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SUPREME COURT OF THE STATE OF WASHINGTON

In re the Detention of
MARK BLACK

APPEAL FROM THE SUPERIOR COURT FOR KING COUNTY
THE HONORABLE CAROL A. SCHAPIRA

SUPPLEMENTAL BRIEF OF PETITIONER

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A. ISSUES PRESENTED

1. Whether Black failed to preserve the issue concerning his absence from half a day of jury selection because he did not object on the record, and whether Black should have been required to demonstrate a manifest error affecting a constitutional right in order to raise this issue on appeal under RAP 2.5(a).

2. Whether Black's trial comported with due process because his absence from half a day of jury selection created no risk of erroneous civil commitment, and because the robust procedural safeguards built into the SVP trial process ensured that Black's trial was fundamentally fair.

B. STATEMENT OF THE CASE

The State filed a petition to civilly commit Mark Black as a sexually violent predator at the end of Black's prison sentence for, among other crimes, child molestation in the second degree and attempted child molestation in the second degree. CP 1-87.

Pretrial motions and a jury trial took place in September, October, and November 2013 before the Honorable Carol Schapira.

During pretrial motions, Black's attorneys explained that Black would not be present for the first day of jury selection because the prospective jurors were likely to be more forthcoming

during individual questioning about sensitive matters if Black was not present. RP (9/26/13) 42-43.¹ Defense counsel stated:

Just so Your Honor knows, if this helps with figuring this out at all, we are planning for Mr. Black to arrive on the second day of trial. So the first day, which the jurors may want to speak to us privately, he wouldn't have to be here for that. I think that can also help them be more open and honest about their history without having the person here accused of something like that. So our hope was to address those that first day, so that can be taken care of.

RP (9/26/13) 42-43. The trial court agreed that this was a sensible strategy. RP (9/26/13) 43.

The first day of jury selection proceeded in Black's absence as planned. The trial court began the process by considering hardship excusals, distributing a questionnaire, and asking some general questions of the venire. RP (10/21/13) 13-29, 36-40. Each party then conducted a round of questioning focused primarily on identifying prospective jurors who should be questioned individually or who should be excused for cause immediately. RP (10/21/13) 44-80. The trial court and the parties spent the rest of the day individually questioning prospective jurors who indicated that they

¹ Some volumes of the verbatim report of proceedings are identified only by date, others are identified by date and a Roman numeral, and others are identified by date and the type of proceedings that occurred (e.g. "jury voir dire"). This brief references the transcripts accordingly.

wanted to speak more privately about sensitive matters.

RP (10/21/13) 85-135. Throughout the day, prospective jurors were excused both for hardship and for cause.²

The next morning, defense counsel notified the court off the record that Black was not present due to an issue with the jail.³ CP 1430. Nothing was said on the record. Individual questioning of the prospective jurors who wanted to speak more privately about sensitive matters then continued without objection. RP (10/22/13, voir dire) 3-45. As a result of the individual questioning, one prospective juror was excused for cause at the defense's request,

² Specifically, 13 prospective jurors were excused for hardship, three were excused for cause without being individually questioned, and 12 were individually questioned. Of those who were individually questioned, ten were excused for cause. RP (10/21/13, voir dire). Black obviously had no input with respect to the 26 prospective jurors who were excused or the two who were not on the first day of jury selection.

³ The relevant entry in the clerk's minutes reads in its entirety as follows:

(OFF THE RECORD.)

Counsel is present to proceed with trial, however, the Defendant (sic) is not present.

Counsel states that the Defendant (sic) has not been brought up from the jail, even though he did not waive his presence from this point forward. The Court directs the Bailiff to contact the jail about the situation and report back to the court.

CP 1430. The Court of Appeals' opinion does not mention the fact that this occurred off the record. In re Detention of Black, 189 Wn. App. 641, 644, 357 P.3d 91 (2015).

and another was excused for cause *sua sponte* by the trial court.
RP (10/22/13, voir dire) 32-33, 43-45.

In the midst of these proceedings, a representative of the jail informed the court and the parties that Black had not been transported due to multiple logistical issues. RP-II (10/22/13) 11-17. The defense did not object or ask for a recess at that time. Instead, after hearing from the jail representative, the court and the parties continued with individual questioning. CP 1430; RP-II (10/22/12) 17.

Later in the morning's proceedings, after discussing a legal issue pertaining to "the general voir dire,"⁴ Black's counsel asked for the first time to excuse the venire for the day. RP 1430; RP (10/22/13, voir dire) 49-51. The trial court asked whether Black would be willing to waive his presence so that general voir dire could proceed. Defense counsel responded that although she could speak with Black about it, "it would be better for the jury to see him at some point before it's actually picked. You know, someone may recognize him." RP (10/22/13, voir dire) 51. The trial court observed that further delay would cause substantial

⁴ "General voir dire" refers to the portion of jury selection where the entire venire is present and each party is given the opportunity to question the venire.

inconvenience to a large group of citizens for another day, even though most of them would be excused in any event. RP (10/22/13, voir dire) 51-52. Defense counsel explained that it was important to have Black's input on selecting the jury during general voir dire. The trial court agreed with defense counsel on that point, and then took a recess. RP (10/22/13, voir dire) 52-53.

