Jones given the importance of jury selection noted by Washington courts. *Irby*, 170 Wn.2d at 880-82. As a consequence, Mr. Jones' right to "appear and defend in person" was violated when the trial court selected the alternate jurors in his absence. Const. art. I, § 22. Mr. Jones is entitled to reversal of his convictions.

2. MR. JONES' RIGHT TO A PUBLIC TRIAL AND THE PUBLIC'S RIGHT TO OPEN PROCEEDINGS WAS VIOLATED BY THE TRIAL COURT'S PROCEDURE IN SELECTING THE ALTERNATE JURORS

The State contends there is no record the courtroom was closed when the courtroom clerk selected the alternate jurors. Brief of Respondent at 25. In the motion for a new trial based upon the trial court's selection of the alternate jurors during a break in private, Mr. Jones also objected to the process on the basis that it was conducted when the courtroom was closed:

Not only was the defendant not present, and we would allege that this is a very critical part of the trial, *but also in terms of the courtroom not being open to the public.*

RP 4110 (emphasis added). The State did not dispute this assertion at trial, thus contradicting the State's claim here.

Both the federal and state constitutions guarantee the accused the right to a public trial. U.S. Const. amend. VI (“In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial”); Const. article I, section 22 (“In criminal prosecutions the accused shall have the right to . . . have a speedy public trial by an impartial jury . . .”). In addition, the public also has a vital interest in access to the criminal justice system. U.S. Const. amend. I (the First Amendment’s guarantees of free speech and a free press also protect the right of the public to attend a trial); Art. I, § 10: (“Justice in all cases shall be administered openly, and without unnecessary delay.”). These provisions provide the public and the press a right to open and accessible court proceedings. *State v. Easterling*, 157 Wn.2d 167, 174, 137 P.3d 825 (2006). Further, the right to a public trial applies to jury selection. *In re the Personal Restraint of Orange*, 152 Wn.2d 795, 804, 100 P.3d 291 (2004).

Although the defendant’s right to a public trial and the public’s right to open access to the court system are different, they serve “complimentary and interdependent functions in assuring the fairness of our judicial system.” *State v. Bone-Club*, 128 Wn.2d 254, 259, 906 P.2d 325 (1995).

Without any citation to authority, the State claims the courtroom clerk's act of selecting the alternate jurors was "a ministerial act." Brief of Respondent at 25. As was argued, *supra*, the act of selecting the alternate jurors was part and parcel of the act of selecting the entire jury panel of which alternates is merely a subset. In light of that fact, the trial court violated Mr. Jones' right to a public trial and the public's right to open access to the proceedings.

The presumptive remedy for a public trial right violation is reversal and remand for a new trial. *Orange*, 152 Wn.2d at 814; *Easterling*, 157 Wn.2d at 179-80. Contrary to the State's claim, nothing in the Supreme Court's decision in *State v. Momah*, 167 Wn.2d 140, 217 P.3d 321 (2009) has changed that presumptive remedy. Brief of Respondent at 26.

The decision in *Momah* cited the decision in *Easterling* with approval:

For instance, in *State v. Easterling*, 157 Wash.2d 167, 137 P.3d 825 (2006), we remanded a case for a new trial where the court closed the courtroom, excluding the defendant from a portion of his own trial, while his codefendant made a motion to sever and struck a deal with the State to testify against him. In that case, the closure affected the fairness of Easterling's trial because the court did not seek or receive input or objection from Easterling, and it prevented him from

being present during a portion of his own proceedings.

Momah, 167 Wn.2d at 150. The Court refused to reverse *Momah*'s conviction because

Momah affirmatively assented to the closure, argued for its expansion, had the opportunity to object but did not, actively participated in it, and benefited from it. Moreover, the trial judge in this case not only sought input from the defendant, but he closed the courtroom after consultation with the defense and the prosecution.

Id at 152.

Here, Mr. Jones did not assent to the courtroom's closure while the alternate jurors were selected, did not actively participate in it because he did not know the selection process was occurring, and certainly did not benefit. In light of that, *Momah* has no application and the presumptive remedy of reversal and remand for a new trial is the correct one.

