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89619-4

IN THE SUPREME COURT

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OF THE STATE OF WASHINGTON

STATE OF WASHINGTON,

Respondent,

v.

UNTERS L. LOVE,

Appellant.

SUPPLEMENTAL BRIEF OF RESPONDENT

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ORIGINAL

INDEX

I. ISSUES PRESENTED 1

II. STATEMENT OF THE CASE 1

III. ARGUMENT 4

 A. A CRIMINAL DEFENDANT ALLEGING FOR THE FIRST TIME ON APPEAL THAT HIS CONSTITUTIONAL RIGHT TO BE PRESENT WAS VIOLATED MUST DEMONSTRATE THE EXISTENCE OF MANIFEST ERROR AFFECTING A CONSTITUTIONAL RIGHT PURSUANT TO RAP 2.5(A)(3)..... 4

 B. THE DEFENDANT HAS NOT DEMONSTRATED MANIFEST CONSTITUTIONAL ERROR WHERE HIS FOR-CAUSE CHALLENGES TO PROSPECTIVE JURORS WERE PRESENTED TO THE JUDGE AND PROSECUTOR AT THE BENCH WHILE DEFENDANT REMAINED AT COUNSEL TABLE..... 7

 1. There was no manifest constitutional error because there was no constitutional violation relating to the right to be present. 7

 2. RAP 2.5 prevents the bringing of this belated presence claim because there was no “manifest error”..... 12

 C. THE DEFENDANT’S CONSTITUTIONAL RIGHT TO A PUBLIC TRIAL WAS NOT VIOLATED WHEN HIS TWO FOR-CAUSE CHALLENGES TO PROSPECTIVE JURORS WERE EXERCISED IN A SIDEBAR CONFERENCE AND A PEREMPTORY CHALLENGE WAS EXERCISED BY THE SILENT EXCHANGE OF THE JUROR SELECTION FORM BETWEEN COUNSEL..... 16

IV. CONCLUSION 20

TABLE OF AUTHORITIES

CASES

Campbell v. Rice, 408 F.3d 1166, 1172 (9th Cir.2005)..... 15

Gov't of Virgin Islands v. Weatherwax, 77 F.3d 1425,
1434 (3d Cir. 1996)..... 9

In re Benn, 134 Wn.2d 868, 952 P.2d 116 (1998)..... 15

In re Lord, 123 Wn.2d 296, 868 P.2d 835 (1994) 8, 10, 15

Johnson v. United States, 520 U.S. 461, 117 S.Ct. 1544,
137 L.Ed.2d 718 (1997)..... 6

Kentucky v. Stincer, 482 U.S. 730, 107 S.Ct. 2658,
96 L. Ed. 2d 631 (1987)..... 7, 8, 10

Lewis v. United States, 146 U.S. 370, 13 S.Ct. 136, 138,
36 L. Ed. 1011 (1892)..... 19

New Meadows Holding Co. v. Wash. Water Power Co.,
102 Wn.2d 495, 687 P.2d 212 (1984)..... 4

People v. Colon, 90 N.Y.2d 824, 682 N.E.2d 978, 979 (1997) 9

Rushen v. Spain, 464 U.S. 114, 104 S.Ct. 453,
78 L. Ed. 2d 267 (1983)..... 15

State v. Brightman, 155 Wn.2d 506, 122 P.2d 150 (2005)..... 18

State v. Caliguri, 99 Wn.2d 501, 664 P.2d 466 (1983)..... 15

State v. Gentry, 125 Wn.2d 570, 888 P.2d 1105 (1995) 16

State v. Guloy, 104 Wn.2d 412, 705 P.2d 1182 (1985) 15

State v. Irby, 170 Wn.2d 874, 246 P.3d 796 (2011) 6, 13, 14, 15

State v. Love, 176 Wn.App. 911, 309 P.3d 1209 (2013),
review granted in part, 340 P.3d 228 (2015)..... passim

