

SUPREME COURT NO. 82665-0

IN THE SUPREME COURT OF THE STATE OF WASHINGTON

STATE OF WASHINGTON,

Petitioner,

v.

TERRENCE J. IRBY,

Respondent.

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

The Honorable John M. Meyer, Judge

SUPPLEMENTAL BRIEF OF RESPONDENT

DAVID. B. KOCH
Attorney for Respondent

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

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A. SUPPLEMENTAL ISSUE STATEMENT

Jury selection is a critical stage of trial and appellant had a constitutional right to attend and participate. When the court conducted a portion of jury selection by e-mail, only defense counsel and the prosecuting attorney participated in the process. There is no indication appellant was present or consulted in any way. Did this violate appellant's constitutional rights?

B. SUPPLEMENTAL STATEMENT OF THE CASE

1. Trial Proceedings/Voir Dire

The Skagit County Prosecutor's Office charged Terrance Irby with multiple criminal offenses. CP 1-4. On December 27, 2006, in Irby's presence, the parties and Judge John Meyer agreed that on Tuesday, January 2, 2007, prospective jurors would be provided with a written questionnaire and given the necessary oath without the attorneys or Irby being present. The parties would then appear and question the jurors on Wednesday, January 3. There was no indication whatsoever that jurors might be removed from the panel prior to face-to-face questioning in Irby's presence on January 3. RP (12/27/06) 14-16, 30.

As planned, jury selection began on January 2. Jurors were sworn and provided the questionnaire. RP (1/3/07 "Vol. 1") 2; CP

1234-1236. Completed copies were apparently distributed to counsel for review back at their respective offices. Judge Meyer had previously indicated he was amenable to “powering through” jury selection in order to start the presentation of evidence on Thursday, January 4. He wanted to be “extremely efficient.” RP (12/27/06) 29.

Just after 1:00 p.m., Judge Meyer sent an e-mail message to counsel suggesting that certain potential jurors be removed from Irby’s panel:

I note that 3, 23, 42 and 59 were excused after one week by the Court Administrator.

17 home schools, and 3 weeks is a long time.

77 has a business hardship.

36, 48, 49, and 53 had a parent murdered.

Any thoughts? If we’re going to let any go, I’d like to do it today.

John M. Meyer, Judge
Skagit County Superior Court

CP 1279-1280.

Defense counsel indicated he had no objection to releasing some or all of these jurors. The prosecutor’s response is not part of the record, but a subsequent message from Judge Meyer indicates the State objected to releasing jurors 36, 48, and 49. CP 1279.

The court released the seven jurors for whom neither attorney

had an objection. The clerk's minutes indicate, "In chambers not on the record. Counsel stipulate to excusing the following jurors for cause: #7, 17, 23, 42, 53, 59 & 77."¹ CP 1239. The minutes also indicate Irby was in custody and not present in court on January 2. CP 1239. There is nothing in the record indicating Irby was ever consulted or informed about the dismissal of these jurors.

2. Argument and Decision on Appeal

On appeal, Irby argued that the trial court's dismissal of the seven jurors via e-mail violated his constitutional right to be present at all critical stages of his trial. See Brief of Appellant, at 13-17. The Court of Appeals agreed. Recognizing that selection of one's jury is a critical stage, the court held that "these excusals violated Irby's right to be present and contribute to jury selection." Slip op., at 5. The court did not address harmless error because the State had failed to argue the issue in its briefing. Slip op., at 5-6. Irby's convictions were reversed and his case remanded for a new trial.² Slip op., at 6.

¹ While Judge Meyer's initial e-mail message proposed that counsel consider juror 3, a later message indicates he had intended instead to list juror 7. CP 1279.

² In addition to Irby's claim on appeal that he was denied his right to be present at a critical stage of trial, Irby also argued he had been denied his constitutional right to a public trial and

The State filed a Motion for Reconsideration, which was denied. The State then filed a Petition for Review, which this Court granted.

C. ARGUMENT

THE FAILURE TO INCLUDE IRBY IN THE
PROCESS OF STRIKING JURORS VIOLATED HIS
RIGHT TO BE PRESENT FOR TRIAL.

