67560-5

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NO. 67560-5-I

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

STATE OF WASHINGTON,

Respondent,

v.

ISAIAH KALEBU,

Appellant.

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

The Honorable Michael C. Hayden, Judge

REPLY BRIEF OF APPELLANT

DAVID B. KOCH
Attorney for Appellant

NIELSEN, BROMAN & KOCH, PLLC
1908 East Madison
Seattle, WA 98122
(206) 623-2373

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A. ARGUMENT IN REPLY

1. THE TRIAL COURT ERRED WHEN IT DENIED THE DEFENSE MOTION TO STRIKE THE ENTIRE JURY PANEL.

The State claims that Kalebu has argued a due process violation for the first time on appeal and, accordingly, must establish manifest constitutional error under RAP 2.5(a)(3). See Brief of Respondent, at 20, 22-23. In fact, however, the constitutional issue originated below. See CP 69 ("Kalebu has a procedural due process right to have a jury venire selected in the manner prescribed by law, and it is fundamentally unfair for the State to deviate from the designated jury source lists for a particular defendant or a particular class of cases, i.e., serious violent, or aggravated homicides." CP 69.

The State also argues that, because Kalebu's claimed liberty interest does not involve freedom from restraint, he cannot prevail. See Brief of Respondent, at 21. While most cases involve prisoners' rights, there is no absolute requirement they do so. See Sandin v. Conner, 515 U.S. 472, 484, 115 S. Ct. 2293, 132 L. Ed. 2d 418 (1995) (protected interests "generally limited to freedom from restraint" by inmates) (emphasis added).

2. KALEBU WAS DENIED HIS RIGHT TO BE PRESENT FOR ALL CRITICAL STAGES OF TRIAL.

a. The Issue Is Properly Raised.

The State contends that, because defense counsel suggested the discussion of Kalebu's testimony could take place in Judge Hayden's chambers, the subsequent violation of Kalebu's right to be present was invited and therefore waived. Brief of Respondent, at 23-24, 30-31.

As an initial matter, the State's claim that defense counsel "demanded" the conference take place in chambers is incorrect. See Brief of Respondent, at 30. After indicating he could not discuss the matter in open court (because the prosecution was present), defense counsel said, "If the court wants to hear that in chambers, I'd be happy to tell the court what that is." 47RP 2-3. While counsel suggested chambers, his only *demand* was that the discussion take place outside the prosecutors' presence. There can be no doubt defense counsel would have been satisfied had Judge Hayden simply excused the public and counsel for the State and conducted the hearing in the closed courtroom.

In any event, that defense counsel first suggested a hearing in chambers could not and did not waive Kalebu's constitutional

right to participate by video feed. It is the *court's* role to ensure a knowing, voluntary, and intelligent waiver of constitutional rights. The duty to protect fundamental constitutional rights "imposes the serious and weighty responsibility upon the trial judge of determining whether there is an intelligent and competent waiver by the accused." Johnson v. Zerbst, 304 U.S. 458, 465, 58 S. Ct. 1019, 82 L. Ed. 1461 (1938).

Consistent with this duty, CrR 3.4(a) requires the defendant's presence at every stage of trial unless "excused or excluded *by the court* for good cause shown." (emphasis added). And when a defendant initially appears for trial but thereafter fails to attend, it is *the trial court* that must assess several factors to determine whether there has been a knowing and voluntary waiver. See State v. Thomson, 123 Wn.2d 877, 880-884, 872 P.2d 1097 (1994).

Thus, the critical mistake was Judge Hayden's. While defense counsel also erred by not recognizing Kalebu's constitutional right to see and hear what was happening, this did not waive Kalebu's ability to assert the violation of his rights on appeal. Indeed, violations of the right to be present will often

involve a failure, on counsels' part, to adequately protect client rights.

In State v. Rice, 110 Wn.2d 577, 757 P.2d 889 (1988), cert. denied, 491 U.S. 910, 109 S. Ct. 3200, 105 L. Ed. 2d 707 (1989), for example, defense counsel mistakenly believed their client did not have a right to be present for the replay, in the jury's presence, of a taped confession and affirmatively indicated they could proceed in his absence. The Supreme Court found a violation of Rice's constitutional rights without regard to whether counsel had invited the error. Id. at 613-614.

