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Court of Appeals
Division I
State of Washington

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NO. 71193-8-I

IN THE COURT OF APPEALS – STATE OF WASHINGTON
DIVISION ONE

STATE OF WASHINGTON
Respondent,

v.

CARRI DARLENE WILLIAMS,
Appellant.

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

The Honorable Susan K. Cook, Judge

**RESPONDENT'S BRIEF REGARDING
SUPPLEMENTAL ASSIGNMENTS OF ERROR**

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I. SUMMARY OF ARGUMENT

Carri Williams assigns supplemental error for the handling of the use of peremptory challenges at side bar conference with the judge. She contends this violated her right to public trial and her right to be present.

However, Ms. Williams failed to raise the issue below, exercise of peremptory challenges need not be made orally and Williams' right to presence was not violated by the procedure sine she had been present throughout the jury selection process.

For these reasons, Carri Williams' supplemental challenges must be denied.¹

II. ISSUES

1. May a challenge to the procedure to exercise peremptory challenges at a sidebar conference be raised for the first time on appeal?²

¹ The practice of sidebar or written or silent exercise of peremptory challenges has been approved by all three divisions Of the Court of Appeals. See *State v. Filitaula*, 184 Wn. App. 819, 339 P.3d 221 (Div. I, 2014); *State v. Marks*, 184 Wn. App. 782, 339 P.3d 196 (Div. II, 2014); *State v. Thomas*, 16 Wn. App. 1, 553 P.2d 1357 (Div. II 1976); *State v. Webb*, 183 Wn. App. 242, 246-47, 333 P.3d 470 (Div. II, 2014), *rev. denied*, 182 Wn.2d 1005, 342 P.3d 327 (2015); *State v. Dunn*, 180 Wn. App. 570, 321 P.3d 1283 (Div. II, 2014), *rev. denied*, 181 Wn.2d 1030 (2015); *State v. Love*, 176 Wn. App. 911, 309 P.3d 1209 (Div. III, 2013), *petition for review granted in part*, 181 Wn.2d 1029 (2015). The Supreme Court heard oral argument in *State v. Love*, on March 10, 2015. *Love* presents a slightly different scenario than the case herein since it involved for cause challenges at sidebar and written peremptory challenges. The present case involves peremptory challenges at sidebar.

² Williams first assignment of error pertains to "for cause" challenges done at sidebar. Reply Brief of Appellant/Supplemental Brief at page 1. No factual citations to the record support that assignment and the remaining portion of the brief address only the

2. Was the exercise of peremptory challenges at a sidebar conference in violation of the right to open public trial?
3. Was the exercise of peremptory challenges exercised at a sidebar conference in violation of the defendant's right to presence?

III. STATEMENT OF THE CASE PERTAINING TO SUPPLEMENTAL ASSIGNMENTS OF ERROR

Williams fails to provide any citations to the record or report of proceedings to support factual assertions. The report of proceedings contains the following comments by the trial court.

THE COURT: Alright any challenges for cause?

MS. KAHOLOKULA: No.

MR. RICHARDS: No.

MS. FORDE: We pass for cause.

THE COURT: Ladies and Gentlemen, what we are going to do is have the attorneys come up to the bench. We are going to select who are going to be on the jury. Because of the length of trial we are going to select 15 people. Helga has a couple of extra chairs up here for the people who won't fit in the jury box. It's going to take a few minutes to go through this process. Please just bear with us. If you need to stand up and get the blood flowing to your lower extremities I understand that. Stay where you are vis-à-vis one another so we can look out there and remind ourselves if we need to.

Alright. Counsel.

MR. WEYRICH: Could we have a couple minutes?

(SIDEBAR CONFERENCE)

THE COURT: We have selected the jury. We will be calling up the names of 15 people who will sit in the jury box right there.

peremptory challenges taken at sidebar. The record supports that all challenges for cause were made on the record and all jurors were "passed for cause." 7/25/13 RP Supp. 70-1.

