

61167-4

61167-4

NO. 61167-4-I

COURT OF APPEALS OF THE STATE OF WASHINGTON

DIVISION I

STATE OF WASHINGTON,

Respondent,

v.

MATHEW MOI,

Appellant.

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STATE OF WASHINGTON
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APPEAL FROM THE SUPERIOR COURT FOR KING COUNTY

THE HONORABLE LAURA GENE MIDDAUGH

SUPPLEMENTAL RESPONSE BRIEF OF RESPONDENT

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I. PROCEDURAL BACKGROUND

Mathew Moi was granted permission to raise a supplemental assignment of error in his reply brief. This is the State's supplemental response to this new assignment of error.

II. SUPPLEMENTAL ISSUE PRESENTED

A defendant has a right to be present during all critical stages of trial, including voir dire, but this right does not extend to side bar conferences addressing administrative issues. Defendant Moi was present during the entirety of voir dire and there is no indication he was unable to consult with and advise his attorney about the dismissal of any potential juror. After the jurors were given an opportunity to express whether a one-month trial would be a hardship, the trial court consulted with counsel at a side bar about excusing a number of jurors for hardship reasons. Did the fact that Moi was not included in this side bar conference violate his constitutional right to be present at trial?

III. FACTUAL BACKGROUND: JURY SELECTION

Jury selection commenced on October 22, 2007. 10/22/07RP 1. The defendant Mathew Moi was present with his attorney, Don Minor. 10/22/07RP 13. The trial judge indicated to the venire that the trial would last three to four weeks. 10/22/07RP 15. The judge then asked whether

“based on this time frame, does this case [present] an unusual hardship to anyone?” 10/22/07RP 15. Forty-two jurors raised their hands to indicate that a one-month trial would present a hardship. 10/22/07RP 15, 36.

The court then asked each juror to indicate the reason that serving would be a hardship. Each juror did so in a few sentences or less. The entire hardship inquiry was conducted by the court. There was no discussion about the merits of the case or any effort to conduct voir dire for cause or peremptory challenges. 10/22/07RP 16-36.

The trial court then held a side bar conference with Moi’s attorney and the deputy prosecutor to discuss the jurors’ hardship. During this side bar, jurors were allowed to use the restroom. Jurors were admonished by the trial court not to talk to each other or any participant in the case, including Moi. 10/22/07RP 35-36. It is this side bar, and only this side bar, that Moi asserts violated his right to be present at trial.

After the side bar, one more juror explained why a month-long trial would be a hardship. 10/22/07RP 36. The trial court then excused 17 jurors for hardship reasons. Moi was present when the jurors were excused. There was no objection to the excusal of these jurors or the failure to exclude any other juror for hardship reasons. 10/22/07RP 36.

The court then informed the jurors that it had incorrectly stated the date by which the trial would likely end. 10/22/07RP 36-37. Based on

this new information, five more jurors expressed reservations about serving for hardship reasons. 10/22/07RP 37-39. Three of these jurors were excused. 10/22/07RP 39. This left 66 jurors in the venire from which the parties could select the twelve jurors and two alternate jurors. 10/22/07RP 39.

The rest of the jury selection took two days and included a jury questionnaire, the opportunity to individually question many jurors, and voir dire by counsel for Moi and the State. 10/22/07RP 39-136; 10/23/07RP 1-160. Individual challenges for cause were conducted on the record. See, e.g., 10/23/07RP 87-89.

Toward the end of voir dire, the trial court indicated that there were 56 jurors remaining. The court inquired if the parties would be interested in excusing four of the jurors (from the initial group who had claimed hardship but had not been excused) who were “borderline hardship” because they had expressed concerns about childcare issues. 10/23/07RP 90-91. Moi’s attorney objected to excusing these jurors, stating that he wanted to ask them some more questions. 10/23/07RP 91. The court did not excuse these jurors. 10/23/07RP 91. Subsequently, the court inquired about one juror who was “borderline hardship” and Moi’s attorney agreed he could be excused. 10/23/07RP 92-93. Moi was present

when the preemptory challenges were made by both parties. 10/23/07RP
152-61.

