NO. 89321-7

SUPREME COURT OF THE STATE OF WASHINGTON

STATE OF WASHINGTON,

Petitioner,

v.

MARTIN ARTHUR JONES,

Respondent.

STATE'S REPLY TO CROSS-PETITION FOR REVIEW

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I. INTRODUCTION

Respondent Martin Jones cross-petitions for review of numerous issues decided against him in the part-published opinion below. The Court should deny Jones's cross-petition because it fails to satisfy or even argue the considerations governing acceptance of review set forth in RAP 13.4. The Court should further deny Jones's cross-petition because it fails to show that the issues raised are significant constitutional questions this Court should answer; or that the Court of Appeals' opinion on these issues conflicts with published opinions of this Court or the Court of Appeals.

II. ISSUES IN CROSS-PETITION FOR REVIEW

If the Court were to grant the cross-petition, the issues would be:

A. Did Jones's right to be present attach to the court clerk's administrative act of drawing alternate juror numbers from a box where this act was not a critical stage of the proceedings that impacted Jones's right to defend against the charge of attempted murder?

B. Did the trial court properly admit Trooper Johnson's photographic identification of Jones as the person who shot him where the record supported the trial court's conclusion that the identification was reliable?

C. Did the trial court properly exclude evidence of "other suspects" where Jones failed to provide proper foundation for admissibility of such evidence?

D. Did the trial court properly exclude the lay opinion of a Crime Lab employee concerning the quality of the police investigation where the lab employee was not part of the police investigation and his lay opinion was irrelevant?

III. STATEMENT OF THE CASE

The facts are set forth in the Court of Appeals' part-published opinion below,[1] as well as the State's Petition for Review, which are incorporated herein. The State provides the following additional facts.

Jones filed a motion for new trial wherein he asserted that the courtroom was closed at the time the clerk drew juror numbers from a box. CP 1286-1310; RP 4110. However, Jones's motion was predicated on the incorrect assumption that the clerk drew the numbers "over the lunch hour." CP 1286-1310 (page 2). Jones's trial counsel did not have the benefit of the clerk's minute entries or trial transcript when he filed the motion for new trial. In contrast to Jones's description in the motion for new trial, the verbatim report of proceedings shows that the trial court did not announce that the clerk drew the numbers "over the lunch hour."

[1] The Court of Appeals' part-published opinion in this case is appended to the State's petition for review and is cited herein as Slip. Op..

Rather, the trial court announced that "at the break *at 3:00*, four juror numbers were pulled randomly." RP 4061 (emphasis added). The court announced when she took the break that it was "just a little bit before 3:00." RP 4017-18. The clerk's minutes show that the afternoon break was from 2:55 p.m. to 3:03 p.m. CP 1429. Jones's assertion that numbers were pulled "over the lunch hour" when the courtroom may have been closed is incorrect. The record is well-settled that the clerk drew the numbers at 3:00 p.m. during a short break in closing arguments. CP 1429; RP 4061. The State has consistently argued in this appeal that the courtroom was never closed and there is no record Jones was absent.

IV. ARGUMENT ON ISSUES RAISED IN CROSS-PETITION

Considerations governing acceptance of review of a decision of the Court of Appeals on direct review are:

> (1) If the decision of the Court of Appeals is in conflict with a decision of the Supreme Court; or
> (2) If the decision of the Court of Appeals is in conflict with another decision of the Court of Appeals; or
> (3) If a significant question of law under the Constitution of the State of Washington or of the United States is involved; or
> (4) If the petition involves an issue of substantial public interest that should be determined by the Supreme Court.

RAP 13.4(a). Failure to discuss these considerations is grounds to deny a petition (or cross-petition) for review. *Jones v. Sisters of Providence in Washington, Inc.*, 140 Wn.2d 112, 115 n.4, 994 P.2d 838 (2000).

At the outset, the Court should dismiss Jones's cross-petition for failure to discuss the considerations governing acceptance of review or establish why any are present. Jones's cross-petition also fails on its merits.