7/25/13 RP Supp. 70-1.³

The clerk's minutes from the proceedings show that all cause challenges were done orally on the record. CP Supp.⁴ 2-5. Following the exhaustion of cause challenges, the trial court accepted peremptory challenges. CP Supp. 5. The clerk's minutes refers to the "judge's list" for exercise of those challenges. The judge's lists shows the exercise of peremptory challenges by both parties. CP Supp. 75-80. Neither party chose to make a record of any objections to exercise of peremptory challenges. 7/25/13 RP Supp. 71.

IV. ARGUMENT

1. A DEFENDANT ALLEGING FOR THE FIRST TIME ON APPEAL A VIOLATION OF THE CONSTITUTIONAL RIGHT TO BE PRESENT MUST DEMONSTRATE THE EXISTENCE OF MANIFEST ERROR AFFECTING A CONSTITUTIONAL RIGHT UNDER RAP 2.5(a)(3).

It is a fundamental principle of appellate jurisprudence in Washington and in the federal system that a party may not assert on appeal a claim that was

³ Carri Williams has supplemented the record by including a transcript which was prepared by the co-defendant, Larry Williams, COA #71112-1-I. This was supplemental transcript #8 for that appeal. For the purpose of this appeal, the State refers to that as 7/25/13 RP Supp.

⁴ This has been a supplemental designation filed in the Larry Williams' case. The State relies upon the numbering used by the clerk although as designated, they were not numbered sequentially from prior documents. Therefore, the State refers to the CP Supp. The State will be preparing a Supplemental Designation herein but is uncertain how they will be numbered by the clerk's office as to Ms. Williams' case. Jury Trial – (Clerk's Minutes) Sub. No. 192.100 Filed July 22, 2013.

not first raised at trial. *State v. Strine*, 176 Wn.2d 742, 749, 293 P.3d 1177 (2013). This principle is embodied federally in Fed. R. Crim P. 51 and 52, and in Washington under RAP 2.5. RAP 2.5 is principled as it "affords the trial court an opportunity to rule correctly upon a matter before it can be presented on appeal." *State v. Strine*, 176 Wn.2d at 749 (quoting *New Meadows Holding Co. v. Wash. Water Power Co.*, 102 Wn.2d 495, 498, 687 P.2d 212 (1984)). This rule supports a basic sense of fairness, perhaps best expressed by this court in *Strine*, where the court noted the rule requiring objections helps prevent abuse of the appellate process

[I]t serves the goal of judicial economy by enabling trial courts to correct mistakes and thereby obviate the needless expense of appellate review and further trials, facilitates appellate review by ensuring that a complete record of the issues will be available, ensures that attorneys will act in good faith by discouraging them from "riding the verdict" by purposefully refraining from objecting and saving the issue for appeal in the event of an adverse verdict, and prevents adversarial unfairness by ensuring that the prevailing party is not deprived of victory by claimed errors that he had no opportunity to address.

BENNETT L. GERSHMAN, TRIAL ERROR AND MISCONDUCT § 6-2(b), at 472-73 (2d ed. 2007) (footnotes omitted).

State v. Strine, 176 Wn. 2d at 749-50.

Under RAP 2.5(a), a party may not raise a claim of error on appeal that was not raised at trial unless the claim involves (1) trial court jurisdiction, (2) failure to establish facts upon which relief can be granted, or

(3) manifest error affecting a constitutional right. Specifically regarding RAP 2.5(a)(3), this court has indicated that "the constitutional error exception is not intended to afford criminal defendants a means for obtaining new trials whenever they can 'identify a constitutional issue not litigated below.'" *State v. Scott*, 110 Wn.2d 682, 687, 757 P.2d 492 (1988) (quoting *State v. Valladares*, 31 Wn.App. 63, 76, 639 P.2d 813 (1982), *affd in part, rev'd in part*, 99 Wn.2d 663, 664 P.2d 508 (1983)).

2. THE DEFENDANT'S CONSTITUTIONAL RIGHT TO A PUBLIC TRIAL WAS NOT VIOLATED WHEN PEREMPTORY CHALLENGES WERE EXERCISED IN A SIDEBAR CONFERENCE.

