

82665-8

NO. 59741-8-I

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

FILED  
COURT OF APPEALS  
STATE OF WASHINGTON  
2008 AUG 15 PM 4:29

STATE OF WASHINGTON,

Respondent/Cross-Appellant,

v.

TERRANCE J. IRBY,

Appellant/Cross-Respondent.

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

The Honorable John M. Meyer, Judge

REPLY BRIEF OF APPELLANT/CROSS-RESPONDENT

DAVID B. KOCH  
Attorney for Appellant

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

Today I deposited in the mails of the United States of America a properly stamped and addressed envelope directed to attorneys of record of ~~respondent~~ appellant/plaintiff containing a copy of the document to which this declaration is attached.

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

*P. Mayorsky* *8-15-2008*  
Name Done in Seattle, WA Date

**TABLE OF CONTENTS**

	Page
A. <u>ARGUMENT IN REPLY</u> .....	1
1. IRBY WAS DENIED HIS CONSTITUTIONAL RIGHT TO PUBLIC TRIAL. ....	1
2. THE FAILURE TO INCLUDE IRBY IN THE PROCESS OF REMOVING JURORS VIOLATED HIS SIXTH AMENDMENT RIGHT TO BE PRESENT FOR TRIAL. ....	6
3. IRBY'S 1976 CONVICTION FOR STATUTORY RAPE IS NOT COMPARABLE TO A STRIKE OFFENSE. ....	8
4. THE STATE FAILED TO PROVE THAT INTERVENING MISDEMEANOR CONVICTIONS PREVENTED IRBY'S ASSAULT CONVICTION FROM WASHING OUT. ....	13
B. <u>ARGUMENT IN RESPONSE TO CROSS-APPEAL</u> .....	14
C. <u>CONCLUSION</u> .....	15

**TABLE OF AUTHORITIES**

Page

**WASHINGTON CASES**

In re Personal Restraint of Lavery,  
154 Wn.2d 249, 111 P.3d 837 (2005) . . . . . 10, 11, 13

In re Personal Restraint of Pirtle,  
136 Wn.2d 467, 965 P.2d 593 (1998) . . . . . 7

In the Matter of Personal Restraint of Orange,  
152 Wn.2d 795, 100 P.3d 291 (2004) . . . . . 2

State v Morley,  
134 Wn.2d 588, 952 P.2d 167 (1998) . . . . . 10

State v. Bone-Club,  
128 Wn.2d 254, 906 P.2d 325 (1995) . . . . . 2

State v. Brightman,  
155 Wn.2d 506, 122 P.3d 150 (2005) . . . . . 2

State v. Collins,  
50 Wn.2d 740, 314 P.2d 660 (1957) . . . . . 3, 4

State v. Duckett,  
141 Wn. App. 797, 173 P.3d 948 (2007) . . . . . 3

State v. Erickson,  
\_\_\_ Wn. App. \_\_\_, 2008 WL 2901573  
(Slip op. filed 7/29/08) . . . . . 2

TABLE OF AUTHORITIES (CONT'D)

Page

WASHINGTON CASES (CONT'D)

State v. Farnsworth,  
133 Wn. App. 1, 130 P.2d 389 (2006),  
review granted in part and remanded,  
159 Wn.2d 1004 (2007) . . . . . 9, 10

State v. Ford,  
137 Wn.2d 472, 973 P.2d 452 (1999) . . . . . 14

State v. Frawley,  
140 Wn. App. 713, 167 P.3d 593 (2007) . . . . . 3

State v. Lopez,  
147 Wn.2d 515, 55 P.3d 609 (2002) . . . . . 13

State v. McDonald,  
74 Wn.2d 141, 443 P.2d 651 (1968) . . . . . 2

State v. Moen,  
129 Wn.2d 535, 919 P.2d 69 (1996) . . . . . 2

State v. Moncrief,  
137 Wn. App. 729, 154 P.3d 314 (2007) . . . . . 10

State v. Olson,  
126 Wn.2d 315, 893 P.2d 629 (1995) . . . . . 12

State v. Ortega,  
120 Wn. App. 165, 84 P.3d 935 (2004),  
review granted in part and remanded,  
154 Wn.2d 1031 (2005) . . . . . 10, 11