A. The Court Should Deny Jones's Cross-Petition Because The Court of Appeals Applied Well-Settled Case Law To Conclude That The Drawing Of Juror Numbers Was Not A Critical State of the Proceedings To Which The Right To Be Present Attached

The accused's presence in court is constitutionally required "whenever his presence has a relation, reasonably substantial, to the fullness of his opportunity to defend against the charge." *Snyder v. Massachusetts,* 291 U.S. 97, 105-06, 54 S.Ct. 330, 78 L. Ed. 674 (1934), *overruled in part on other grounds sub nom, Malloy v. Hogan,* 378 U.S. 1, 84 S.Ct. 1489, 12 L. Ed.2d 653 (1964). This right is not triggered where "presence would be useless, or the benefit but a shadow." *Snyder,* 291 U.S. at 106-07. The defendant does not have the right to "be present every second or minute or even every hour of the trial." *United States v. Bustamante,* 456 F.2d 269, 277 (9th Cir. 1972) (*citing Snyder,* 291 U.S. at 116).

The jury voir dire and selection process is distinct from the "administrative impaneling process." *United States v. Gomez,* 490 U.S. 858, 875, 109 S.Ct. 2237, 104 L. Ed 923 (1989). The accused has the

right to be present during voir dire and jury selection, but he does not have the right to be present for matters where his presence will have no impact on the proceedings. *In re Lord,* 123 Wn.2d 296, 306-07, 868 P.2d 835 (1994).

Here, Jones's claim that His right to be present was violated failed for several reasons. First, it was Jones's burden on appeal to present a record showing that he was absent from the courtroom at a time when he had a right to be there. *State v. Bennett,* 168 Wn. App. 197, 206-07 n.9, 275 P.3d 1224 (2012). Jones's argument is premised on his claim that the courtroom was closed at the time the clerk drew numbers and therefore he must not have been there. But Jones's appeal failed to present a record showing that he was absent from court during the short break when the numbers were drawn.[2] Nor is it likely that he would have been removed from the courtroom during such a short break. The courtroom was *not* closed during the short 8-minute break in closing arguments and there is no record that the clerk drew the numbers somewhere other than in open court. Jones failed to present a record that he was absent from the courtroom when the clerk drew numbers.

[2] The claim in Jones's cross-petition that his motion for new trial "proves" he was absent from the courtroom is wholly incorrect. *Answer and Cross-Petition* at 4 n.1. Again, the motion for new trial was predicated on Jones's trial counsel's erroneous belief that the numbers were drawn "over the lunch hour" when the courtroom may have been closed. CP 1286-1310. The record is clear that the numbers were drawn during a short break in closing arguments at 3:00 p.m., not "over the lunch hour." RP 4061.

Second, the Court of Appeals relied upon well-settled case law to conclude that the clerk's act of randomly drawing numbers from a box in order to identify the alternate jurors selected during voir dire was not a "critical stage of the proceedings." *State v. Jones,* No. 41902-5 slip. op. at 15-17 (Wash. Ct. App. June 4, 2013) Jones's presence was not necessary for the drawing of the numbers. There were no facts in dispute at the drawing. There were not even any legal issues to be argued at the drawing of the numbers. The clerk simply performed a rote administrative task.

Nor does the Court of Appeals' opinion conflict with *State v. Irby*, 170 Wn.2d 874, 246 P.3d 796 (2011). *Irby* held that the constitutional right to be present at critical stages of the proceedings attaches to voir dire proceedings, including those proceedings where the court determines whether to excuse jurors for hardship. *Irby*, 170 Wn.2d at 883-85. *Irby* did not hold that the accused's right to be present attaches to those administrative tasks of the clerk involved in empaneling a jury, such as drawing numbers from a box.

Here, Jones was present throughout voir dire and jury selection, which occurred weeks prior to the drawing of juror numbers from the box. The jurors, including those who were identified by the drawing as alternates, had already been vetted and selected in open court by the time the clerk drew numbers from the box. RP 518-816. Indeed, these jurors

had already heard the entirety of the evidence at the time the clerk drew the numbers. RP 4061.

As the Court of Appeals noted, "Jones had the opportunity during voir dire to question, challenge, and ultimately select all jurors, including those who were randomly selected as alternates, well before the alternate drawing." *Slip. Op.* at 15. The clerk's act of drawing numbers from the box was not part of "voir dire" and the Court of Appeals' opinion does not conflict with *Irby*.

Jones's presence at the drawing of the numbers would not have furthered his ability to "defend" against the charge of attempted murder. The Court of Appeals reasonably and correctly concluded that the right to be present did not attach to the clerk's administrative act of drawing numbers from a box. Jones's cross-petition should be denied.