IV. ARGUMENT

Moi contends that his constitutional right to be present at a critical stage of the proceedings was violated when the court held a side bar conference during voir dire to discuss which jurors would be excused for hardship reasons. This argument fails under both the United States Constitution and under Washington constitution, article I, § 22.

A. **LEGAL STANDARD: RIGHT TO BE PRESENT DURING VOIR DIRE.**

A defendant has a constitutional right under the confrontation clause of the Sixth Amendment, the due process clause of the Fourteenth Amendment, and art. I, § 22 of the Washington constitution, to be present during all critical stages of trial, including jury voir dire.¹ Illinois v. Allen, 397 U.S. 337, 338, 90 S. Ct. 1057, 25 L. Ed. 2d 353 (1970); State v. Wilson, 141 Wn. App. 597, 603-04, 171 P.3d 501 (2007); CrR 3.4. A defendant's presence at voir dire is required because it is substantially

¹ Constitutional questions are reviewed de novo. State v. Castro, 141 Wn. App. 485, 490, 170 P.3d 78 (2007).

related to the defense and allows the client “to give advice or suggestion or even to supersede his lawyers.”² Wilson, 141 Wn. App. at 604.

But a defendant does not have the right to be present if legal matters are at issue rather than the resolution of facts. In the Matter of the Personal Restraint of Lord, 123 Wn.2d 296, 306, 868 P.2d 835, clarified on other grounds, 123 Wn.2d 737 (1994). Thus, the defendant has no right to be present during in-chambers or bench conferences between the court and counsel on legal matters where those matters do not require a resolution of disputed facts. See, e.g., In re Lord, 123 Wn.2d 306-07; United States v. Williams, 455 F.2d 361 (9th Cir. 1972); People v. Dokes, 79 N.Y.2d 656, 595 N.E.2d 836 (1992).

Excusal of jurors for hardship reasons is an administrative question within the discretion of the trial court, not a legal question or a resolution of a disputed fact. Hardship excusals are governed by RCW 2.36.100, which states in relevant part:

(1) Except for a person who is not qualified for jury service under RCW 2.36.070, no person may be excused from jury service *by the court except upon a showing of undue hardship, extreme inconvenience, public necessity,*

² The core of the constitutional right is the right to be present when evidence is being presented. United States v. Gagnon, 470 U.S. 522, 526, 105 S. Ct. 1482, 84 L. Ed. 2d 486 (1985). Beyond that, the defendant has a “right to be present at a proceeding ‘whenever his presence has a relation, reasonably substantial, to the fullness of his opportunity to defend against the charge. . . .’” Gagnon, 470 U.S. at 526, 105 S. Ct. at 1484 (quoting Snyder v. Massachusetts, 291 U.S. 97, 54 S. Ct. 330, 78 L. Ed. 674 (1934)).

or any reason deemed sufficient by the court for a period of time the court deems necessary.

RCW 2.36.100 (emphasis added). This statute establishes an administrative rule for excusing jurors for hardship (as opposed to for cause or pursuant to peremptory challenges) and vests the discretion for exercising such excusals solely with the trial court.

That excusal for cause is an administrative responsibility of the trial court may be seen from the fact that the court may delegate the function of excusing jurors for hardship to the court clerk. See GR 28(1) (“The judges of a court may delegate to court staff and county clerks their authority to disqualify, postpone, or excuse a potential juror from jury service.”); see also State v. Rice, 120 Wn.2d 549, 844 P.2d 416 (1993) (clerk’s office excused 450 of 600 jurors summoned; defendant’s argument that only a judge, not a clerk, may excuse prospective jurors was properly overruled).