Due Process guarantees any person accused of a crime the right to be present for all critical stages of the prosecution. U.S. Const. amends. 5, 6, 14; Const. art. 1, §§ 3, 22; Kentucky v. Stincer, 482 U.S. 730, 745, 107 S. Ct. 2658, 96 L. Ed. 2d 631 (1987); United States v. Gagnon, 470 U.S. 522, 526, 105 S. Ct. 1482, 84 L. Ed. 2d 486 (1985); Illinois v. Allen, 397 U.S. 337, 338, 90 S. Ct. 1057, 25 L. Ed. 2d 353 (1970). The Washington Constitution specifically provides for the right to "appear and defend in person." Const. art. 1, § 22.

There is no constitutional right when the defendant's "presence would be useless, or the benefit but a shadow[.]"

improperly sentenced as a persistent offender. See Brief of Appellant, at 7-13, 18-32. Because the Court of Appeals reversed based on Irby's exclusion from jury selection, it did not reach the other issues. See Slip op., at 2, 6. Should this Court reverse the Court of Appeals, those issues will need to be addressed, along

Stincer, 482 U.S. at 745. However, the defendant has the right to be present whenever “his presence has a relation, reasonably substantial, to the fulness of his opportunity to defend against the charge” In re Personal Restraint of Lord, 123 Wn.2d 296, 306, 868 P.2d 835 (quoting Gagnon, 470 U.S. at 526), cert. denied, 513 U.S. 849 (1994).

The constitutional right to be present for the selection of one’s jury is well recognized. See Lewis v. United States, 146 U.S. 370, 373-374, 13 S. Ct. 136, 36 L. Ed. 1011 (1892); Gomez v. United States, 490 U.S. 858, 873, 109 S. Ct. 2237, 104 L. Ed. 2d 923 (1989); State v. Wilson, 141 Wn. App. 597, 604, 171 P.3d 501 (2007). Consistent with this constitutional guarantee, CrR 3.4(a) explicitly requires the defendant’s presence “at every stage of the trial including the empanelling of the jury” [F]or purposes of CrR 3.4 the beginning of trial occurs, at the latest, when the jury panel is sworn for voir dire and before any questioning begins.” State v. Thomson, 70 Wn. App. 200, 211, 852 P.2d 1104 (1993) (emphasis added), aff’d, 123 Wn.2d 877, 872 P.2d 1097 (1994).

with the issues raised in Mr. Irby’s Statement of Additional Grounds for Review. See RAP 13.7(b).

Far from being “useless” or its benefit “but a shadow,” “[j]ury selection is the primary means by which [to] enforce a defendant’s right to be tried by a jury free from ethnic, racial, or political prejudice, or predisposition about the defendant’s culpability[.]” Gomez, 490 U.S. 858 at 873 (citations omitted). The defendant’s presence “is substantially related to the defense and allows the defendant ‘to give advice or suggestion or even to supersede his lawyers.’” Wilson, 141 Wn. App. at 604 (quoting Snyder v. Massachusetts, 291 U.S. 97, 106, 54 S. Ct. 330, 78 L. Ed. 2d 674 (1934), overruled on other grounds by Malloy v. Hogan, 378 U.S. 1, 84 S. Ct. 1489, 12 L. Ed. 2d 653 (1964)); see also United States v. Gordon, 829 F.2d 119, 124 (D.C. Cir. 1987) (Fifth Amendment requires opportunity to give advice or suggestions to lawyer when assessing potential jurors).

Similar to CrR 3.4, the constitutional right to be present and participate in the selection of one’s jury attaches at the very outset of the process – “at least from the time when the work of empanelling the jury begins.” Gomez, 490 U.S. at 873 (quoting Lewis, 146 U.S. at 374. In Irby’s case, “the work of empanelling the jury” began on January 2, when jurors were sworn and filled out the questionnaires. The process was certainly under way that

afternoon, by the time Judge Meyer sent counsel an e-mail asking them to contemplate the removal of ten jurors. The State has conceded this point. See Brief of Respondent, at 25 (“the jury selection process was occurring”); Motion for Reconsideration, at 3 (“jury selection began with the jurors completing a questionnaire”). Yet, without Irby’s knowledge, input, or consent, the attorneys and Judge Meyer dismissed seven of the ten jurors from his panel.