B. The Court Should Deny Jones's Cross-Petition Because The Court Of Appeals' Decision Applied Well-Settled Principles Of Constitutional Law To Conclude That The Trial Court Properly Admitted Trooper Johnson's Eyewitness Identification

"Admission of a photo identification or montage is, reduced to its essence, the admission of evidence in a criminal case" and is accordingly "subject to the sound discretion of the trial court." *State v. Kinard,* 109 Wn. App. 428, 432, 36 P.3d 573 (2001). The standard of review of admission of evidence of eyewitness identification is a deferential

standard. *Id.* When a claim of constitutional error is raised to the admission of evidence, the reviewing court does not conduct an independent evaluation of the evidence, but instead determines whether substantial evidence supports the trial court's findings. *State v. Hill,* 123 Wn.2d 641, 647, 870 P.2d 313 (1994).

A photographic identification, even if suggestive, is admissible unless it was "so impermissibly suggestive as to give rise to a very substantial likelihood of irreparable misidentification." *Simmons v. United States,* 390 U.S. 377, 384, 88 S.Ct. 967, 19 L. Ed.2d 1247 (1968). The reliability of the identification, in light of the totality of the circumstances, controls the determination of whether an identification procedure created a substantial likelihood of irreparable misidentification. *Manson v. Brathwaite,* 432 U.S. 98, 113-14, 97 S.Ct. 2243, 53 L. Ed.2d 140 (1977). As the Court of Appeals stated in this case, "In other words, if the identification is reliable, it cures the suggestive nature of the confrontation procedure." *Slip. Op.* at 22.

Several factors are used to guide the court's analysis of the reliability of an identification procedure. *Brathwaite,* 432 U.S. at 114. These factors include:

- The opportunity of the witness to view the criminal at the time of the crime
- The witness' degree of attention at the time of the crime

- The accuracy of the witness' prior description of the criminal
- The level of certainty the witness demonstrates in his identification at the time of the confrontation
- The time between the crime and the confrontation

Id. at 116.

Most importantly, the United Supreme Court has stated that the reliability of an eyewitness' identification is best left for the jury to weigh, even in cases where it would have been preferable for the police to use a better procedure:

> such evidence is for the jury to weigh. We are content to rely upon the good sense and judgment of American juries, for evidence with some element of untrustworthiness is customary grist for the jury mill. Juries are not so susceptible that they cannot measure intelligently the weight of identification testimony that has some questionable feature.

Id.

Washington and United States Supreme Court case law are well-settled on the constitutional issue of the admissibility of evidence of eyewitness identification. Here, the Court of Appeals relied on well-settled principles of constitutional law when it decided that there was no error in the admission of Trooper Johnson's identification of Jones as the person who shot him.

Jones stipulated to the facts relied upon by the court for its evidentiary ruling. RP 1398-1406. Included in the stipulated facts was

evidence that Trooper Johnson interacted with and spoke to Jones minutes before the shooting; Trooper Johnson looked at Jones's face; Trooper Johnson had a high degree of attention at the time he viewed Jones's face; Trooper Johnson accurately described Jones's physical appearance prior to the photographic identification; Trooper Johnson was confident Jones was the shooter; and Trooper Johnson's identification of Jones occurred the day after the shooting. RP 1398-1406. All of these factors weighed heavily towards a finding of reliability, regardless of any suggestiveness that accompanied the identification procedure.

The trial court entered written findings detailing the evidence of reliability and why it supported a finding of reliability. RP 1238-1241. The trial court noted that the jury could consider defects in the identification procedure in assessing the identification, but those defects went to the weight of the evidence, not its admissibility. RP 1238-1241. The Court of Appeals appropriately relied upon the trial court's findings, which were supported by substantial evidence, and concluded that the trial court did not err. *Slip. Op.* at 22.

The trial court also found that there were exigent circumstances present that justified the identification procedure used to show Jones's photograph to Trooper Johnson. Jones never challenged this finding on appeal. RP 1238-1241 (Finding #2). This finding was a verity on appeal,

was not considered by the Court of Appeals, and should not be subject to further review.

The Court of Appeals relied upon well-settled case law in concluding that the identification of Jones was reliable. Jones's cross-petition fails to explain why the opinion below presents a significant constitutional question not already answered by existing case law. Jones further fails to show that the Court of Appeals' opinion on this issue conflicts with any published opinion. Jones's cross-petition should be denied.

