NO. 43203-0-II

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

STATE OF WASHINGTON, Respondent

v.

MARK ALLEN MARKUSSEN, Appellant

FROM THE SUPERIOR COURT FOR CLARK COUNTY
CLARK COUNTY SUPERIOR COURT CAUSE NO.10-1-01901-4

SUPPLIMENTAL BRIEF OF RESPONDENT

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During jury selection the jury sent out two questions. CP 267, 269. When the trial court received the first question he called both attorneys to the courtroom and invited defense counsel to ask for his client to be brought over. RP 924. Defense counsel didn't accept the invitation. Id. The first question said "We don't have the cell phone maps. Shouldn't we have those?" CP 267. The trial court said "no," and attached a type written note that said "Exhibits may have been marked by the court clerk and given a number, but they do not go with you to the jury room during the deliberations unless they have been admitted into evidence. The exhibits that have been admitted will be available to you in the jury room." CP 267-68. The parties were in agreement that this was the proper response. RP 924-25.

When the trial court received the second question the attorneys were again brought to the courtroom and the trial court again invited defense counsel to request the presence of his client. RP 927. Defense counsel again did not accept the invitation. RP 927. The question said "We

noticed that defence [sic] evidence #173 is a copy and been altered (see Qty) and that the item #looks to be written with a different pen. Is it possible to get an official copy from VPD? Something wrong here. We don't believe what the DA said about the "item #." CP 269.[1] The trial court, after receiving input from both parties, answered "You have all of the exhibits admitted at trial. You can't have anything more." CP 269. Both parties agreed this was the correct answer. RP 930. The trial court also directly asked defense counsel if he was agreeing to proceed without his client and defense counsel said he was. RP 929.

C. ARGUMENT

I. MARKUSSEN WAS NOT DENIED HIS CONSTITUTIONAL RIGHT TO BE PRESENT, AND THE TRIAL COURT DID NOT "REINSTRUCT" THE JURY.

Markussen claims that he was denied his constitutional right to be present when the trial court, after consulting his counsel, answered two jury questions in the negative—that is, when the trial court declined to provide additional evidence or instruction and explained to the jury that they had all of the evidence that had been admitted into evidence and they would receive no additional evidence. Markussen's claim is meritless.

[1] This was a defense exhibit. As such, it is not clear whether "DA" is short for "defense attorney" or "district attorney."

Both the Confrontation Clause of the Sixth Amendment and the Due Process Clause of the Fourteenth Amendment guarantee the right of the criminal defendant to be present at all critical stages of the criminal proceeding. *State v. Pruitt*, 145 Wn.App. 145 Wn.App. 784, 798, 187 P.3d 326 (2008); *State v. Jasper*, 158 Wn.App. 518, 538-39, 245 P.3d 228 (2010).

> A critical stage is one where the defendant's presence has a reasonably substantial relationship to the fullness of his or her opportunity to defend against the charge. *In re Pers. Restraint of Benn*, 134 Wn.2d 868, 920, 952 P.2d 116 (1998) (quoting *United States v. Gagnon*, 470 U.S. 522, 526, 105 S. Ct. 1482, 84 L. Ed. 2d 486 (1985)). Generally, in-chambers conferences between the court and counsel on legal matters are not critical stages except when the issues raised involve disputed facts. *In re Pers. Restraint of Lord*, 123 Wn.2d 296, 306, 868 P.2d 835 (1994) (citing *United States v. Williams*, 455 F.2d 361 (9th Cir. 1972); *People v. Dokes*, 79 N.Y.2d 656, 595 N.E.2d 836, 584 N.Y.S.2d 761 (1992)).

Jasper at 539.

Markussen raises this claim of error for the first time on appeal. This Court should decline to review this claim. "The general rule in Washington is that a party's failure to raise an issue at trial waives the issue on appeal unless the party can show the presence of a 'manifest error affecting a constitutional right.' *State v. Robinson*, 171 Wn.2d 292, 304, 253 P.3d 292 (2011), quoting *State v. Kirwin*, 165 Wn.2d 818, 823, 203 P.3d 1044 (2009) and *State v. McFarland*, 127 Wn.2d 322, 333, 899 P.2d