TABLE OF AUTHORITIES (CONT'D)

Page

WASHINGTON CASES (CONT'D)

State v. Rivas,  
49 Wn. App. 677, 746 P.2d 312 (1987) ..... 9

State v. Rivera,  
108 Wn. App. 645, 32 P.2d 292 (2001),  
review denied, 146 Wn.2d 1006 (2002) ..... 5

FEDERAL CASES

Apprendi v. New Jersey,  
530 U.S. 466, 120 S. Ct. 2348,  
147 L. Ed. 2d 435 (2000) ..... 10, 11

Ayala v. Speckard,  
131 F.3d 62 (2nd Cir. 1997) ..... 5

Gomez v. United States,  
490 U.S. 858, 109 S. Ct. 2237,  
104 L. Ed. 2d 923 (1989) ..... 7

Press-Enterprise Co. v. Superior Court of California,  
464 U.S. 501, 104 S. Ct. 819,  
78 L. Ed. 2d 629 (1984) ..... 1, 5

United States v. Gordon,  
829 F.2d 119 (D.C. Cir. 1987) ..... 7

TABLE OF AUTHORITIES (CONT'D)

	Page
<u>RULES, STATUTES AND OTHERS</u>	
ER 1002 .....	13
ER 1004 .....	13
Former RCW 9.79.210 .....	12
Former RCW 13.04.120 .....	12
RAP 2.5(a)(3) .....	3
RCW 10.95.030(1) .....	14
U.S. Const. amend. 6 .....	6, 13

A. ARGUMENT IN REPLY

1. IRBY WAS DENIED HIS CONSTITUTIONAL RIGHT TO PUBLIC TRIAL.

The State does not dispute the entire voir dire process must be open to the public absent compelling circumstances. Nor could it. This centuries-old rule pre-dates the Norman Conquest and played a prevalent role in British courts and those of colonial America. See Press-Enterprise Co. v. Superior Court of California, 464 U.S. 501, 505-508, 104 S. Ct. 819, 78 L. Ed. 2d 629 (1984). Addressing the need for open voir dire, the United States Supreme Court has said, "No right ranks higher than the right of the accused to a fair trial. But the primacy of the accused's right is difficult to separate from the right of everyone in the community to attend the *voir dire* which promotes fairness." Press-Enterprise Co., 464 U.S. at 508.

Instead, the State makes two claims: (1) Irby cannot raise this constitutional violation for the first time on appeal and (2) conducting voir dire by e-mail is equivalent to a sidebar conference, to which the public trial right does not attach. See Brief of Respondent, at 11-21. Both arguments fail.

As an initial matter, this Court should not require Irby's objection because he was not afforded the opportunity to object. Irby was in jail.

34RP 3. Objections are required "so that any mistakes can be corrected in time to prevent the necessity of a second trial." State v. McDonald, 74 Wn.2d 141, 145, 443 P.2d 651 (1968); see also State v. Moen, 129 Wn.2d 535, 547-48, 919 P.2d 69 (1996) (where no corrective purpose can be served by an objection, the lack of an objection will not preclude appellate review). Requiring Irby to object where the trial judge initiated the process from his chambers and only included the attorneys in the discussion hardly seems fair. Irby was not in court again until the following day. Even assuming he was told what had happened sometime after the fact, any objection would have been useless since the violation had already occurred. It was too late to save this jury or their ultimate verdicts.