In *State v. Smith*, 181 Wn.2d 508, 513-14, 334 P.3d 1049 (2014), the Supreme Court adopted the three-step framework set forth in Justice Madsen's concurring opinion in *State v. Sublett*, 176 Wn.2d 58, 92, 292 P.3d 715 (2012) as the analytical framework to guide the court's analysis of public trial right cases. The inquiry begins by examining whether the public trial right is implicated at all, then proceeds to the question whether, if the public trial right is implicated, there is in fact a closure of the courtroom; and finally, if there is a closure, whether the closure was justified. *Smith*, 181 Wn.2d at 513-14. This court uses the experience and logic test to evaluate whether a particular proceeding implicates the public trial right. *Smith*, 181 Wn.2d at 511.

The proceeding here was exercise of peremptory challenges at sidebar. The clerk's minutes recorded the peremptory challenges exercised. CP Supp. 75-80. And the record here does not indicate that either party objected to the exercise of any peremptory challenges.

This court has held that “[s]idebars are not subject to the public trial right under the experience and logic test because they have not historically been open to the public and because allowing public access would play no positive role in the proceeding.” *Smith*, 181 Wn.2d at 511. The *Smith* court also indicated “without any evidence the public has traditionally participated in sidebars, the experience prong cannot be met.” *Smith*, 181 Wn.2d at 517. Peremptory challenges have been likewise withheld from the remaining jurors. The specific practice of silent or written peremptory jury challenges has existed in Washington since at least 1976. See *State v. Thomas*, 16 Wn. App. 1, 13, 553 P.2d 1357 (1976) (stating that secret-written - peremptory challenges are utilized in several counties in this state). See also *Popoff v. Mott*, 14 Wn.2d 1, 9, 126 P.2d 597 (1942) (allowing a challenge for cause to be heard at sidebar). The Legislature has authorized silent or written peremptory challenges to prospective jurors since 1881. See Code 1881, § 219 (“The challenge, the exception, and the denial may be made orally.” [Emphasis added] now codified as RCW 4.44.250.

No logic compels the conclusion that sidebars must be conducted in open court.

State v. Smith, 181 Wn.2d 508, 518-19, 334 P.3d 1049 (2014).

An examination of peremptory challenges at sidebar under the logic prong does not indicate the challenges needed to be conducted publicly. The practice of silent exercise of peremptory challenges was identified as a "best practice" by the Washington State Jury Commission. See Washington State Jury Commission, *Report to the Board for Judicial Administration*, at 41 (July 2000) ("BEST PRACTICES SHOULD INCLUDE: ... TAKING PEREMPTORY CHALLENGES OUT OF THE HEARING OF JURORS, WITH THE COURT ANNOUNCING THE FINAL SELECTIONS TO THE PANEL"). The American Bar Association strongly encourages peremptory strikes to be conducted outside the presence of the jurors. *ABA Standards for Criminal Justice Discovery and Trial by Jury* stand. 15-2.7 commentary (3d ed. 1996) ("[peremptory] challenges [should] be presented at the bench, [or] at sidebar" in order "to avoid the prejudicial effect of exercising challenges in open court."). The United States Supreme Court has recognized that "[i]t is common practice not to reveal the identity of the challenging party to the jurors and potential jurors." *Georgia v. McCollum*, 505 U.S. 42, 53 n. 8, 112 S. Ct. 2348, 120 L. Ed. 2d 33 (1992).

Additionally, preemptory challenges, these challenges historically

originated at common law in England,⁵ and are “objection[s] to a juror for which there is no reason given, but upon which the court shall exclude the juror.” CrR 6.4 (e)(1)(in part). Because the record of the challenges is kept, no reason need be given and because the jurors affected are excused from the panel in full view of the public, there is no purpose served by conducting these challenges before the remaining venire, where there is no requirement that a reason for the challenge be expressed. No ruling is required, no discussion necessary.

3. THE DEFENDANT HAS NOT DEMONSTRATED MANIFEST ERROR OF CONSTITUTIONAL MAGNITUDE WHERE THE SOLE CHALLENGES EXERCISED AT SIDEBAR WERE PEREMPTORY CHALLENGES FOR WHICH THE DEFENDANT WAS AVAILABLE FOR CONSULTATION.