The administrative nature of excusals for hardship is consistent with the long-held principle that it is the trial court’s responsibility to secure a qualified and impartial jury. Thus, in State v. Killen, 39 Wn. App. 416, 693 P.2d 731 (1985), a defendant challenged the trial court’s releasing three individuals in the venire who claimed to have scheduling

conflicts with the trial. In denying defendant's claim that such excusals were improper, the Court of Appeals observed:

[S]tatutory and common law authorize[s] the court to excuse veniremen on its own motion. "To deny this right would be out of harmony with the policy of the law, which charges the court with the responsibility of insuring that qualified and impartial grand jurors are secured."

Killen, 39 Wn. App. at 418-19 (citing State v. Guthrie, 185 Wash. 464, 475, 56 P.2d 160 (1936)); see also State v. Langford, 67 Wn. App. 572, 583, 837 P.2d 1037 (1992).

B. THERE WAS NO VIOLATION OF MOI'S RIGHT TO BE PRESENT DURING VOIR DIRE.

Moi's suggestion that there was a violation of his right to be present during a critical stage of the proceedings is without merit. Moi was present during the entirety of voir dire and was thus able to assist and advise his attorney during this process. Moreover, the side bar conference involved an administrative issue, not a legal question or the resolution of a disputed fact. In these circumstances, the fact that Moi was not included in the side bar conference did not violate his constitutional right to be present at trial.

First, Moi was not excluded from any portion of voir dire. To the contrary, the record demonstrates that Moi was present during the entirety of voir dire, was able to view in person all of the potential jurors, was able

to hear their stated reasons why serving would be a hardship, and was able to consult with his attorney before the hardship challenges were discussed at side bar.

Moi was also present when the trial court placed the side bar on the record by excusing 17 jurors for hardship reasons. If Moi had some objection to any hardship, he was present and could have raised that issue with his attorney and the court. Thus, Moi was present in the fullest sense of that term during voir dire, specifically including the exclusion of potential jurors for hardship reasons. For this reason there was no violation of his right to be present at a critical stage of the proceedings.

Second, Moi assigns error only to the fact that he was not present during a side bar conference. As discussed above, the right to be present is not violated when a defendant is not included in a bench conference addressing an administrative issue. Hardship excusals involve the trial court's determination of whether a potential juror has a valid reason for being excused from the venire for reasons that have nothing to do with the facts of the case. The decision to excuse such jurors has nothing to do with a party's "good cause" request to excuse a juror, the juror's relationship to the parties, or any other case-specific reason. Indeed, as discussed, whether to excuse a juror for hardship is an administrative issue

that may be accomplished by the court clerk (with appropriate written directions from the trial court) and outside the presence of counsel.

In the present case, the fact that the trial court held a side bar conference and alerted counsel as to the jurors it was going to excuse for hardship, and gave counsel an opportunity to object outside the presence of the venire, was a courtesy. It is not a critical stage of the proceedings (such as a resolution of disputed factual questions) that required the defendant's presence.

Finally, the State submits that if a defendant's presence is required at a side bar relating to the recusal of a juror for hardship – which is then immediately put on the record – it is difficult to imagine what issues could be addressed at a side bar that would *not* require the defendant to be present. An evidentiary ruling made during the course of trial, for example, is potentially far more significant than an excusal for hardship. The rule proposed by Moi would eviscerate virtually all side bar conferences between the court and counsel.

C. ASSUMING MOI HAD A RIGHT TO BE PRESENT AT THE SIDE BAR, THE ERROR WAS HARMLESS.

The denial of a defendant's right to be present during criminal proceedings is a “trial error” (as opposed to a “structural” error) and is therefore subject to harmless error analysis. In re Lord, 123 Wn.2d at

306-07; In re Benn, 134 Wn.2d 868, 921, 952 P.2d 116 (1998); Rice v. Wood, 44 F.3d 1396, 1441 (9th Cir. 1995), vacated in part, 77 F.3d 1138 (9th Cir. 1996); accord Hegler v. Borg, 50 F.3d 1472, 1476 (9th Cir. 1995); Rushen v. Spain, 464 U.S. 114, 117-18, 104 S. Ct. 453, 455, 78 L. Ed. 2d 267 (1983)).