In any event, it is now well settled that claimed violations of the right to public trial can be raised for the first time on appeal. The Washington Supreme Court has expressly rejected the need for an objection below. See State v. Brightman, 155 Wn.2d 506, 517-518, 122 P.3d 150 (2005). Indeed, in most of the leading cases on this subject, the issue was raised for the first time in an appellate court. See, e.g., In the Matter of Personal Restraint of Orange, 152 Wn.2d 795, 801-02, 100 P.3d 291 (2004); State v. Bone-Club, 128 Wn.2d 254, 257, 906 P.2d 325 (1995); State v. Erickson, \_\_\_ Wn. App. \_\_\_, 2008 WL 2901573, at \*1 and \*2

n.2. (Slip op. filed 7/29/08); State v. Duckett, 141 Wn. App. 797, 805, 173 P.3d 948 (2007); State v. Frawley, 140 Wn. App. 713, 720, 167 P.3d 593 (2007).

In fact, the issue can be raised on appeal even where the defendant knowingly waives his own participation in voir dire. Addressing those very circumstances in Duckett, now Washington Supreme Court Justice Debra Stephens wrote, "The failure to assert this right at trial does not effect a waiver, nor free the court from its independent obligation to consider public trial rights before closing all or a portion of the proceedings." Duckett, 141 Wn. App. at 805. The right to public trial is waived only where the trial court advises the defendant of his right to a public hearing and the defendant then waives it. Moreover, it is not even clear this would affect the *public's* right to an open hearing. Duckett, 141 Wn. App. at 806-07.

Nonetheless, the State argues that Irby should be denied an opportunity to assert his public trial rights because the violation in his case is less manifest than in other cases. Therefore, argues the State, his claim does not satisfy RAP 2.5(a)(3). In support of this argument, the State cites State v. Collins, 50 Wn.2d 740, 314 P.2d 660 (1957), where the court locked the courtroom door due to overcrowding, the defendant did not object, and the Supreme Court found the issue waived. Brief of

Respondent, at 17. Apart from apparent factual distinctions between that case and this one, Collins was decided well before the current analytical framework for public trial issues. Whatever it may have once dictated, it does not represent the state of the law. Under current precedent, no objection is necessary to preserve the issue for appeal.

Moreover, the record simply does not support the State's argument that the violation here is somehow less manifest. It is significantly worse than violations deemed sufficiently egregious to require new trials. Unlike other cases, there is no indication Irby knew anything about the private process employed to remove jurors from his venire. Moreover, by conducting voir dire via e-mail, the court ensured that neither Irby nor members of the public could attend. Because there was no scheduled jury selection until the following day, this was not a situation where Irby or members of the public could demand an open proceeding. While the courtroom's physical doors were closed for business, jury selection continued in cyberspace initiated from inside the judge's private chambers. It is difficult to imagine a less public scenario.

The State also equates the discussion and removal of jurors with a sidebar conference. The State notes that in every case involving a violation of the right to public trial, the court either expressly closed the courtroom

or it was apparent members of the public were being excluded. Brief of Respondent, at 19. But the State does not explain why this is important. At least in those cases, the defendant and the public knew they were being excluded and could object. The procedure implemented in Irby's case left no such opportunities. The fact voir dire in Irby's case was *more* secretive and *more* private does not help the State.

Finally, the State cites to this Court's decision in State v. Rivera, 108 Wn. App. 645, 32 P.2d 292 (2001), review denied, 146 Wn.2d 1006 (2002). Brief of Respondent, at 19-21. But this opinion supports Irby. At Rivera's murder trial, the trial judge briefly closed the courtroom to discuss one juror's complaints about a fellow juror's poor hygiene. Rivera, 108 Wn. App. at 652. Because the brief hearing was not adversarial and "did not involve . . . any issue related to the trial," this Court properly deemed it ministerial and in the nature of a bench conference, which neither the defendant nor the public has a right to attend. Rivera, 108 Wn. App. at 653. Notably, however, this Court reaffirmed that "a defendant has a right to an open court whenever evidence is taken, during a suppression hearing, and during voir dire." Rivera, 108 Wn. App. at 653 (emphasis added) (citing Ayala v. Speckard, 131 F.3d 62, 69 (2nd Cir. 1997); Press-

Enterprise Co. Superior Court of California, 464 U.S. 501, 104 S. Ct. 819, 78 L. Ed. 2d 629 (1984)).