C. The Trial Court's Ruling Excluding Evidence Of "Other Suspects" For Lack Of Foundation Was Properly Affirmed By The Court Of Appeals Based Upon Well-Settled Case Law

At trial, Jones offered evidence that 40 minutes prior to the shooting, a white male was observed walking along the main street of Long Beach where the shooting later occurred. CP 1046-1080; 1218-1228. The shooting occurred on a Friday night[3] on the main street of Long Beach in a business area where it was not uncommon for people to be walking along the street. RP 886, 971-72. The trial court excluded evidence of the unknown white male on grounds that Jones failed to present proper foundation for admission of evidence of another suspect. CP 1242-43.

[3] The shooting occurred shortly after midnight in the early morning hours of Saturday, February 13, 2010.

Jones argues in his cross-petition for review that he did not offer evidence of the unknown white male as "other suspect" evidence. Rather, evidence of a man walking along the main street of the city on a Friday night 40 minutes prior to the shooting was offered as "evidence that cast doubt upon the State's entirely circumstantial case." *Cross-Petition for Review* at 12. Jones argues that this evidence was admissible to rebut the "prosecution theory . . . that there was no other person who could have committed the crime." *Cross-Petition for Review* at 13.

Jones' argument runs counter to common sense, case law, and the record. First, the State never presented evidence or argued that Martin Jones was the only person present in the city of Long Beach on the night that Trooper Johnson was shot. The State simply presented evidence that Martin Jones was the person who committed the crime. The evidence was undisputed that the shooting occurred in the middles of the city and there were many people out and about that night.

Second, evidence that a white male walked past the scene of the shooting 40 minutes prior to the shooting would "cast doubt" upon the State's case only if it was possible that this white male was "the real shooter." This is classic "other suspect" evidence and its admissibility was subject to the law on admissibility of "other suspect" evidence.

Jones cites *State v. Lord,* 128 Wn. App. 216, 223, 114 P.3d 1241 (2005)[4] in support of his novel theory that such evidence is admissible to "cast doubt upon the State's theory of the case." *Cross-Petition for Review* at 12-13. However, review of *Lord* reveals (1) Jones improperly[5] cites and quotes the unpublished portion of *Lord*,[6] and (2) the unpublished portion of *Lord* does not support Jones's argument. In the unpublished portion of *Lord*, the court discusses that the State introduced evidence in a murder prosecution to impeach a defense witness who claimed to have observed the victim alive at a time when the State argued she was already dead. The defense tried to suppress the evidence by analogizing it to "other suspect" case law. The Court of Appeals rejected the argument, concluding that "other suspect" case law "does not apply here." The portion of *Lord* cited by Jones is both unpublished and unsupportive of Jones's argument.

The trial court, followed by the Court of Appeals, appropriately applied well-settled case law in determining that the necessary foundation

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[4] *State v. Lord,* 128 Wn. App. 216, 223, 114 P.3d 1241 (2005). The published portion of the Lord opinion ends at page 223. The lengthy unpublished portion of the opinion continues thereafter.

[5] GR 14.1(a) ("A party may not cite as an authority an unpublished opinion of the Court of Appeals. Unpublished opinions of the Court of Appeals are those opinions not published in the Washington Appellate Reports").

[6] Jones cites to page 223 of *Lord.* However, the language quoted in Jones's brief is not found on page 223. Page 223 was the last page of the published opinion and does not address "other suspect" evidence. The quoted language Jones cites is instead found in the unpublished portion of the opinion that has no page numbers. *Cross-Petition* at 12-13 (*quoting Lord,* unnumbered and unpublished portion of opinion).

for admission of "other suspect" evidence was insufficient in this case. Jones's cross-petition fails to explain why the opinion below presents a significant constitutional question not already answered by existing case law. Jones further fails to show that the Court of Appeals' opinion on this issue conflicts with any published opinion. Jones's cross-petition should be denied.

D. The Trial Court's Ruling Excluding An Out-Of-Court Lay Opinion About The Quality Of The Police Investigation Was An Evidentiary Ruling That Did Not Implicate A Significant Constitutional Question

A criminal defendant has the constitutional right to present a defense, but this right does not encompass the presentation of irrelevant evidence. *State v. Jones*, 168 Wn.2d 713, 720, 230 P.3d 576 (2010). Even relevant evidence is inadmissible if it is unfairly prejudicial, may confuse the issues, or may mislead the jury. ER 403; *State v. Darden*, 145 Wn.2d 612, 625, 41 P.3d 1189 (2002). The trial court's rulings under ER 403 are reviewed for abuse of discretion. *In re Post*, 170 Wn.2d 302, 317, 241 P.3d 1234 (2010).