Error requires reversal only if it is prejudicial. Prejudice to the defendant who alleges that his right to be present was violated will not simply be presumed. Rushen v. Spain, 464 U.S. 114, 117-20, 104 S. Ct. 453, 455-56, 78 L. Ed. 2d 267 (1983); see also State v. Rice, 110 Wn.2d 577, 615 n. 21, 757 P.2d 889 (1988). The burden of proving harmlessness is on the State and it must do so beyond a reasonable doubt. State v. Saraceno, 23 Wn. App. 473, 475-76, 596 P.2d 297 (1979). Nonetheless, the defendant must first raise at least the possibility of prejudice. See, e.g., United States v. Ford, 632 F.2d 1354, 1379 n. 28 (9th Cir. 1980); State v. Smith, 85 Wn.2d 840, 853, 540 P.2d 424 (1975); State v. Caliguri, 99 Wn.2d 501, 508, 664 P.2d 466 (1983).

Thus, in State v. Phillips, 65 Wash. 324, 118 P. 43 (1911), doubt was raised about a potential juror's citizenship. The trial court excused him without proof he was not a United States citizen. The Washington Supreme Court affirmed, holding that the fact that a potential juror may

have been rejected on insufficient grounds is of no consequence *unless as a result an unqualified juror is selected*. *Id.* at 326-27.

Even if it was error not to include Moi in the side bar conference, Moi has not established the possibility of prejudice and the record establishes that any error was harmless beyond a reasonable doubt. Moi had a complete opportunity to view the jurors and hear the reasons articulated by the hardship jurors for being excused. Moi could have discussed these reasons, and whether he did or did not agree with the hardship requests, with his attorney prior to the side bar. Had he wished to do so, Moi could have followed up with his attorney after the court placed the side bar on the record by excusing the hardship jurors. Moi was thus able to “give advice or suggestion” to his attorneys concerning the excusal of jurors and has failed to show any prejudice from the fact that he was not physically present during the side bar conference.

Further, after the hardship jurors were excused, there were 56 jurors left in the venire. Moi was present during the entirety of voir dire and the selection of twelve jurors and two alternates. Moi alleges no violation of his right to be present during the selection of the jury that actually heard his case.

Finally, and perhaps most importantly, Moi does not allege that the jury that heard his case was partial, biased, or unfair. A defendant in a

criminal case has no right to be tried by a particular juror or by a particular jury. Creech v. Aberdeen, 44 Wash. 72, 74, 87 P. 44 (1906) (citing State v. Straub, 16 Wash. 111, 47 P. 227 (1896)); State v. Gentry, 125 Wn.2d 570, 615, 888 P.2d 1105 (1995). Courts presume that each juror sworn to hear a case is impartial. State v. Reid, 40 Wn. App. 319, 322, 698 P.2d 588 (1985). Unless a party can show that unqualified jurors were seated as the result of the removal of a specific juror, any error in removing a juror is harmless. State v. Killen, 39 Wn. App. 416, 419, 693 P.2d 731 (1985). Given the complete failure to show that the jury that heard Moi's case was unqualified in any way, the fact that Moi was not included in a side bar discussion to excuse jurors for hardship reasons is harmless beyond a reasonable doubt.

D. IT IS NOT NECESSARY TO CONDUCT A GUNWALL ANALYSIS.

The State respectfully submits that because Moi was present during the entirety of voir dire and because any error was harmless beyond a reasonable doubt, it is unnecessary to conduct Gunwall³ analysis to determine whether the state constitution provides greater protection than the federal constitution in this context. Moreover, Moi never makes clear what "greater protection" he is seeking under the Washington constitution.

³ State v. Gunwall, 106 Wn.2d 54, 61-62, 720 P.2d 808 (1986).

If Moi is requesting the adoption of a “no harmless error” rule that argument has already been rejected. In re Lord, 123 Wn.2d at 306-07; In re Benn, 134 Wn.2d at 921; Rice v. Wood, 44 F.3d at 1441 (9th Cir.1995). As discussed above, assuming it was error not to have Moi at the side bar conference, the error was harmless beyond a reasonable doubt. This remains true even if a “Gunwall” analysis were to establish that art. I, § 22 provided greater protection than the federal constitution.