The defendant in this case has not demonstrated manifest constitutional error by exclusion⁶ from a sidebar conference where the parties provided peremptory excuses of jurors because she cannot show constitutional error occurred or that she was prejudiced by the process.

⁵ “In criminal cases, or at least in capital ones, there is, in favorem vitae, allowed to the prisoner an arbitrary and capricious species of challenge to a certain number of jurors, without showing any cause at all, which is called a ‘peremptory challenge.’ *Lewis v. United States*, 146 U.S. 370, 376, 13 S.Ct. 136, 138, 36 L. Ed. 1011 (1892).

⁶ Although the record indicates counsel was invited to sidebar, there is no record showing the defendant was excluded or that her counsel was unable to consult with her. Her presence in court at the time would suggest she was available to be consulted.

Williams makes a factual assertion that the trial court “closed the courtroom by instructing the parties to conduct peremptory challenges on paper.” Reply Brief of Appellant/Supplemental Brief at page 14. She provides no citations to the record or report of proceedings. There is no indication on the record of how the peremptory challenges were recorded. However, they were recorded on the “Judge’s List” of the clerk’s minutes of trial. CP Supp. 75-80.

i. There was no manifest constitutional error because there was no constitutional violation relating to the right to be present.

A defendant has a due process right under the state and federal constitutions to be present to defend him or herself against criminal charges.⁷ U.S. CONST. amend. VI, XIV, *Kentucky v. Stincer*, 482 U.S. 730, 745, 107 S.Ct. 2658, 96 L. Ed. 2d 631 (1987); WASH. CONST. art. I, §§ 3, 22; *State v. Rice*, 110 Wn.2d 577, 757 P.2d 889 (1988) (applying *Stincer*). The core right is the right to be present when evidence is presented. *United States v. Gagnon*, 470 U.S. 522, 105 S.Ct. 1482, 84 L. Ed. 2d 486 (1985); *In re Lord*, 123 Wn.2d 296, 306, 868 P.2d 835 (1994). The right also attaches whenever the defendant's presence has a reasonably substantial relationship to the fullness of his opportunity to defend. *Stincer*, 482 U.S. at 745; *Lord*, 123 Wn.2d at 306. The right is not guaranteed when the defendant's presence would be useless, but is limited to those times when a fair hearing would be thwarted by the defendant's absence or to those critical stages where the defendant's presence would contribute to the fairness of the proceedings. *Stincer*, 482 U.S. at 745.

Here the defendant was present in court with her attorney throughout the voir dire process. CP Supp. 2-5. Her attorney questioned numerous prospective jurors. *Id.* After juror questioning was concluded, all parties passed the jurors for cause challenges. 7/25/13 RP 70-1. It was only at that point where the sidebar

⁷ Williams cites to both Federal and State Constitutions, but fails to contend greater protection is afforded under the Washington Constitution. Reply Brief of Appellant/Supplemental Brief at pages 9-10.

conference was held and peremptory challenges were conducted. Such challenges typically occur with the State exercising the first challenge and defendants challenges in turn until all requests are granted or challenges exhausted. There is no record in the present case that any party objected to any challenges.

This bench sidebar did not implicate defendant's right to be present. She was present when the jury was presented the questionnaire on the first day and over each of the following three days. CP Supp. 2-5. She had the ability to discuss the juror qualifications and make decisions with her attorneys who presented these decisions to the court. She was able to see the challenges at work when the judge informed the jurors of the final selection. 7/25/13 RP 71-2. William's presence at the bench would bear no relation, let alone a substantial one, to the fullness of her opportunity to defend against the charges. *Stincer*, 482 U.S. at 745. Her presence at the bench would serve no purpose or benefit.

The decision regarding which jurors to challenge ultimately rests with the attorney.