1251 (1995). The rule requiring issue preservation at trial encourages the efficient use of judicial resources and ensures that the trial court has the opportunity to correct any errors, thereby avoiding unnecessary appeals. *Robinson* at 305, *McFarland* at 333; *State v. Scott*, 110 Wn.2d 682, 685, 757 P.2d 492 (1988). "[P]ermitting appeal of all unraised constitutional issues undermines the trial process and results in unnecessary appeals, undesirable retrials, and wasteful use of resources." *Robinson* at 305. Violating the state and federal constitutional rights to be present (federal) and appear and defend (state) would be constitutional error, but would only rise to "manifest" constitutional error if the defendant can show actual prejudice. *State v. O'Hara*, 167 Wn.2d 91, 99, 217 P.3d 756 (2009). That is, if the defendant can plausibly show that the error had practical and identifiable consequences at trial. *State v. Lynn*, 67 Wn.App. 339, 345, 835 P.2d 251 (1992).

Here, Markussen speculates that had he been personally present, he might have guided his attorney "in a request for a new instruction," or confer with his attorney to obtain information as to what was transpiring with the jury request. See Supp. Brief of Appellant at 5. First, Markussen cannot show that the trial court would have granted his hypothetical request to instruct the jury anew on factual matters (nor does he identify what, if any, alternate instruction he would have proposed), nor can he

show how obtaining information "as to what was transpiring with the jury request" was in any way necessary to the court responding to the jury on the strictly legal question of whether the jury could view additional, un-admitted evidence as part of its deliberation. Markussen has not demonstrated actual prejudice and this Court should decline to review this claim of error for the first time on appeal.

Markussen's claim also fails on the merits because the questions here involved solely legal matters. In *Jasper*, supra, the jury asked two questions, both of which involved questions of law. The Court of Appeals held that because the jury's questions "did not raise any issues involving disputed facts, the court's consideration of and response to the jury's inquiries did not constitute a critical stage of the proceedings." *Jasper* at 539. Thus, the defendant's presence was not required. Notably, in *Jasper*, the record did not show that either the defendant *or his counsel* was present when the trial court considered and responded to the jury question. Thus, although the Court of Appeals found there was no constitutional violation, there had been a violation of CrR 6.15 (f) (1) in that case (an error which was deemed harmless).[2] In this case, in contrast, Markussen's

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[2] CrR 6.15 (f) (1) provides:

(f) *Questions from jury during deliberations.*

(1) The jury shall be instructed that any question it wishes to ask the court about the

counsel was present prior to the court responding to the jury's questions, and he waived his client's presence and agreed with the court's responses to the questions. There was no CrR 6.15 (f) (1) violation.

The questions posed by the jury were legal questions. That is, they were asking whether they would be permitted under the law to view additional evidence. The trial court responded in the negative. Contrary to Markussen's passing claim that the trial court "reinstructed" the jury, the trial court did not, in fact, reinstruct the jury. The court's responses did not convey any affirmative information. This is in contrast to what occurred in *State v. Ratliff*, 121 Wn.App. 642, 90 P.3d 79 (2004), where the jury asked the court to resolve specific factual questions and the court obliged, effectively introducing new evidence into the case (and without having consulted either the defendant or his counsel).

Here, there was no error under the federal or state constitution, nor was CrR 6.15 (f) violated. Moreover, if any error occurred it was harmless. "Generally, where the trial court's response to a jury inquiry is

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instructions or evidence should be signed, dated and submitted in writing to the bailiff. The court shall notify the parties of the contents of the questions and provide them an opportunity to comment upon an appropriate response. Written questions from the jury, the court's response and any objections thereto shall be made a part of the record. The court shall respond to all questions from a deliberating jury in open court or in writing. In its discretion, the court may grant a jury's request to rehear or replay evidence, but should do so in a way that is least likely to be seen as a comment on the evidence, in a way that is not unfairly prejudicial and in a way that minimizes the possibility that jurors will give undue weight to such evidence. Any additional instruction upon any point of law shall be given in writing.

'negative in nature and conveys no affirmative information,' no prejudice results and the error is harmless." *State v. Russell*, 25 Wn. App. 933, 948, 611 P.2d 1320 (1980); *accord State v. Safford*, 24 Wn. App. 783, 794, 604 P.2d 980 (1979). The trial court's answers to the two jury questions posed in this case were proper. The trial court merely apprised the jury that they would not be receiving any information beyond what had been admitted at trial. No affirmative information was conveyed. Any error was harmless and Markussen's claim fails.

D. CONCLUSION

Markussen's conviction and sentence should be affirmed.

DATED this 9th day of August, 2013.

Respectfully submitted:

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