E. THE RIGHT TO BE PRESENT AT TRIAL UNDER ARTICLE I, § 22 IS COEXTENSIVE WITH THE SIMILAR RIGHT UNDER THE UNITED STATES CONSTITUTION.

In determining whether the Washington constitution offers greater protection than the federal constitution, courts consider the Gunwall factors. These include: (1) the textual language of the state constitution; (2) significant differences in the texts of the parallel provisions of the federal and state constitutions; (3) state constitutional and common law history; (4) preexisting state law; (5) differences in structure between the federal and state constitutions; and (6) whether the subject matter of the constitutional provision presents a matter of particular state interest or local concern. State v. Gunwall, 106 Wn.2d 54, 61-62, 720 P.2d 808 (1986); see also State v. Foster, 135 Wn.2d 441, 458, 957 P.2d 712 (1998) (emphasis added). Applying these factors demonstrates that article I, § 22

of the Washington Constitution does not offer greater protection of a defendant's right to be present at trial than does the federal constitution.

1. The Language Of The Parallel Provisions: Factors 1 And 2.

The Confrontation Clause provides that “[i]n all criminal prosecutions, the accused shall enjoy the right . . . to be confronted with the witnesses against him. . . .” Article I, § 22, provides similar protection: “In criminal prosecutions the accused shall have the right to appear and defend in person, or by counsel” The language of the federal and state provisions is not exactly the same. However, the language of the federal constitution has been interpreted to mean that a defendant has the right to be present at all critical stages of the trial.

While the federal provision does not explicitly guarantee the “right to appear,” the right of a defendant to “confront” witnesses at a public trial necessarily implies the right to be present at trial. Indeed, the United States Supreme Court has long interpreted the protections of the Confrontation Clause to include a defendant's right to be present at every stage of the trial proceedings. Illinois v. Allen, 397 U.S. 337, 338, 90 S. Ct. 1057, 25 L. Ed. 2d 353 (1970) (citing Lewis v. United States, 146 U.S. 370, 13 S. Ct. 136, 36 L. Ed. 1011 (1892)) (“One of the most

basic of the rights guaranteed by the Confrontation Clause is the accused's right to be present in the courtroom at every stage of his trial.”).

As discussed above, Washington law is in accord. See also 4A Karl B. Tegland, WASHINGTON PRACTICE: RULES PRACTICE CRR 3.4, at 237 (6th ed. 2002) (Author's Comments) (criminal defendant's right under Wash. Const. Art. I, § 22 to appear and defend in person is “a basic right, derived from the common law and guaranteed by the confrontation clause of the Sixth Amendment”); State v. Maryott, 6 Wn. App. 96, 102-03, 492 P.2d 239 (1971) (accused's fundamental right to be present at his trial and to confront witnesses against him derives from common law, and is guaranteed by the Sixth Amendment and Wash. Const. Art. I, § 22).

Thus, the Washington Supreme Court has found no significant differences between these two provisions:

Although the language of the Sixth Amendment and this state's confrontation clause is not word-for-word identical, the meaning of the words used in the parallel clauses is substantially the same. . . . Additionally, the United States Supreme Court has consistently interpreted the language of the Confrontation Clause to mean “face-to-face” confrontation. . . .

We find no significant difference between the language used in the parallel provisions of the state and federal confrontation clauses.

State v. Foster, 135 Wn.2d 441, 459, 957 P.2d 712 (1998) (citations omitted). While the actual language of the federal and state provisions is different, they have been interpreted consistently. These factors do not support an independent state analysis.⁴

**2. State Constitutional and Common Law History:
Factor 3.**

As Moi concedes, there is no relevant evidence of the framers' intent in crafting the language of Article I, § 22. See App. Reply Brief at 8; see also Foster, 135 Wn.2d at 461 (review of the limited history of state confrontation clause does not reveal an intent on the part of the drafters to create a broader right than that stated in the Sixth Amendment).