State v. Irby, 170 Wn.2d 874, 246 P.3d 796 (2011), provides another example. Defense counsel erroneously believed his client had no right to be present for the release of jurors from the panel and proceeded without him. See id. at 878. Yet, the fact defense counsel arguably contributed to the error did not preclude review of the issue on appeal.

United States v. Gordon, 829 F.2d 119 (D.C. Cir. 1987), provides yet another example. Defense counsel successfully moved the court to conduct jury selection in Gordon's absence. Gordon, 829 F.2d at 121. Although counsel claimed he informed Gordon he could attend, counsel also provided misinformation that

may have impacted whether Gordon exercised that right. Id. at 126. The Court of Appeals reversed, holding that Gordon could not knowingly, intelligently, and voluntarily waive his right to participate without an on-the-record colloquy conducted by the trial court. Id. at 124-126. That defense counsel had invited the error made no difference.

The critical point is this: the defendant, and only the defendant, has the ability to waive his right to be present at a critical stage of trial. Neither defense counsel nor the court can waive this right for him. So whether an error is partly attributable to counsel, the court, or both, only the defendant himself is capable of waiving the issue.

Ultimately, the only pertinent question is whether Kalebu validly waived his presence. Courts "must indulge every reasonable presumption against the loss of the constitutional right to be present at a critical stage of the trial." Campbell v. Wood, 18 F.3d 662, 672 (9th Cir. 1994). There can be no knowing and intelligent waiver unless the defendant is aware of the right at issue. See State v. Sargent, 111 Wn.2d 641, 655, 762 P.2d 1127 (1988) ("Unless the defendant is informed of his right, he cannot be presumed to know it."); State v. Duckett, 141 Wn. App. 797, 806-

807, 173 P.3d 948 (2007) (without advisement of right and requested waiver, there is not a knowing, intelligent and voluntary waiver of a constitutional right), review denied, 176 Wn.2d 1031, 299 P.3d 19 (2013); see also Gordon, 829 F.2d at 125-126 (on-the-record waiver only sufficient means to determine valid waiver of right to attend); State v. Eden, 163 W.Va. 370, 256 S.E.2d 868, 873 (1979) (valid waiver of right to be present requires "that the accused has not only a full knowledge of all facts and of his rights, but a full appreciation of the effects of his voluntary relinquishment.").

Cases in which there has been a valid waiver of the right to attend trial proceedings involve a clear and unequivocal waiver, on the record, with full knowledge of the defendant's rights. See, e.g., Amaya-Ruiz v. Stewart, 121 F.3d 486, 495-496 (9th Cir. 1997) (trial judge informs defendant of right and potential adverse consequences of waiver; defense counsel also stressed consequences of waiver), cert. denied, 522 U.S. 1130, 118 S. Ct. 1083, 140 L. Ed. 2d 140 (1998); Campbell v. Wood, 18 F.3d at 670-673 (discussions between defendant and judge in open court regarding consequences of waiving presence followed by signed written waiver).

No one informed Kalebu he had the right to see and hear the private hearing and no one asked him if he wished to waive that right. Because there was no valid waiver, Kalebu can raise this violation of his rights regardless whether his attorney contributed to the error.

b. The Private Hearing Was A Critical Stage Of Trial.

The State attempts to equate the hearing in Kalebu's case with hearings in which criminal defendants had no right to be present. None of the cited cases, however, involve facts even remotely similar to those here. Nor do any of the cases involve a claimed violation under article 1, section 22. See Brief of Respondent, at 32-34. When the circumstances in this case are applied to federal and state constitutional standards, a violation is apparent.

Under the Sixth and Fourteenth Amendments, a criminal defendant's right to be present has been described in several different ways. But it is clear the right exists "'whenever his presence has a relation, reasonably substantial, to the fullness of his opportunity to defend against the charge.'" Irby, 170 Wn.2d at

881 (quoting Snyder v. Massachusetts, 291 U.S. 97, 105-106, 54 S. Ct. 330, 78 L. Ed. 2d 674 (1934)).