Here, State's witness Sara Trejo was a fingerprint analyst for the State Crime Lab. RP 2542. Trejo was called as a witness by the State. RP 2541. Trejo testified on direct examination for 10 minutes. CP 1423;

RP 2541-47. Trejo testified that she examined a fired cartridge casing for fingerprints, but she did not find any fingerprints. RP 2542-47.

Jones sought to "impeach" Trejo with an e-mail authored by Chris Sewell, the manager of the Tacoma Crime Lab. RP 2536-37. In response to a request from the Vancouver Crime Lab that the Tacoma lab send Trooper Johnson's uniform shirt from Tacoma to Vancouver for DNA analysis, Sewell sent an e-mail to several lab employees that included an amorphous suggestion that the police investigation of the case was "haphazard." Exhibit 402; RP 3042. Sewell's e-mail did not address Trejo's qualifications or her fingerprint analysis. Exhibit 402.

Sewell was a scientist who did not examine any evidence in this case. Sewell was not a State's witness, nor was he listed on the defense witness list.

The State objected on grounds that Sewell's opinion was hearsay, irrelevant, and pertained to an issue that was collateral to Trejo's testimony. RP 2535. The trial court agreed that the offered lay opinion was impeachment on a collateral matter and sustained the objection. RP 2538. The Court of Appeals affirmed, holding that the lay opinion was properly excluded under ER 403. *Slip. Op.* at 27.

Jones's assertion that the ruling "created the false impression with the jury that the investigation was flawless" is itself false. Jones

vigorously cross-examined all of the officers who actually participated in the investigation and he challenged their work.[7] Jones vigorously cross-examined forensic scientists who examined evidence and he challenged their work.[8] What Jones was not allowed to do was challenge the police investigation with unreliable, irrelevant opinion evidence.

The trial court made a simple evidentiary ruling that proffered evidence was irrelevant. The Court of Appeals reasonably concluded that the trial court's ruling was not an abuse of discretion:

> Although perhaps relevant to the general quality of the police investigation, the generality of Sewell's comments minimize their probative value. Allowing a crime lab supervisor to openly and generally criticize the entire police investigation through an opinion that it was haphazard would have elicited an emotional, rather than rational, response among jurors.

Slip. Op. at 28.[9] There is no "significant constitutional question" presented for this court's review. The Court should deny Jones's cross-petition.

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[7] RP 961-84, 1019-28, 1066-85, 1145-81, 1220-49, 1265-68, 1453-59, 1475-83, 1554-68, 1581-90, 1686-91, 1697-1702, 1713-30, 1755-80, 1903-49, 1986-89, 2009-16, 2078-2101, 2125-36, 2166-85, 2275-79, 2402-15, 2583-06, 2664-86, 2709-16, 2735-45, 2760-62, 2986-97.

[8] 2253-86, 2308-25, 2476-2514, 2632-39, 3015-31, 3102-3119.

[9] The opinion is appended to the State's "Petition for Review."

V. CONCLUSION

The cross-petition for review fails to identify any conflict among court opinions and does not present significant constitutional questions not already addressed by case law. The Court should deny the cross-petition.

RESPECTFULLY SUBMITTED this 12TH day of November, 2013.

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NO. 89321-7

IN THE SUPREME COURT OF THE STATE OF WASHINGTON

THE STATE OF WASHINGTON, Petitioner, v. MARTIN ARTHUR JONES, Respondent.	DECLARATION OF SERVICE

DAISY LOGO declares as follows:

On November 12, 2013, I deposited into the United States Mail, first-class delivery, postage fully prepaid and addressed as follows:

Thomas Kummerow
Washington Appellate Project
1511 Third Avenue, Suite 701
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Copies of the following documents:

1) State's Reply to Cross-Petition For Review

2) Declaration of Service

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

RESPECTFULLY SUBMITTED this 12th day of November, 2013.

DAISY LOGO
LEGAL ASSISTANT

OFFICE RECEPTIONIST, CLERK

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Attached for filing for the case referenced above, please find the following document:

1) State's Reply to Cross-Petition For Review & Declaration of Service

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