3. Preexisting State Law: Factor 4.

To determine the scope of a right under the Washington Constitution, courts look to Washington law in existence in 1889, at the time of the adoption of the constitution. State v. Smith, 150 Wn.2d 135, 151, 153, 75 P.3d 934 (2003). As Moi points out, Washington law has long protected a defendant's right to be present at his trial. See App.

⁴ Even if this court were to determine that the state provision is significantly distinctive, that fact alone would be insufficient to support independent state interpretation. Foster, 135 Wn.2d at 459.

Reply Brief at 9-10. The State does not dispute this. It is significant, however, that none of the early cases cited by Moi address the right to be present during voir dire or, more particularly, to be present during a sidebar conference. The early case law provides no specific assistance in evaluating the scope of the Washington constitution.

4. Structural Differences Between The Federal And State Constitutions: Factor 5.

The United States Constitution is a grant of limited power to the federal government, while the state constitution limits the otherwise plenary power of the state. Gunwall, 106 Wn.2d at 66; Foster, 135 Wn.2d at 458-59. This difference in structure supports an independent state constitutional analysis in every case. Id.

5. Particular State Interest Or Local Concern: Factor 6.

This factor requires the court to determine whether the right at issue is a matter of such “singular” state interest or local concern that the Washington constitutional provision should be interpreted independently of its federal counterpart. Foster, 135 Wn.2d at 461.

Moi does not cite any cases that bear directly on the question of whether the right to be present, or even the right to voir dire, is a particularly local concern.⁵ The Washington Supreme Court, analyzing a different aspect of article I, § 22, found that “[t]he concern of this state in the fundamental right of an accused to confront witnesses against him or her, in the context of child victim testimony, is not unique to the State of Washington.” Foster, 135 Wn.2d at 465. The court concluded that, because “Washington’s interest in the protection of a defendant’s confrontation right in this context is comparable to the national interest in this same right,” this Gunwall factor did not support independent state constitutional analysis. Id.

Similarly, there is no basis to conclude that Washington’s interest in protecting a defendant’s right to be present during voir dire (or a sidebar conducted during voir dire) is somehow different from the national interest in protecting that same right. This factor does not support independent state constitutional analysis.

⁵ Moi’s reliance on State v. Lanciloti, 165 Wn.2d 661, 667, 201 P.3d 323 (2009), is not on point. Lanciloti addressed a different provision of art. I, § 22:

The Washington constitution provides that “[i]n criminal prosecutions the accused shall have the right ... to have a speedy public trial *by an impartial jury of the county in which the offense is charged to have been committed.*” CONST. art. I, § 22. This follows the common law *principle that juries should be drawn from the area of the alleged crime.*

Id. at 667 (emphasis added).

In sum, there is no support in Washington law for an independent state analysis of a defendant's right to be present at an administrative side bar.

V. CONCLUSION

For the reasons stated above, the State respectfully suggests that Moi's supplemental assignment of error is without merit and his conviction for one count of murder in the first degree be affirmed.

DATED this 22nd day of June, 2009.

Respectfully submitted,

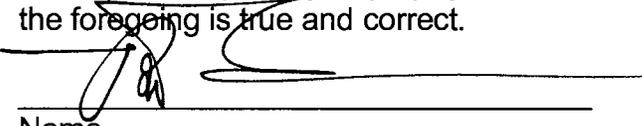
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Certificate of Service by Mail

Today I deposited in the mail of the United States of America, postage prepaid, a properly stamped and addressed envelope directed to Nancy Collins, the attorney for the appellant, at Washington Appellate Project, 701 Melbourne Tower, 1511 Third Avenue, Seattle, WA 98101, containing a copy of SUPPLEMENTAL RESPONSE BRIEF OF RESPONDENT, in STATE V. MATTHEW MOI, Cause No. 61167-4-I, in the Court of Appeals, Division I, for the State of Washington.

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



Name
Done in Seattle, Washington

06/22/2009
Date

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