Irby's claim is properly before this Court. Conducting a portion of jury selection by e-mail violated the right to public trial.

2. THE FAILURE TO INCLUDE IRBY IN THE PROCESS OF REMOVING JURORS VIOLATED HIS SIXTH AMENDMENT RIGHT TO BE PRESENT FOR TRIAL.

Noting that 51 minutes elapsed between the court's suggestion that certain jurors be removed from consideration and defense counsel's affirmative response, the State argues, "[t]here is no indication that the defendant was not available to be consulted by his counsel prior to the decision by the defense." Brief of Respondent, at 21, 25. This is pure conjecture.

The State has no idea when defense counsel read the judge's message. Given that Irby was in jail, it is highly unlikely the two reviewed the pertinent questionnaires together before defense counsel responded. In any event, the right at issue is the Sixth Amendment right to be present. It is not the right to be merely consulted from afar. Irby was not present in the judge's chambers when the judge proposed releasing jurors, he was not present in his attorney's office when defense counsel

responded, and he was not present in the prosecutor's office when the trial deputy objected to removal of some jurors and agreed to removal of others.

The State also cites several cases involving proceedings where the defendant's presence was not constitutionally required. These include the passing out of juror handbooks, sidebar or in-chambers conferences involving purely legal matters, and discussions concerning jury instructions. See Brief of Respondent, at 22-24. But a defendant's right to be present for selection of his jurors is well established. See Gomez v. United States, 490 U.S. 858, 873, 109 S. Ct. 2237, 104 L. Ed. 2d 923 (1989); United States v. Gordon, 829 F.2d 119, 124 (D.C. Cir. 1987). One case cited by the State -- In re Personal Restraint of Pirtle, 136 Wn.2d 467, 965 P.2d 593 (1998) -- acknowledges the importance of a defendant's presence for hearings affecting jury composition. The Pirtle Court found that defendants should be present for hearings on alleged juror misconduct. Pirtle, 136 Wn.2d at 484.

Similar to its approach on the public trial issue, the State argues Irby had no right to be present for this portion of voir dire because it was akin to a sidebar conference. As support, the State points out that there "was not a hearing on the record" and "[a]lthough the jury selection process was

occurring, there was not a courtroom proceeding occurring at the point where the trial court sent the e-mail." Brief of Respondent, at 24-25.

In other words, so long as no record is made of the proceedings and no courtroom made available, there can be no constitutional violation. Although the constitutional rights to public jury selection and to be present and actively participate in jury selection are indisputable, under the State's circular reasoning both rights are extinguished so long as jury selection is conducted privately and without the defendant's or the public's knowledge or presence. There is no authority for this position, which would gut constitutional protections.

**3. IRBY'S 1976 CONVICTION FOR STATUTORY RAPE IS NOT COMPARABLE TO A STRIKE OFFENSE.**

The State concedes Irby's statutory rape conviction is not legally comparable to a current conviction for rape of a child. Respondent, at 33-34. As the State acknowledges, the former offense permitted conviction where the victim was 11 years old, whereas the current statute requires a victim of 12 or 13. Moreover, the former statute merely required that the perpetrator be over 16 years old, whereas the current statute requires the perpetrator be at least 36 months older than the victim. See Brief of Appellant, at 20-21.

But the State contends that Irby's prior conviction for statutory rape is factually comparable to rape of a child. The State argues, "[t]he information alleges that the victim was age thirteen and thus, this was a fact that was charged and proven to the jury." Brief of Respondent, at 34. This is incorrect. To prove statutory rape, the State merely had to prove the victim was at least 11 years old. That the information includes an allegation the victim was 13 does not mean the State actually proved she was 13 years old. Specific factual assertions included in the information need not be proved unless they are also included in the jury instructions. State v. Rivas, 49 Wn. App. 677, 683, 746 P.2d 312 (1987). And the State has not provided jury instructions from the 1976 case.