3. TROOPER JOHNSON'S IDENTIFICATION OF MR. JONES WAS IMPERMISSIBLY SUGGESTIVE AND WAS NOT OTHERWISE RELIABLE THEREBY VIOLATING MR. JONES' RIGHT TO DUE PROCESS

a. The identification procedure was impermissibly suggestive. While acknowledging that the decision in *State v. Maupin*¹ ruled that a single photograph identification procedure is impermissibly suggestive, the State attempts to distinguish *Maupin* from the procedure used here. Brief of Respondent at 33-35. It is important to note that the trial court in denying the motion to suppress the identification implicitly found the single photograph identification procedure used here was suggestive, but excused it based upon "exigent circumstances." CP 1238-39.

Contrary to the State's conclusion, this was a single photograph identification procedure. The evidence showed the trooper was predisposed to identify Mr. Jones as the assailant as he believed the person who shot him was the husband of the driver of the van, based upon his claim that the driver, Ms. Jones, was angry when told her car was to be impounded. The trooper continually asked to see a photo of Mr. Jones. Trooper Johnson wrote the name "Marty" on his hand when Ms. Jones told the

¹ *State v. Maupin*, 63 Wn.App. 887, 896, 822 P.2d 355 (1992).

troopers "Marty" could come and retrieve her car prior to their decision to impound. CP 1398. While being treated at OHSU, Trooper Johnson was shown several photographs, including at least one photo montage of potential suspects, none of which he identified as his assailant. CP 1401. During this period, Trooper Johnson asked several times to see a picture of Ms. Jones' husband, Martin Jones. CP 1402. Ultimately, Trooper Johnson was shown a poor quality photograph of Mr. Jones from which he was unable to make an identification, but requested a clearer copy. CP 1402. Once shown a clear copy of Mr. Jones' DOL picture, which included Mr. Jones' name and identifying information, the trooper identified Mr. Jones as his assailant. CP 1402. Trooper Jones was later shown a photo montage, which included the same DOL photo of Mr. Jones without his name showing. CP 1403. The trooper told the officers Mr. Jones' photo looked "similar" to the person who shot him. CP 1403.

It is important to note that when shown a photo montage which included Mr. Jones' photograph, the trooper was unable to identify Mr. Jones. Only when shown a *single* photograph did the trooper make an identification. This is the very essence of an impermissible single photo show-up.

b. The trooper's identification was not otherwise reliable and violated Mr. Jones' right to due process. The State contends that even if the identification procedure was suggestive, it was otherwise reliable. Brief at 35-38. The primary fact the State relies on is the fact the trooper was a "experienced police officer," relying on the decision in *Braithwaite*.² Brief at 37. One must keep in mind this was a trooper who had many years of service and who repeatedly violated well established police procedures in identifying Mr. Jones here.

The trooper was an experienced state trooper, employed for 27 years, who should have known a single photo identification was improper, but he short-circuited the process by continually demanding to be shown a single photograph of Mr. Jones. Later, the trooper failed to tell the officers conducting the subsequent photo montage that he had previously identified Mr. Jones from his DOL photo. CP 1403; RP 1726. One of these officers stated he would not have shown Trooper Johnson the montage had he known the trooper had made a prior identification. RP 1726.

The inescapable conclusion to draw from these facts was that Trooper Johnson was predisposed to believe Mr. Jones was

² *Manson v. Braithwaite*, 432 U.S. 98, 97 S.Ct. 2243, 53 L.Ed.2d 140 (1977).

his assailant, thus his identification of Mr. Jones in the single photograph procedure was a *fait accompli*. As a consequence, the trooper's identification of Mr. Jones was not otherwise reliable.

c. There is no "police exception" to the due process requirement. In arguing that "exigent circumstances" excused the suggestive identification procedure used here, the State seems to be arguing for a "police exception" to the due process requirement. Brief of Respondent at 38-40. The State relies on language in *Stovall v. Denno*, 388 U.S. 293, 87 S.Ct. 1967, 18 L.Ed.2d 1199 (1967), which excused a suggestive identification procedure where the police did not know whether the victim would survive. From this, the State analogizes to Mr. Jones' matter because "A person who committed an unprovoked attempted murder of a police officer . . ." Brief of Respondent at 39. But the State misses the entire point of the *Stovall* decision.