The State has consistently speculated that defense counsel may have consulted with Irby after receiving Judge Meyer’s e-mail and before responding. See Brief of Respondent, at 21, 25; Motion for Reconsideration, at 13, 19; Petition for Review, at 16. Given that Irby was in his jail cell, this is highly unlikely. In any event, “where the [defendant’s] personal presence is necessary in point of law, the record must show the fact.” Lewis, 146 U.S. at 372; see also People v. Williams, 858 N.Y.S.2d 147, 52 A.D.3d 94, 96-97 (2008) (exclusion of defendant from sidebar conference where jurors excused by agreement violates right to be present; court refuses to speculate that defendant could overhear conversations).

There is no evidence Irby would have consented to dismissal of the jurors. As to jurors 7, 23, 42, and 59, Judge Meyer noted they “were excused after one week by the Court

Administrator.” CP 1279. Although not entirely clear, it appears the administrator planned to excuse these jurors after one additional week of service. But one, several, or all of these jurors may have been desirable in Irby’s eyes. Moreover, one, several, or all of them may have been willing to serve beyond the additional week envisioned by the administrator. Trial was projected to last up to three weeks. See RP (12/27/06) 29-30. That the administrator nonetheless provided these individuals for Irby’s case suggests they could have extended their service.

Judge Meyer also indicated, “17 home schools, and 3 weeks is a long time” and “77 has a business hardship.” CP 1280. As with the other dismissed jurors, neither the attorneys nor the court had any right to dismiss these jurors in Irby’s absence. Both jurors may have been attractive to Irby and, at his behest, questioning may have revealed both were fully willing to make arrangements allowing them to serve.

Finally, Judge Meyer noted that “36, 48, 49 and 53 had a parent murdered.” CP 1280. The prosecutor objected to releasing jurors 36, 48, and 49, but did not lodge an objection to releasing juror 53. As a result, only juror 53 was released. CP 1270. Irby may also have wanted this juror on his panel. The fact an

individual was a crime victim (or a parent was a victim) does not automatically disqualify a juror from service. Juror 53 may have possessed attributes that made him or her a very attractive juror in Irby's eyes. And the fact the prosecutor felt there was no need to keep juror 53 certainly heightens the prospect this juror possessed certain characteristics beneficial to the defense. Yet, Irby played no role in juror 53's removal from the panel.

Defense counsel's response to Judge Meyer's e-mail indicates he did not have strong feelings on the subject. He simply replied, "No objection from the defense to letting some or all go." CP 1279. Notably, the court only dismissed those jurors for which both attorneys agreed. This is not a situation where the court had already decided to release all ten. Had Irby been provided his right to object to their release, and exercised that right, all seven of the jurors would have returned the following day and been available for full examination in Irby's presence (just as jurors 36, 48, and 49 were retained at the prosecutor's request). And three of the seven released – jurors 7, 17, and 23 – would have been within the group from which the final jury was selected. See CP 1274, 1278 (juror 37 (Mark Cook) last individual used to select jury).

Moreover, there can be little doubt Irby would have wanted to be involved in the process of deciding whether these jurors should be removed. Speaking to Judge Meyer on the last court day before jury selection began, defense counsel described Irby as “someone who has very strong opinions about the conduct of this case and someone who Your Honor well knows has been intimately involved in the work up and preparation of this case.” RP (12/27/06) 2-3.

The situation in this case bears little resemblance to the purely legal proceedings criminal defendants have no right to attend. See In re Personal Restraint of Pirtle, 136 Wn.2d 467, 484, 965 P.2d 593 (1998) (no right to attend hearing on wording of jury instructions or issue of jury sequestration, but presence may have been required for conference on alleged juror misconduct); In re Lord, 123 Wn.2d at 306 (legal rulings on evidentiary and discovery motions; determining wording of instructions and jury questionnaire); State v. Bremer, 98 Wn. App. 832, 834-35, 991 P.2d 118 (2000) (discussion of jury instructions purely a legal matter; defendant could not have contributed); State v. Berrysmith, 87 Wn. App. 268, 273-276, 944 P.2d 397 (1997), review denied,

134 Wn.2d 1008 (1998) (required withdrawal of attorney purely a legal matter). The Court of Appeals properly found a violation.³

Having established a violation of Irby's right to be present at a critical stage, the remaining issue is whether reversal is required. As previously mentioned, the State did not address the harmless error standard in its initial briefing. In its Motion for Reconsideration and Petition for Review, it argued that a violation of the right to participate in jury selection is not structural error and therefore subject to harmless error analysis. Motion for Reconsideration, at 23-25; Petition for Review, at 18-20. In the Court of Appeals, Irby assumed this type of error was subject to a constitutional harmless error analysis. See Brief of Appellant, at 15. He now believes it to be structural.