For all we know, the jury instructions and proof at trial demonstrated the victim was actually 11 years old. Or, alternatively, the State may have maintained at trial that she was 13, but Irby would have had no incentive at the time to prove she was actually 11. It simply did not matter under the former statute.

The State cites State v. Farnsworth, 133 Wn. App. 1, 130 P.2d 389 (2006), review granted in part and remanded, 159 Wn.2d 1004 (2007), for its position that allegations contained in an information are sufficient to prove factual comparability. Brief of Respondent, at 32. The Farnsworth

court cited to State v Morley, 134 Wn.2d 588, 952 P.2d 167 (1998), for this proposition. Farnsworth, 133 Wn. App. at 18. But Morley predates Apprendi v. New Jersey, 530 U.S. 466, 120 S. Ct. 2348, 147 L. Ed. 2d 435 (2000) by two years and In re Personal Restraint of Lavery, 154 Wn.2d 249, 111 P.3d 837 (2005) by seven years. These more recent cases require facts to be admitted, stipulated, or proved beyond a reasonable doubt to the fact finder, and an allegation in the information does not satisfy this standard. Compare State v. Moncrief, 137 Wn. App. 729, 730-734, 154 P.3d 314 (2007) (defendant's signed stipulation in prior case that victim was only six years old sufficient to prove factual comparability on age element).

One of the cases discussed with approval in Lavery demonstrates the point quite well. In State v. Ortega, 120 Wn. App. 165, 84 P.3d 935 (2004), review granted in part and remanded, 154 Wn.2d 1031 (2005), the defendant had a prior Texas conviction for second-degree indecency with a child. The State maintained this crime was comparable to the Washington crime of first-degree child molestation. Ortega, 120 Wn. App. at 168, 173. The pertinent age elements differed, however. The Texas offense covered victims younger than 17 while the Washington offense covered victims younger than 12. Various documents and the testimony of a witness

demonstrated the Texas victim was 10 years old, thereby satisfying the Washington offense. Ortega, 120 Wn. App. at 172-174. Still, the sentencing court refused to treat the Texas conviction as comparable to a Washington felony, reasoning there was no indication the victim's precise age had been proved to a jury beyond a reasonable doubt. Ortega, 120 Wn. App. at 169 (citing Apprendi).

It was with Ortega in mind that the Lavery Court noted the difficulty with factual comparability under Apprendi:

Any attempt to examine the underlying facts of a foreign conviction, facts that were neither admitted or stipulated to, nor proved to the finder of fact beyond a reasonable doubt in the foreign conviction, proves problematic. Where the statutory elements of a foreign conviction are broader than those under a similar Washington statute, the foreign conviction cannot truly be said to be comparable.

Lavery, 154 Wn.2d at 258.

The same rule applies to Irby's age. As an initial matter, after reviewing Irby's opening brief, undersigned counsel notes that he failed to assign error to the court's finding of fact 1, in which the sentencing court found that Irby was born June 10, 1958. CP 1204. This was an oversight. The brief assigns error to the court's later conclusion (conclusion 1) using that date to calculate Irby's age. Brief of Appellant, at 1. The argument section of the brief also makes it clear Irby challenges the court's attempts

to determine the ages and age disparities of those involved in the 1976 offense. Brief of Appellant, at 21-25. Moreover, the State has fully addressed Irby's age in its response brief. Brief of Respondent, at 32-35. Therefore, Irby asks this Court to overlook this oversight and treat entry of the finding as challenged. See State v. Olson, 126 Wn.2d 315, 318-324, 893 P.2d 629 (1995) (failure to assign error in opening brief will be overlooked where issue addressed in brief and nature of argument clear); RAP 1.2(a) (rules liberally construed to facilitate decisions on the merits).