In *Stovall* the critical piece of information that excused the suggestive process was the fact the police did not know whether the victim would live or not, thus the police took the opportunity to attempt to gain an identification while the victim was still alive. *Stovall* did not somehow carve out a "police exception" to the due process requirement. The trooper here was alive and able to

engage in an identification process with relative ease, thus cutting against any argument of an exigency. This Court should reject the State's invitation to carve out a "police exception."

B. CONCLUSION

For the reasons stated in the instant reply brief as well as the previously filed Brief of Appellant, Mr. Jones requests this Court reverse his conviction and remand for a new trial.

DATED this 10th day of May 2012.

Respectfully submitted,

A handwritten signature in black ink, appearing to read 'Tom Kummerow', is written over a horizontal line. The signature is enclosed within a large, hand-drawn oval.

THOMAS M. KUMMEROW (WSBA 21518)
tom@washapp.org
Washington Appellate Project – 91052
Attorneys for Appellant

**IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON
DIVISION TWO**

STATE OF WASHINGTON,)	
)	
RESPONDENT,)	
)	NO. 41902-5-II
v.)	
)	
MARTIN JONES,)	
)	
APPELLANT.)	

DECLARATION OF DOCUMENT FILING AND SERVICE

I, MARIA ARRANZA RILEY, STATE THAT ON THE 11TH DAY OF MAY, 2012, I CAUSED THE ORIGINAL **REPLY BRIEF OF APPELLANT** TO BE FILED IN THE **COURT OF APPEALS - DIVISION TWO** AND A TRUE COPY OF THE SAME TO BE SERVED ON THE FOLLOWING IN THE MANNER INDICATED BELOW:

<input checked="" type="checkbox"/> KATHLEEN PROCTOR, DPA PIERCE COUNTY PROSECUTOR'S OFFICE 930 TACOMA AVENUE S, ROOM 946 TACOMA, WA 98402-2171 E-MAIL: PCpatcecf@co.pierce.wa.us	() () (X)	U.S. MAIL HAND DELIVERY E-MAIL VIA COA E-FILE
<input checked="" type="checkbox"/> MARTIN JONES 348031 WASHINGTON STATE PENITENTIARY 1313 N 13 TH AVE. WALLA WALLA, WA 99362	(X) () ()	U.S. MAIL HAND DELIVERY _____

SIGNED IN SEATTLE, WASHINGTON THIS 11TH DAY OF MAY, 2012.

X _____ 

Washington Appellate Project
701 Melbourne Tower
1511 Third Avenue
Seattle, Washington 98101
☎(206) 587-2711

WASHINGTON APPELLATE PROJECT

May 11, 2012 - 3:27 PM

Transmittal Letter

Document Uploaded: 419025-Reply Brief.pdf

Case Name: STATE V. MARTIN JONES

Court of Appeals Case Number: 41902-5

Is this a Personal Restraint Petition? Yes No

The document being Filed is:

- Designation of Clerk's Papers Supplemental Designation of Clerk's Papers
- Statement of Arrangements
- Motion: ____
- Answer/Reply to Motion: ____
- Brief: Reply
- Statement of Additional Authorities
- Cost Bill
- Objection to Cost Bill
- Affidavit
- Letter
- Copy of Verbatim Report of Proceedings - No. of Volumes: ____
Hearing Date(s): _____
- Personal Restraint Petition (PRP)
- Response to Personal Restraint Petition
- Reply to Response to Personal Restraint Petition
- Other: _____

Sender Name: Maria A Riley - Email: maria@washapp.org

A copy of this document has been emailed to the following addresses:

PCpatcecf@co.pierce.wa.us