Upon returning from the recess, the trial court and the parties briefly discussed additional potential hardship excusals. RP (10/22/13, voir dire) 53-58. The venire was then brought into the courtroom, and the trial court announced that jury selection would not continue. RP (10/22/13, voir dire) 60. The court excused a few additional prospective jurors for hardship, asked a couple of them to remain for individual questioning, and, with apologies, instructed the rest of the venire to return the following day. RP (10/22/13, voir dire) 61-67. Following a brief recess, one additional prospective juror was excused for hardship, one was excused for cause at the defense's request, two were excused due to language difficulties, and one was asked to return the next day. RP (10/22/13, voir dire) 68-89. The defense did not object to excusing or retaining any of these additional prospective jurors.

The rest of the day was then devoted to other matters.⁵ RP-II (10/22/13) 18-103.

Black was present in court the next day for the remainder of jury selection, which consisted of general questioning of the venire by both parties, peremptory challenges by both parties, and seating and swearing in the jury. RP (10/23/13, voir dire, opening stmts.) 3, 8-131. After a trial spanning more than two weeks and multiple days of deliberation, the jury found beyond a reasonable doubt that Black is a sexually violent predator. CP 1411.

The Court of Appeals reversed Black's civil commitment in a published decision holding that the issue of Black's absence from the second half-day of jury selection was adequately preserved for appeal, and that it deprived Black of his right to due process. In re Detention of Black, 189 Wn. App. 641, 357 P.3d 91 (2015).

C. ARGUMENT

1. THE ISSUE OF BLACK'S ABSENCE FROM HALF A DAY OF JURY SELECTION WAS NOT PRESERVED AND IS NOT A MANIFEST ERROR AFFECTING A CONSTITUTIONAL RIGHT.

The Court of Appeals rejected the State's argument that Black had not preserved the issue of his absence from half a day of

⁵ Black has not challenged the propriety of addressing other matters in his absence for the rest of the day.

jury selection with an objection on the record. In re Black, 189 Wn. App. at 654-55. Consequently, the Court of Appeals did not require Black to show that this was a manifest error affecting a constitutional right under RAP 2.5(a). Id. The Court of Appeals' decision is contrary to fundamental principles of error preservation and the scope of appellate review.

It is axiomatic that appellate courts generally will not consider issues for the first time on appeal. RAP 2.5(a). This rule "reflects a policy of encouraging the efficient use of judicial resources." State v. Scott, 110 Wn.2d 682, 685, 757 P.2d 492 (1988). More to the point, "appellate courts will not sanction a party's failure to point out at trial an error which the trial court, if given the opportunity, might have been able to correct to avoid an appeal and a consequent new trial." Id.

In this case, if Black's attorneys had objected on the record to proceeding with hardship excusals and individual questioning in Black's absence on the second day of jury selection, the process may not have continued. At a minimum, a record of the parties' arguments and the trial court's ruling on the subject would have been made for purposes of appeal. Instead, although Black's attorneys mentioned Black's absence off the record before the

proceedings began, and they discussed the issue with the jail's representative on the record as the proceedings continued, they did not object on the record until the trial court proposed going forward with general voir dire in Black's absence. At that point, the trial court agreed with the defense's position, completed the remaining hardship and for-cause excusals, and instructed the remaining prospective jurors to return the next day. Black was then present for the rest of jury selection, which consisted of rounds of questioning by both parties, peremptory challenges, and seating the jury that heard the evidence and rendered the verdict.

In other words, when the trial court was confronted with an explicit request by Black's attorneys not to proceed further in his absence, the trial court granted that request. Thus, when the trial court was given an opportunity to correct a potential error or to prevent it from happening at all, the trial court took that opportunity.

The Court of Appeals erred when it equated *mentioning* Black's absence off the record and *discussing* his absence with the jail's representative on the record with *objecting to* his absence on the record. The Court of Appeals' opinion undermines the policy of conserving judicial resources and avoiding unnecessary retrials that

underlies RAP 2.5(a). This Court should hold that an objection on the record was required to preserve this issue.

Because this issue was not preserved, the Court of Appeals compounded its error by not requiring Black to show a manifest error affecting a constitutional right under RAP 2.5(a). As this Court has stated, this rule requires a party to show that an error is “truly of constitutional dimension” and that it resulted in “actual prejudice that makes the error ‘manifest,’ allowing appellate review.” State v. Kirkman, 159 Wn.2d 918, 926-27, 155 P.3d 125 (2007). As will be discussed in the next argument section, any possible due process issue here is minimal and no prejudice occurred. The purported error in this case is neither truly constitutional nor manifest, and the claim should have been rejected.