It is well established that a defendant, "having accepted the assistance of counsel, retains authority only over certain fundamental decisions regarding the case" such as "whether to plead guilty, waive a jury trial, testify in his or her own behalf or take an appeal" (*People v. White*, 73 N.Y.2d 468, 478, 541 N.Y.S.2d 749, 539 N.E.2d 577; see, *Jones v. Barnes*, 463 U.S. 745, 751, 103 S.Ct. 3308, 3312-13, 77 L.Ed.2d 987). With respect to strategic and tactical decisions concerning the conduct of trials, by contrast, defendants are deemed to repose decision-making authority in their lawyers. The selection of particular jurors falls within the category of tactical decisions entrusted to counsel, and defendants do not retain a personal veto power over counsel's exercise of professional judgments (see, *People v. Sprowal*,

84 N.Y.2d 113, 119, 615 N.Y.S.2d 328, 638 N.E.2d 973;
ABA Standards for Criminal Justice, Defense Function,
Standard 4-5.2[b] [3d ed 1993]).

People v. Colon, 90 N.Y.2d 824, 825-26, 682 N.E.2d 978, 979 (1997), see also,
Gov't of Virgin Islands v. Weatherwax, 77 F.3d 1425, 1434 (3d Cir. 1996) ("The
ABA Standards for Criminal Justice recognize as being among the non-
fundamental issues reserved for counsel's judgment 'whether and how to conduct
cross-examinations, what jurors to accept or strike, [and] what trial motions
should be made ... ' ABA Standards § 4- 5.2(b).").

In *United States v. Reyes*, 764 F.3d 1184 (9th Cir. 2014), the trial court
had questioned a prospective juror at the bench, and had seventeen sidebar
conferences where the lawyers for both parties met to request that jurors be
excused for cause, exercise preemptory challenges, or discuss whether to
continue with the proceedings even though two prospective jurors had not yet
returned from lunch. *Id.* at 1189. Defendant Reyes had requested to be at the
bench for these conferences. *Id.* at 1186. The appellate court noted that Fed. R.
Crim P. 43 dealing with a defendant's right to be present was broader in scope
than the constitutional right to be present. *Id.* at 1189. The court further noted
that while the Constitution was not violated by the sidebar voir dire of the one
juror, the rule was. Important to the case at hand, no constitutional violation
occurred as to the seventeen other sidebar bench conferences:

The district court's decision to exclude Reyes from
the seventeen other side bar exchanges-where the attorneys
argued that jurors should be excused for cause, exercised
preemptory challenges, and discussed whether to proceed in

the absence of some prospective jurors-was likewise consistent with the Constitution. These conferences on questions of law are prototypical examples of instances "when presence would be useless, or the benefit but a shadow." *Snyder*, 291 U.S. at 106-07, 54 S. Ct. 330. Reyes would have merely observed the proceedings while the attorneys made arguments about which jurors should be excused for cause and exercised peremptory challenges. As in *Gagnon*, he "could have done nothing had [he] been at the conference, nor would [he] have gained anything by attending." *Gagnon*, 470 U.S. at 527, 105 S.Ct. 1482.

Reyes, 764 F.3d at 1196-97.7

Therefore, no constitutional violation occurred when Williams' attorney attended a sidebar exchange regarding the peremptory challenges. However, if the court finds that the constitutional right of presence was implicated, there was no resulting manifest error entitling Williams to relief.

ii. RAP 2.5 prevents the bringing of this belated presence claim because there was no "manifest error."

If an error is constitutional in nature, it can be reviewed for the first time on appeal only if it is "manifest," meaning it "had practical and identifiable consequences in the trial of the case" and can survive harmless error review. *State v. O'Hara*, 167 Wn.2d 91, 98-100, 217 P.3d 756 (2009). In other words, a defendant who does not object must show actual prejudice resulting from the error. *Id.* This analysis was undertaken by the appellate court in the instant case.

There is no indication that her counsel sought to excuse jurors differing from her wishes or were unable to consult with her since she was in the very courtroom where the proceeding was ongoing.

In *State v. Irby*, 170 Wn.2d 874, 246 P.3d 796 (2011) the court concluded from the facts that the defendant had no input into the jury selection discussions that had occurred between the judge, the prosecutor, and the defense attorney by e-mail because he was in jail and was not present. It is most likely that Irby was not even aware email exchange was taking place.

“Significantly, the record here does not evidence the fact that defense counsel spoke to *Irby* before responding to the trial judge's e-mail. In sum, conducting jury selection in Irby's absence was a violation of his right under the due process clause of the Fourteenth Amendment to the United States Constitution to be present at this critical stage of trial.”