State v. Lynn, 67 Wn.App. 339, 835 P.2d 251 (1992) 14

<i>State v. O'Hara</i> , 167 Wn.2d 91, 217 P.3d 756 (2009).....	12
<i>State v. Phillips</i> , 65 Wash. 324, 118 P. 43 (1911)	16
<i>State v. Rice</i> , 110 Wn.2d 577, 757 P.2d 889 (1988).....	7
<i>State v. Riley</i> , 121 Wn. 2d 22, 846 P.2d 1365, 1370 (1993).....	6
<i>State v. Scott</i> , 110 Wn.2d 682, 757 P.2d 492 (1988)	5, 14
<i>State v. Smith</i> , 181 Wn.2d 508, 334 P.3d 1049, 1052 (2014).....	16, 17, 18, 19
<i>State v. Strine</i> , 176 Wn.2d 742, 293 P.3d 1177, 1180 (2013)	4, 5
<i>State v. Sublett</i> , 176 Wn.2d 58, 292 P.3d 715, 762 (2012).....	6, 16
<i>State v. Valladares</i> , 31 Wn.App. 63, 639 P.2d 813 (1982), <i>aff'd in part, rev'd in part</i> , 99 Wn.2d 663, 664 P.2d 508 (1983).....	5
<i>State v. Wilson</i> , 141 Wn.App. 597, 171 P.3d 501 (2007)	15, 16
<i>United States v. Bascaro</i> , 742 F.2d 1335, (11th Cir.1984).....	11
<i>United States v. Curtis</i> , 635 F.3d 704, (5th Cir.2011)	11
<i>United States v. Gagnon</i> , 470 U.S. 522, 526, 105 S.Ct. 1482, 84 L. Ed. 2d 486 (1985).....	8
<i>United States v. Gayles</i> , 1 F.3d 735, (8th Cir.1993)	11
<i>United States v. Lewis</i> , 492 F.3d 1219 (11th Cir.2007)	12
<i>United States v. Reyes</i> , 764 F.3d 1184 (9th Cir. 2014).....	10, 11, 12

STATUTES AND CONSTITUTIONAL PROVISIONS

Fed. R. Crim P. 51 and 52.....	4
U.S. CONST. amend. VI, XIV	7
WASH. CONST. art. I, §§ 3, 22	7

RULES

RAP 2.5..... 4, 5, 6

I. ISSUES PRESENTED

1. Whether a criminal defendant alleging for the first time on appeal that his constitutional right to be present was violated must demonstrate the existence of manifest error affecting a constitutional right pursuant to RAP 2.5(a)(3), and if so, whether the defendant in this case demonstrated manifest error in his exclusion from a sidebar conference where challenges to prospective jurors for cause were exercised?
2. Whether in a criminal prosecution the defendant's constitutional right to a public trial was violated when for-cause challenges to prospective jurors were exercised in a sidebar conference and peremptory challenges were exercised by the silent exchange of juror selection forms between counsel?

II. STATEMENT OF THE CASE

At the beginning of voir dire, the nine criminal charges were read to the jury. RP 78-82. The questioning of potential juror members was conducted by the court, the prosecutor, and defense counsel. RP 83-132. At the conclusion of voir dire, the trial judge called the attorneys forward for a bench conference to discuss challenges for cause.¹

¹ *State v. Love*, 176 Wn.App. 911, 913-14, 309 P.3d 1209, 1211 (2013), *review granted in part*, 340 P.3d 228 (2015).

Defense counsel's for-cause challenges of Jurors 15 and 30 were accepted without argument or discussion.² RP 132-33. It seems apparent that Mr. Love felt Juror 15 was unfit for this case because she had revealed during voir dire that her house and car had been broken into several times, and because her ex-husband had been sent to prison for writing insufficient checks. RP 90-91. Her brother-in-law was Chief of Police in a small town in Wisconsin. RP 94. She also expressed concern that the case may take more than two days because she had a medical appointment in two days for a test, "and it could be cancer;" therefore she did not want the trial to go longer than that. RP 96, lines 20-25. Juror 15 averred she could not be fair and objective, stating, "I don't think I could be objective. Nine counts rattling off the various things over a period of a year *makes me suspicious that the defendant is guilty.*" RP 95, lines 12-15. (Emphasis added). She restated that she was concerned regarding her

² COURT: Any for-cause challenges?
DEFENSE: Fifteen.
COURT: Fifteen? Any objection
PROSECUTOR A: For cause, 18? Is that what you - - -
COURT: No. Fifteen.
DEFENSE: One-five.
PROSECUTOR A: I think that's - - - the state has no objection to No. 15 being struck for cause.
COURT: Any others?
DEFENSE: Number 30.
COURT: Number 30?
PROSECUTOR B: Yeah, no objection.

ability to give Mr. Love a fair trial, stating: “*I cannot be fair on this particular case*, I believe, because of my history being married to someone who wrote bad checks and going to prison for that.” RP 103. Additionally, Juror 15 had been elected foreman of a jury on a prior case – because she took good notes - on a two count criminal trial. That defendant was convicted and went to prison for six months: Juror 15 sewed up his arm two months later when he appeared, wearing an electronic tether, at the clinic where she worked. RP 112 and 102-103.