The State claims the private hearing dealt with purely legal matters and, therefore, Kalebu had no right to attend because he could not have affected the outcome. Brief of Respondent, at 32-35. Even accepting the State's characterization of the hearing, this Court has held that where a hearing deals solely with legal matters, it still may be a critical stage of trial. See State v. Berrysmith, 87 Wn. App. 268, 273-274, 944 P.2d 397 (1997) (even if purely legal, right attaches where presence bears substantial relation to opportunity to defend or a fair and just hearing was thwarted), review denied, 134 Wn.2d 1008, 954 P.2d 277 (1998).

Recently, the Supreme Court of Washington rejected defining the *public's* right to be present based on whether a hearing involved purely legal or ministerial matters, recognizing that these labels cannot accurately determine such rights. See State v. Sublett, 176 Wn.2d 58, 71-73, 292 P.3d 715 (2012). The same is true when defining a *defendant's* right to be present.

As discussed in the opening brief, the private hearing did not merely involve the mechanics of examining Kalebu on the stand. It involved the substance of his testimony and discussions concerning

the impact – if Kalebu took the stand and confessed – on his trial defenses, including the fact it would *not* lead to jurors' consideration of a mental defense. Critically, Judge Hayden's comments at the hearing appeared to confirm (and certainly did nothing to dispel) a conclusion that Kalebu's testimony would jeopardize the entire defense case and offer no benefit. See Brief of Appellant, at 19-20, 38-39.

Again, the critical question for federal constitutional purposes is whether Kalebu's presence had a reasonably substantial relationship to his opportunity to defend himself. And it quite clearly did. Without knowledge of what occurred during the private hearing, it was impossible for Kalebu to make a knowing, intelligent, and voluntary decision on whether to waive his right to silence, take the stand, and testify that God told him to attack the women. See Brief of Appellant, at 39-40.

Kalebu's non-participation also violated his state constitutional rights. Under article 1, section 22 of the Washington Constitution, the test is merely whether "substantial rights may be affected." Irby, 170 Wn.2d at 885. Unlike the federal right, article 1, section 22 "does not condition the right . . . on what a defendant might do or gain by attending . . . or to the extent the defendant's

presence may have aided his defense . . . ." Irby 170 Wn.2d at 885 n.6 (citations omitted).

Not only was there a chance that Kalebu's substantial rights "may be affected" at the hearing, they were affected because, had he observed the hearing, it would have been confirmed for him that waiving his right to silence involved grave risk to his trial defenses and no reasonable chance of establishing a mental defense. This was critical information at a time when Kalebu had not yet made a final decision on whether to testify. See 47RP 11.

The State faults undersigned counsel for not including analysis under State v. Gunwall, 106 Wn.2d 54, 720 P.2d 808 (1986), to demonstrate the greater protections of article 1, section 22. Brief of Respondent, at 37. No such analysis is necessary because, in Irby, the Supreme Court recognized it was "obliged" to examine the state claim separately from the federal claim given that, historically, the state and federal provisions had been interpreted independently.

It then proceeded to do so.[1] Irby, 170 Wn.2d at 885; see also id. at 887 (reversing under both the federal Constitution and article 1, section 22).

The State next argues that Kalebu was not entitled to the protections of article 1, section 22 because "Kalebu's absence was the fault of his attorney." Brief of Respondent, at 38. As support, the State cites State v. Shutzler, 82 Wash. 365, 367, 144 P. 284 (1914), which indicates any violation of article 1, section 22 must not be "the fault of the accused." Kalebu's absence was not "the fault of the accused." Kalebu did not cause the error. And while his attorney failed to protect his rights by suggesting the possibility of an in-chambers hearing, as previously discussed, counsel could not waive or forfeit Kalebu's rights.

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[1] The State focuses on the word "arguably" in the Irby decision to suggest it has not yet been established that article 1, section 22 is broader than its federal counterpart. See Brief of Respondent, at 37. Whatever the intent behind that word, the Irby majority very clearly recognized that our state provision does not condition its protections on whether the defendant could have said or done something to influence a judicial decision at the particular hearing. See Irby, 170 Wn.2d at 885 n.6.

c. The State Has Not Established That Kalebu's Exclusion Was Harmless Beyond A Reasonable Doubt.