Irby, 170 Wn.2d at 884. In the instant case, the defendant was present throughout jury questioning and throughout the selection process and had the opportunity to provide any input necessary to whether to pursue any challenges.

The defendant must identify a constitutional error and show how, in the context of the trial, the alleged error actually affected the defendant's rights; it is this showing of actual prejudice that makes the error “manifest”, allowing appellate review. *Scott*, 110 Wn.2d at 688; *State v. Lynn*, 67 Wn.App. 339, 346, 835 P.2d 251 (1992).

Furthermore any claimed error was harmless. A violation of the due process right to be present is subject to harmless error analysis. *Rushen v. Spain*, 464 U.S. 114, 117–18, 104 S.Ct. 453, 78 L. Ed. 2d 267 (1983); *In re Benn*, 134 Wn.2d 868, 921, 952 P.2d 116 (1998); *Lord*, 123 Wn.2d at 306–07; *Campbell v.*

Rice, 408 F.3d 1166, 1172 (9th Cir.2005) (en banc). Under this standard, the State bears the burden of showing the error was harmless beyond a reasonable doubt. *State v. Guloy*, 104 Wn.2d 412, 425, 705 P.2d 1182 (1985). However, the defendant has the obligation to first raise the possibility of prejudice. *State v. Caliguri*, 99 Wn.2d 501, 509, 664 P.2d 466 (1983). A defendant's claim that his right to be present has been violated is a question of law, subject to de novo review. *Irby*, 170 Wn.2d at 880. There is no harm here, because the exercise of challenges at the bench had no practical or identifiable consequences in this case.

It is the defendant's burden to demonstrate how his absence affected the outcome; prejudice will not be presumed. *Lord*, 123 Wn.2d at 307; *State v. Wilson*, 141 Wn.App. 597, 605, 171 P.3d 501 (2007) (Defendant's due process rights were not violated when he was not present for an in-chambers conference concerning juror; impartiality.). Speculation that a defendant's presence might have affected the outcome is insufficient. *Wilson*, 141 Wn.App. at 605-06. Williams cannot show how she was prejudiced when her attorney went to the bench to inform the court and State of her challenges. Moreover, a criminal defendant is not entitled to any particular juror; he is entitled to an impartial jury. *State v. Gentry*, 125 Wn.2d 570, 615, 888 P.2d 1105 (1995); *State v. Phillips*, 65 Wash. 324, 327, 118 P. 43 (1911). Williams has not demonstrated how the excuse of the jurors impacted her right to an impartial jury, nor does any such prejudice appear in the record.

Williams' reliance on *State v. Irby* for a different rule is inappropriate. The *Irby* Court did not mention RAP 2.5 in its analysis as the question of issue preclusion and the manifest error requirement under that rule was not raised. The State was the petitioner in the case and did not raise the issue on review. While this court could have independently raised the issue, it did not. Moreover, the court's analysis effectively found manifest constitutional error, and that the error was not harmless. *Irby*, 170 Wn.2d at 887. A reviewing court is not required to address issues unraised by either party. *State v. Riley*, 121 Wn. 2d 22, 30, 846 P.2d 1365 (1993) (court refusing to consider or address an argument when the issue has not been briefed or argued below). The rationale for RAP 2.5 and the history of the rule (and its federal counterpart) are well- principled and purposed.

V. CONCLUSION

For the foregoing reasons, Carri Williams' supplemental assignments of error are insufficient and her convictions for Homicide by Abuse and Assault in the First Degree must be affirmed.

DATED this 25th day of June, 2015.

SKAGIT COUNTY PROSECUTING ATTORNEY

By: 

ERIK PEDERSEN, WSBA#20015

Deputy Prosecuting Attorney

Skagit County Prosecutor's Office #91059

DECLARATION OF DELIVERY

I, Vickie Maurer, 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: Thomas M. Kummerow, addressed as Washington Appellate Project, 1511 Third Avenue, Suite 701, Seattle, WA 98101 . 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 25th day of June, 2015.



VICKIE MAURER, DECLARANT