Juror 30 twice asserted he could not be fair, because his mother had lost \$100,000 to some people that had sold her some stocks that apparently did not exist. RP 107, RP 111. Also, Juror 30’s daughter’s car had been broken into and several things had been taken. RP 91.

After the for-cause challenges, counsel also discussed three other jurors, but no challenges were raised to those jurors after it appeared they were too far down the list to end up serving on the panel. *Love*, at 914. Both counsel assented to the trial judge's suggestion that two alternates be used. The court reporter then noted that the bench conference concluded. *Love*, at 914.

The attorneys returned to their tables where the peremptory challenge process was conducted while the jurors were allowed to stretch and talk. RP 134.

[T]he handwriting on the record of jurors suggests that the prosecutor exercised the first [and only] peremptory strike by drawing a line through the name of the juror and putting a “P1” next to it. After that, the parties waived further challenges by so noting in writing on the form and then signing the document. They appear to have acted off of the written form, which likely was passed back and forth.

Love, at 914 fn. 1.

III. ARGUMENT

A. A CRIMINAL DEFENDANT ALLEGING FOR THE FIRST TIME ON APPEAL THAT HIS CONSTITUTIONAL RIGHT TO BE PRESENT WAS VIOLATED MUST DEMONSTRATE THE EXISTENCE OF MANIFEST ERROR AFFECTING A CONSTITUTIONAL RIGHT PURSUANT TO 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 not first raised at trial. *State v. Strine*, 176 Wn.2d 742, 749, 293 P.3d 1177, 1180 (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), *aff'd in part, rev'd in part*, 99 Wn.2d 663, 664 P.2d 508 (1983)).

The appellate court in this case applied RAP 2.5(a)(3) analysis. *State v. Love*, 176 Wn.App. 911, 921, 309 P.3d 1209 (2013),

review granted in part, 340 P.3d 228 (2015). There is no reason in the present case to abandon this court's requirements for appellate review set forth in RAP 2.5(a)(3).

Petitioner's tacit claim that *State v. Irby*, 170 Wn.2d 874, 246 P.3d 796 (2011), involves a different analysis is without merit. Petitioner's Brief 14-15. While the application of *Irby* to this case is discussed later in the brief, 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, this 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, 1370 (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)³ are well-

³ The Supreme Court has held that Fed.R.Crim.P. 52(b) (the federal plain error rule, which is similar to our RAP 2.5), applies to structural errors. *Johnson v. United States*, 520 U.S. 461, 466, 117 S.Ct. 1544, 137 L.Ed.2d 718 (1997). As Justice Wiggins points out in his concurrence in *State v. Sublett*, 176 Wn.2d 58, 153-54, 292 P.3d 715, 762 (2012), "RAP 2.5 will always be satisfied in cases of structural error like *Bone-Club*, *Orange*, *Easterling*, and *Brightman*. However, we held in *Momah* that not all public trial errors are structural. 167 Wn.2d at 150-51, 217 P.3d 321; see *Paumier*, 176 Wn.2d at 53-

principled and purposed; the rule was properly applied by the appellate court in this case.

B. THE DEFENDANT HAS NOT DEMONSTRATED MANIFEST CONSTITUTIONAL ERROR WHERE HIS FOR-CAUSE CHALLENGES TO PROSPECTIVE JURORS WERE PRESENTED TO THE JUDGE AND PROSECUTOR AT THE BENCH WHILE DEFENDANT REMAINED AT COUNSEL TABLE.

The defendant in this case has not demonstrated manifest constitutional error in his exclusion⁴ from a sidebar conference where his for-cause challenges to prospective jurors were communicated to the judge and prosecutor because he cannot show constitutional error occurred or that he was prejudiced by the process.