Consistent with its position that Kalebu's rights were not violated because his presence could not have affected any judicial decisions at the private hearing, the State argues any violation was harmless beyond a reasonable doubt for the same reason. Brief of Respondent, at 38-39. The State's argument stems from its refusal to acknowledge that – as discussed above – the right to be present, under both federal and state provisions, can be violated regardless whether some judicial decision might have differed. Kalebu's case demonstrates that significant prejudice can result, not simply from an impact the defendant might have had on a ruling, but from critical information never shared with the defendant due to his absence.

The State also maintains that Kalebu's absence from the hearing had no impact on his decision to testify because "Kalebu had all of the information that was discussed in the conference."[2] Brief of Respondent, at 40. There is no doubt defense counsel

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[2] The State makes a similar argument as to why Kalebu's constitutional claim is not "manifest" under RAP 2.5(a)(3) and should not be heard. See Brief of Respondent, at 30-31.

discussed with Kalebu whether he should testify. See 47RP 8-11. But there is simply no way for the State to know that Kalebu had already heard everything his attorneys discussed at the private hearing. The content of those discussions certainly did not come out when Judge Hayden summarized for prosecutors, or for Kalebu, what happened in chambers. See 47RP 18-21.

Moreover, Kalebu had not heard one very important aspect of the hearing: Judge Hayden's responses to his attorneys' assertions. Those responses indicated, among other things, that by testifying, Kalebu would give up his right to effective representation and jeopardize the defense theory of the case. 47RP 16. The State cannot demonstrate, beyond a reasonable doubt, that Kalebu necessarily would have waived his right to silence and chosen to incriminate himself with knowledge of these responses.

The State also argues Kalebu actually benefitted from his decision to take the stand because it allowed him to present a diminished capacity defense. Brief of Respondent, at 41-42. But jurors were not instructed on diminished capacity. See CP 179-232. And Judge Hayden struck Kalebu's statement that he had been diagnosed in the past with mental illness. 48RP 15-16.

Rather than benefit Kalebu, his decision to testify left no doubt he was at the victims' home and no doubt he had premeditated the final attack with the knives. God told him to and he followed God's instructions. 48RP 11-12. While there was other evidence establishing Kalebu's presence in the home, the absence of premeditation had been a primary defense on which Kalebu might succeed. See Brief of Appellant, at 43-46. Kalebu's confession on the stand, however, established the attack clearly was not just a reflexive response to resistance. His confession established that his crimes were the product of thoughtful deliberation and, therefore, premeditated.

B. CONCLUSION

For all of the reasons discussed in Kalebu's opening brief and above, this Court should reverse and remand for a new trial.

DATED this 30th day of September, 2013.

Respectfully Submitted,

NIELSEN, BROMAN & KOCH, PLLC

#40635
for

DAVID B. KOCH
WSBA No. 23789
Office ID No. 91051
Attorneys for Appellant

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DIVISION ONE

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v.	)	COA NO. 67560-5-I
	)	
ISAIAH KALEBU,	)	
	)	
Appellant.	)	

DECLARATION OF SERVICE

I, PATRICK MAYOVSKY, DECLARE UNDER PENALTY OF PERJURY UNDER THE LAWS OF THE STATE OF WASHINGTON THAT THE FOLLOWING IS TRUE AND CORRECT:

THAT ON THE 30TH DAY OF SEPTEMBER 2013, I CAUSED A TRUE AND CORRECT COPY OF THE **REPLY BRIEF OF APPELLANT** TO BE SERVED ON THE PARTY / PARTIES DESIGNATED BELOW BY EMAIL AND/OR DEPOSITING SAID DOCUMENT IN THE UNITED STATES MAIL.

[X] ISAIAH KALEBU
DOC NO. 350965
WASHINGTON STATE PENITENTIARY
1313 N. 13TH AVENUE
WALLA WALLA, WA 99362

SIGNED IN SEATTLE WASHINGTON, THIS 30TH DAY OF SEPTEMBER 2013.

X Patrick Mayovsky