³ In its Petition for Review, the State argued that the Court of Appeals improperly presumed prejudice in Irby's case in finding a violation of his right to be present. Petition for Review, at 8. In In re Lord, this Court noted that prejudice will not be presumed in assessing whether a violation occurred. Rather, a defendant must demonstrate how his presence was necessary. Lord, 123 Wn.2d at 307; see also Wilson, 141 Wn. App. at 605 (citing Lord for proposition). No presumption was necessary in Irby's case, however. Irby was involved in every facet of his defense and his presence was necessary to ensure his right to actively participate in the selection of those individuals who would decide whether he spent the rest of his life in prison.

An error is structural, and therefore never harmless, when it “affect[s] the framework within which the trial proceeds, rather than simply an error in the trial process itself.” Arizona v. Fulminante, 499 U.S. 279, 310, 111 S. Ct. 1246, 113 L. Ed. 2d 302 (1991). A trial error subject to harmless error analysis is one “which occurred during the presentation of the case to the jury, and which may therefore be quantitatively assessed in the context of other evidence presented in order to determine whether its admission was harmless beyond a reasonable doubt.” Id. at 307-08. Structural errors, however, are “defects in the constitution of the trial mechanism, which defy analysis by ‘harmless-error’ standards.” Id. at 309. They affect “[t]he entire conduct of the trial from beginning to end[.]” Id.

In cases *not* involving jury selection, this Court and the Court of Appeals have applied a harmless error standard in assessing the denial of a defendant’s right to be present. See In re Personal Restraint of Benn, 134 Wn.2d 868, 920-21, 952 P.2d 116 (1998) (hearing on motion to continue trial); State v. Pruitt, 145 Wn. App. 784, 798-801, 187 P.3d 326 (2008) (bench trial in drug court; error not harmless beyond a reasonable doubt); see also Rushen v. Spain, 464 U.S. 114, 117-18, 104 S. Ct. 453 78 L. Ed. 2d 267

(1983) (*after* jury selected, ex parte communications between juror and judge in defendant's absence subject to harmless error review).

In determining whether structural error has occurred, courts should "consider the nature of a 'presence error' in the context of the specific proceeding from which the defendant was excluded." Hegler v. Borg, 50 F.3d 1472, 1476 (9th Cir.), cert. denied, 516 U.S. 1029 (1995). This Court has never determined whether, in the defendant's absence, the exclusion of potential jurors during the jury selection process can be harmless.

Far from being an error during the presentation of the case, which is quantifiable in light of the evidence presented, the improper removal of jurors outside the defendant's presence impacts the structure of the trial. It affects the conduct of the trial from beginning to end by changing the make up of those individuals available to determine the defendant's guilt. Like other structural errors, there is no way to accurately assess the impact other than to recognize there may have been one.

In this regard, the error in Irby's case is similar to other structural errors involving jury selection. In State v. Vreen, 143 Wn.2d 923, 927, 26 P.3d 236 (2001), this Court held that the

erroneous denial of a peremptory challenge, resulting in the juror sitting on the panel, is structural error. In doing so, this Court recognized that, short of taping jury deliberations, there was no way to determine the impact of improperly seating the juror. Nevertheless, the only appropriate remedy was a new trial. Vreen, 143 Wn.2d at 930-31; see also United States v. Martinez-Salazar, 528 U.S. 304, 316-17, 120 S. Ct. 774, 145 L. Ed. 2d 792 (2000) (seating any juror who should have been dismissed for cause structural error); Gray v. Mississippi, 481 U.S. 648, 668, 107 S. Ct. 2045, 95 L. Ed. 2d 622 (1987) (improper “for cause” removal of juror in death penalty cases structural error).

Moreover, this Court has held that denial of a defendant’s right to public trial, where the court has closed even a portion of the jury selection process to the public, is not subject to harmless error analysis. Reversal is required. State v. Brightman, 155 Wn.2d 506, 517, 122 P.3d 150 (2005); In re Orange, 152 Wn.2d 795, 814, 100 P.3d 291 (2004). This ensures preservation of both the defendant’s and the public’s right to open proceedings. See State v. Easterling, 157 Wn.2d 167, 174, 137 P.3d 825 (2006) (recognizing individual and public rights).