1. 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 himself against criminal charges.⁵ 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*

56, 288 P.3d 1126 (Wiggins, J., dissenting). And where an error is not structural, we must conduct a thorough RAP 2.5 analysis.”

⁴ There is not a showing in the record that Mr. Love was excluded from the sidebar agreement as to his challenges for cause. The record only shows that he was not invited to be present at the bench when his attorney presented his for-cause challenges.

⁵ Although Love cites to the Washington Constitution in his briefing on this issue, he makes no claim that our constitution provides broader or different protection than the federal constitution in this context.

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.

Defendant was present in court with his attorney throughout the voir dire process. His attorney questioned prospective jurors. After juror questioning was concluded, the trial court called the parties forward to discuss any for-cause challenges. Defendant's attorney challenged Juror 15 and 30 for-cause. RP 132-33. Because both jurors had proclaimed they could not be fair to the defendant, the State agreed to the challenges and there was no discussion or objection to the challenges for-cause.

This bench sidebar did not implicate defendant's right to be present. He was present when the jury was asked and answered questions.

He had the ability to discuss the juror qualifications with his attorney. His attorney presented these decisions to the court. The decision regarding which jurors to challenge for-cause ultimately rests with the attorney. See *People v. Colon*, 90 N.Y.2d 824, 825-26, 682 N.E.2d 978, 979 (1997):

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]).

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).”).

Love was present in the courtroom, but not present at the bench, when his challenges for-cause were relayed to the court and the prosecutor by his attorney. He was able to see his challenges at work when the judge informed the jurors of the final selection. RP 135-137. Love's presence at the bench would bear no relation, let alone a substantial one, to the fullness of his opportunity to defend against the charges. *Stincer*, 482 U.S. at 745. His presence at the bench would serve no purpose or benefit. Love would not have had the right to be present during in-chambers or bench conferences between court and counsel on legal matters, at least where those matters do not require resolution of disputed facts. *Lord*, 123 Wn. 2d 296. Here, there was no dispute as to Mr. Love's challenges for-cause.

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.⁶ Importantly 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 peremptory 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

⁶ “Applying this rule, we conclude that although the district court's decision to conduct voir dire of Juror H outside of Reyes's presence was inconsistent with Rule 43, it did not violate the narrower protections afforded by the Constitution.” *Reyes*, 764 F.3d at 1196

⁷ Several other courts have held that Rule 43 does not require the defendant's presence under similar circumstances. See, e.g., *United States v. Curtis*, 635 F.3d 704, 716 (5th Cir.2011) (holding that the defendant's “right to be present at every stage of his trial” was not violated where he “was present when the peremptory challenges were given formal effect via the impaneling of the jury” and had an “opportunity to consult with his attorney before his attorney submitted the peremptory challenges”); *United States v. Gayles*, 1 F.3d 735, 738 (8th Cir.1993) (“[The defendant] was present in the courtroom while the potential jurors were questioned. Although [the defendant] was absent later when his attorney made his strikes ... [the defendant] was present in the courtroom when the clerk gave the strikes effect by reading off the list of jurors who had not been stricken... [The defendant] was sufficiently present at the jury's impaneling to satisfy Rule 43 and the Constitution.”); *United States v. Bascaro*, 742 F.2d 1335, 1349–50 (11th Cir.1984) (holding that “the defendants were sufficiently present at the impaneling of the jury to

Therefore, no constitutional violation occurred when Love's attorney attended a sidebar exchange regarding his client's challenges for cause. However, if the court finds that the constitutional right of presence was implicated, there was no resulting manifest error entitling Mr. Love to any relief.

2. 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.⁸

satisfy the sixth amendment and Rule 43" where the defendants were in the courtroom when voir dire occurred and they had an opportunity to confer with their attorneys), *abrogated in part on other grounds by United States v. Lewis*, 492 F.3d 1219 (11th Cir.2007) (en banc).