The State claims that Irby was at least age 17 at the time of the 1976 offense and 18 by the time of trial. In support, the State points out that Irby was charged and tried in adult court. Brief of Respondent, at 34-35. But because former RCW 9.79.210 only required the accused to be "over sixteen years of age," Irby had no incentive to litigate whether he was 16, 17, or 18 at the time. Moreover, the fact the case ended up in adult court does not establish Irby's age, either. Consistent with the current system, in 1976 courts had the authority to waive juvenile court jurisdiction for juvenile offenders. See former RCW 13.04.120 ("If, upon investigation, it shall appear that a child has been arrested upon the charge of having committed a crime, the court, in its discretion, may order such child to be

turned over to the proper officers for trial under the provisions of the criminal code.").

To conclude the victim in the 1976 case was 13 years old and Irby was at least 17 is to engage in judicial fact-finding prohibited under Lavery and the Sixth Amendment.

4. THE STATE FAILED TO PROVE THAT INTERVENING MISDEMEANOR CONVICTIONS PREVENTED IRBY'S ASSAULT CONVICTION FROM WASHING OUT.

The Washington Supreme Court has not employed ER 1004's "bad faith" standard where the State has destroyed the judgment in a prior case. Under ER 1002, the Supreme Court expressly reserved its right to adopt a different standard. The rule provides, "To prove the content of a writing, recording, or photograph, the original writing, recording, or photograph is required, except as otherwise provided in these rules or by rules adopted by the Supreme Court of this state or by statute." ER 1002 (emphasis added).

Choosing to exercise this right, the Supreme Court has made it clear that "[t]he state may introduce other comparable evidence only if it is shown that the writing is unavailable for some reason other than the serious fault of the proponent." State v. Lopez, 147 Wn.2d 515, 519, 55 P.3d 609 (2002). This tougher burden for the State is likely the product of basic

principles of due process, which require certain minimum levels of reliability at sentencing hearings. See State v. Ford, 137 Wn.2d 472, 481, 973 P.2d 452 (1999). Requiring copies of judgments is consistent with these principles because it ensures reliability. And the "serious fault" standard encourages retention of the documents.

While the State argues it did not act in bad faith when it destroyed the records in Irby's cases (Brief of Respondent, at 41-45), Irby has not alleged bad faith. He has alleged serious fault, an allegation the State has not and cannot deny.

Moreover, as argued in Irby's opening brief, even if the sentencing court could have properly considered the unsigned docket sheets, they are not sufficiently comparable to certified judgments. In its brief, the State fails to cite a single case where unsigned court dockets -- without something more -- satisfied the State's burden of proof. The docket sheets were insufficient to prove Irby's criminal history. Therefore, his 1984 conviction washed out and should not have been treated as a strike offense.

**B. ARGUMENT IN RESPONSE TO CROSS-APPEAL**

Assuming Irby's conviction for aggravated murder were affirmed, he would be subject to life in prison under RCW 10.95.030(1).

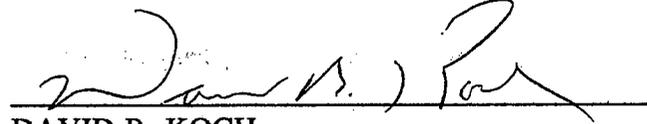
C. CONCLUSION

For the foregoing reasons, and those contained in Irby's opening brief, this Court should reverse and remand for a new trial.

DATED this 15<sup>th</sup> day of August, 2008.

Respectfully submitted,

NIELSEN, BROMAN & KOCH, PLLC

A handwritten signature in black ink, appearing to read "David B. Koch", is written over a horizontal line.

DAVID B. KOCH  
WSBA No. 23789  
Office ID No. 91051

Attorneys for Appellant/Cross-Respondent