Similarly, not only does the right to be present for all of jury selection protect the individual defendant's right to fair trial, it "also rests upon society's interest in due process. . . ." Sturgis v. Goldsmith, 796 F.2d 1103, 1108-09 (9th Cir. 1986) (quoting Bustamante v. Eyman, 456 F.2d 269, 274-75 (9th Cir. 1972)). "The defendant's right to be present at all proceedings of the tribunal which may take his life or liberty is designed to safeguard the public's interest in a fair and orderly judicial system." Id. Just as reversal is automatic when the public is excluded from a portion of jury selection, the rule should be the same where the defendant is excluded from that process. There is no other satisfactory manner in which to ensure the individual's and the public's rights.

Courts in several other jurisdictions have determined that the defendant's exclusion from the process of selecting his jury requires reversal without an affirmative showing of prejudice. See United States v. Crutcher, 405 F.2d 239 (2nd Cir. 1968) ("there is no way to assess the extent of the prejudice, if any, a defendant might suffer by not being able to advise his attorney during the impaneling of the jury"; reversal required), cert. denied, 394 U.S. 908 (1969); State v. Carver, 94 Idaho 677, 496 P.2d 676, 679-680 (1972) (if the right to be present for jury selection "is to be upheld

the only alternative is a retrial”); State v. Bird, 308 Mont. 75, 43 P.3d 266, 272 (2002) (errors involving selection of jurors “indelibly affect the fairness of the trial” and are not amenable to harmless error review); Williams, 52 A.D.3d at 96 (exclusion of defendant “constitutes per se reversible error where the prospective juror is either seated on the jury, excused on consent, or peremptorily challenged by the defense”).

Even if this Court holds that the error in Irby’s case is not structural, reversal is still required unless the State can demonstrate the constitutional violation of his right to be present was harmless beyond any reasonable doubt. See State v. Rice, 110 Wn.2d 577, 613-14, 757 P.2d 889 (1988) (requiring State to prove error in replaying testimony without defendant harmless beyond a reasonable doubt), cert. denied, 491 U.S. 910 (1989); Pruitt, 145 Wn. App. at 798-799 (applying same standard).

Presumably, the only way in which the State could make this showing would be to demonstrate that none of the dismissed jurors could have served on Irby’s jury. This is not possible because jurors 7, 17, and 23 fell within the group that ultimately comprised the jury. As previously discussed, although the court administrator had apparently indicated jurors 7 and 23 would satisfy their

obligations for service in one week, there is nothing in the record indicating they were not interested, or at least open to, serving for a longer period if selected to serve in this case. All we know of juror 17 is that this individual home schooled and that Judge Meyer believed 3 weeks would be a long time to serve. But, as with jurors 7 and 23, there is nothing indicating 17 was not interested and fully able to serve in Irby's case.

A life sentence was at stake for Irby if convicted. He should have been consulted and heard regarding these jurors, as was his right, before they were removed from his panel. He was denied his right to be present for jury selection.

D. CONCLUSION

The Court of Appeals correctly found a violation of Irby's constitutional right to be present at a critical stage of trial. Irby's convictions must be reversed and his case remanded for a new trial.

DATED this 31st day of August, 2009.

Respectfully submitted,

NIELSEN, BROMAN & KOCH, PLLC



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

Attorneys for Respondent

IN THE SUPREME COURT OF THE STATE OF WASHINGTON

STATE OF WASHINGTON)	
)	
Petitioner,)	
)	NO. 82665-0
v.)	
)	
TERRANCE IRBY,)	
)	
Respondent.)	

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 31ST DAY OF AUGUST 2009, I CAUSED A TRUE AND CORRECT COPY OF THE **SUPPLEMENTAL BRIEF OF RESPONDENT** TO BE SERVED ON THE PARTY / PARTIES DESIGNATED BELOW BY DEPOSITING SAID DOCUMENT IN THE UNITED STATES MAIL.

[X] ERIL PETERSEN
SKAGIT COUNTY PROSECUTOR'S OFFICE
COURTHOUSE ANNEX
605 S. THIRD
MOUNT VERNON, WA 98273

[X] TERRANCE IRBY
DOC NO. 631794
WASHINGTON STATE PENITENTIARY
1313 N. 13TH AVENUE
WALLA WALLA, WA 99362

SIGNED IN SEATTLE WASHINGTON, THIS 31ST DAY OF AUGUST 2009.

x Patrick Mayovsky