United States v. Reyes, 764 F.3d 1184, 1192 (9th Cir. 2014)

⁸ Mr. Love has not established that the alleged constitutional error was manifest because he has not shown that he was prejudiced by the process.⁹ He was present beside his counsel during the information gathering phase of voir dire and apparently had the opportunity to provide any input necessary to whether to pursue any challenges for cause. His counsel then successfully challenged two jurors for cause, and the parties discussed but did not need to reach the qualifications of three other jurors who would not make it on to the panel. Having

Love claims that there is a mathematical possibility he could have had Juror 15 sit on his jury. For this possibility to have occurred, his attorney could not have challenged Juror 15 for-cause. Additionally, his attorney would have been required to use two preemptory challenges to theoretically keep Juror 15. Petition, at p. 15, second paragraph. And the State could not have used a preemptory challenge. Love's proffer of this hypothetical outcome is a distorted attempt to bring his situation into some favorable comparison with the facts underlining this court's reasoning in *Irby*. It is without basis because *Irby* is dissimilar.

In *Irby*, the court concluded from the facts⁹ that the defendant had no input into the jury selection discussions that had occurred between the judge, the prosecutor, and the defense attorney because he was in jail and was not present. It is most likely that *Irby* was not even aware voir dire

succeeded in his cause challenges at the sidebar conference, he simply cannot show how he was prejudiced by the procedure.

[Footnote] 9. We question, although do not decide, whether Mr. Love has established he was not present. As we have just determined, the courtroom was not closed by the sidebar conference and Mr. Love was admittedly in the courtroom during jury selection. If "present" means standing beside counsel he might be correct, but there has been no authority presented suggesting that presence has such a meaning. He was in the courtroom, which was "open" to him.

State v. Love, 176 Wn.App. at, 921.

⁹ "The minutes also indicate that *Irby* was in custody at the time, and there is no indication there or elsewhere in the record before us that *Irby* was consulted about the dismissal of any of the jurors who had taken the juror's oath." *Irby*, 170 Wn.2d at 878.

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 “apparently had the opportunity to provide any input necessary to whether to pursue any challenges for-cause.” *Love*, 176 Wn.App. at 921.

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). *Love*'s strained hypothetical does not establish the asserted error was “manifest,” “truly of constitutional magnitude.” *Id.* If the error is “purely abstract and theoretical,” it is not subject to review under RAP 2.5(a)(3). *State v. Lynn*, 67 Wn.App. at 346.

Interestingly, *Love* could have made an arguable ineffective assistance of counsel claim *had his attorney not sought a for-cause*

*challenge of prospective Juror 15.*¹⁰ However, Love has not established manifest error. Any 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 Love's for-cause challenges at the bench had no practical or identifiable consequences in this case, other than to remove Juror 15 for-cause.

It is the defendant's burden to demonstrate how his absence affected the outcome; prejudice will not be presumed. *Lord*, 123 Wn.2d

¹⁰ It was noted that juror 15 repeatedly stated she could not be fair in Love's particular case, that she was "suspicious that the defendant [Love] is guilty." In *Lord*, the court noted that counsel's failure to challenge these jurors was not ineffective unless such challenges for cause would have been granted. *Lord*, 123 Wn.2d at 309-10.

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 Love's presence might have affected the outcome is insufficient. *Wilson*, 141 Wn.App. at 605-06. Love cannot show how he was prejudiced when his attorney went to the bench to inform the court and State of his for-cause 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). Love has not demonstrated how the release of any juror impacted his right to an impartial jury, nor does any such prejudice appear in the record.

C. THE DEFENDANT'S CONSTITUTIONAL RIGHT TO A PUBLIC TRIAL WAS NOT VIOLATED WHEN HIS TWO FOR-CAUSE CHALLENGES TO PROSPECTIVE JURORS WERE EXERCISED IN A SIDEBAR CONFERENCE AND A PEREMPTORY CHALLENGE WAS EXERCISED BY THE SILENT EXCHANGE OF THE JUROR SELECTION FORM BETWEEN COUNSEL.

In *State v. Smith*, 181 Wn.2d 508, 513-14, 334 P.3d 1049, 1052 (2014), the court adopted the three-step framework set forth in Justice Madsen's concurring opinion in *State v. Sublett*,¹¹ as the analytical framework to guide the court's analysis of public trial right cases. The

¹¹ *State v. Sublett*, 176 Wn.2d 58, 92, 292 P.3d 715 (2012) (Madsen, C.J., concurring).

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 first proceeding at issue in this case is a sidebar conference where defendant made two for-cause challenges. No exception was taken by the State, and no argument was had because of the voir dire answers given by the two jurors subject to the for-cause challenges. The trial court granted the for-cause 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. While this holding oversimplifies the present issue, the appellate court in *Love* examined the historical experience of for-cause challenges, the experience prong, and determined:

The history review confirms that in over 140 years of cause and peremptory challenges in this state, there is little evidence of the public exercise of such challenges, and some evidence that they are conducted privately. Our

experience does not require that the exercise of these challenges be conducted in public.

Love, 176 Wn.App. at 919.

An examination of this practice under the logic prong does not indicate the challenges needed to be conducted in public. The lower court found that the purposes served by the public trial right¹² were not furthered in a for-cause challenge situation presenting only issues of law for the judge to decide, especially where no further evidence is necessary to make the decision on the challenge, and where the clerk's written juror record and reporter's transcription of the challenges at sidebar assures all activities were conducted aboveboard. *Love*, at 919-20. The lower court also found that no purpose would be served by forcing the court to use two court rooms to facilitate a for-cause challenge. *Id.* This concern regarding the unnecessary interruption and delay that would result from moving juries back and forth was most recently examined in the sidebar context in *Smith*, where the court concluded that "without any evidence the public has traditionally participated in sidebars, the experience prong cannot be met." 181 Wn.2d at 517.

¹² "[t]o ensure a fair trial, to remind the officers of the court of the importance of their functions, to encourage witnesses to come forward, and to discourage perjury." *Love*, 176 Wn.App. at 919, quoting *State v. Brightman*, 155 Wn.2d 506, 514, 122 P.2d 150 (2005).

The rationale supporting the conclusion reached in *Smith* supports reaching the same conclusion here on the for-cause objections granted without objection or discussion at the sidebar:

But more importantly, evidentiary rulings that are the subject of traditional sidebars do not invoke any of the concerns the public trial right is meant to address regarding perjury, transparency, or the appearance of fairness. See *Sublett*, 176 Wn.2d at 77, 292 P.3d 715. Critically, the sidebars here were contemporaneously memorialized and recorded, thus negating any concern about secrecy. The public was not prevented from knowing what occurred. Nothing positive is added by allowing the public to intrude on the huddle at the bench in real time. *Sublett*, 176 Wn.2d at 97–98, 292 P.3d 715 (Madsen, C.J., concurring) (quoting *Richmond Newspapers, Inc. v. Virginia*, 448 U.S. 555, 598 n. 23, 100 S.Ct. 2814, 65 L.Ed.2d 973 (1980) (Brennan, J., concurring)). 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, 1055 (2014).

Separately, regarding the preemptory challenges, these challenges historically originated at common law in England,¹³ and are “objection[s] to a juror for which there is no reason given, but upon which the court shall exclude the juror.” CrR6.4 (e)(1)(in part). Because the record of the challenges is kept, and because the jurors affected are taken off the panel in full view of the public, there is no purpose served by conducting these

¹³ As was said by Blackstone, and repeated by Mr. Justice Story: ‘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 ‘preemptory challenge.’ *Lewis v. United States*, 146 U.S. 370, 376, 13 S.Ct. 136, 138, 36 L. Ed. 1011 (1892).

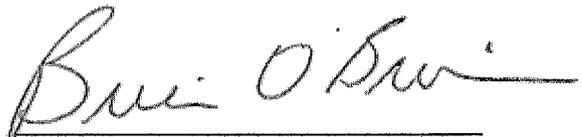
challenges other than by in writing, where there is no requirement that a reason for the challenge be expressed. No ruling is required, no discussion necessary.

IV. CONCLUSION

For the reasons stated above the decision of the court of appeals should be affirmed.

Dated this 6th day of February, 2015.

LAWRENCE H. HASKELL
Prosecuting Attorney

A handwritten signature in cursive script, reading "Brian C. O'Brien", written over a horizontal line.

Brian C. O'Brien #14921
Deputy Prosecuting Attorney
Attorney for Respondent

IN THE SUPREME COURT
OF THE STATE OF WASHINGTON

STATE OF WASHINGTON,

Respondent,

v.

UNTERS L. LOVE,

Appellant,

NO. 89619-4

CERTIFICATE OF MAILING

I certify under penalty of perjury under the laws of the State of Washington, that on February 6, 2015, I e-mailed a copy of the Supplemental Brief of Respondent in this matter, pursuant to the parties' agreement, to:

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2/6/2015
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Attached is the Supplemental Brief of Respondent. Thanks!

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