2. BLACK’S ABSENCE FROM HALF A DAY OF JURY SELECTION DOES NOT CONSTITUTE A DUE PROCESS VIOLATION THAT MERITS REVERSAL.

The Court of Appeals also erred in holding that Black’s absence from half a day of hardship excusals and individual questioning constitutes a due process violation that resulted in prejudice, even though these very same tasks had already been happening in Black’s absence the previous day as a matter of choice and strategy. In so doing, the Court of Appeals essentially

created a new level of due process in civil cases, *i.e.*, an express right to be present for the entirety of jury selection and a presumption of prejudice, even if no risk of an erroneous deprivation of liberty has been shown. This Court should reverse.

Civil commitment as a sexually violent predator “is a significant deprivation of liberty.” In re Detention of Stout, 159 Wn.2d 357, 369, 150 P.3d 86 (2007). Accordingly, a person facing civil commitment as a sexually violent predator is entitled to due process of law. Id. (citing In re Detention of Halgren, 156 Wn.2d 795, 807-08, 132 P.3d 714 (2006)). But as this Court has stated, “due process is a flexible concept,” and “its minimum requirements depend on what is fair in a particular context.” Id. at 370. Thus, to determine whether procedural due process has been satisfied in a particular context in an SVP case, Washington courts use the three-part balancing test from Mathews v. Eldridge, 424 U.S. 319, 96 S. Ct. 893, 47 L. Ed. 2d 18 (1976). The three factors are:

(1) the private interest affected, (2) the risk of erroneous deprivation of that interest through existing procedures and the probable value, if any, of additional procedural safeguards, and (3) the governmental interest, including costs and administrative burdens of additional procedures.

In re Stout, 159 Wn.2d at 370 (citing Mathews, 424 U.S. at 335).

The first Mathews factor balances in favor of the person the State seeks to civilly commit as an SVP due to the significant deprivation of physical liberty involved. In re Stout, at 370; In re Detention of Coe, 175 Wn.2d 482, 510, 286 P.3d 29 (2012); In re Detention of Morgan, 180 Wn.2d 312, 321, 330 P.3d 774 (2014). On the other hand, the third factor balances in favor of the State because “it is irrefutable that the State has a compelling interest both in treating sex predators and protecting society from their actions.” In re Morgan, 180 Wn.2d at 322 (quoting In re Detention of Young, 122 Wn.2d 1, 26, 857 P.2d 989 (1993), and In re Detention of Thorell, 149 Wn.2d 724, 750, 72 P.3d 708 (2003)). The fulcrum is the second factor, *i.e.*, to what degree the procedure at issue poses a risk of an erroneous deprivation of liberty and the probable value, if any, of additional procedural safeguards.

Although involuntary civil commitment is a significant deprivation of liberty, the Mathews test is not a proxy for the constitutional trial rights of criminal defendants. As this Court reaffirmed quite recently, Washington appellate courts have held consistently and repeatedly that the constitutional rights expressly

conferred upon criminal defendants by the state⁶ and federal⁷ constitutions do not apply in SVP cases, which are “resolutely civil in nature.” See In re Detention of Reyes, 184 Wn.2d 340, 346-48, 358 P.3d 394 (2015) (citing numerous cases). Washington courts have also held consistently that the rigorous procedural safeguards provided in chapter 71.09 RCW⁸ are sufficient to protect against erroneous deprivations of liberty under the second Mathews factor in contexts that would raise significant constitutional concerns if

⁶ The Washington Constitution enumerates the following rights in criminal cases:

In criminal prosecutions the accused shall have the right to appear and defend in person, or by counsel, to demand the nature and cause of the accusation against him, to have a copy thereof, to testify in his own behalf, to meet the witnesses against him face to face, to have compulsory process to compel the attendance of witnesses in his own behalf, to have a speedy public trial by an impartial jury of the county in which the offense is charged to have been committed and the right to appeal in all cases.

CONST. art. I, § 22.

⁷ The United States Constitution confers similar rights in criminal prosecutions:

In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed, which district shall have been previously ascertained by law, and to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor, and to have the Assistance of Counsel for his defence.

U.S. CONST. amend. VI.

⁸ These statutory safeguards include representation by counsel at all stages of the proceedings, a jury that must be unanimous, and a requirement that the State must prove beyond a reasonable doubt that the person is a sexually violent predator. RCW 71.09.050(1); RCW 71.09.060(1).

they arose in a criminal case. See, e.g., In re Stout, 159 Wn.2d at 370-71 (right to confrontation does not apply; “significant protections” provided by the SVP statute make it “unlikely an SVP detainee will be erroneously committed if he is not also able to confront a live witness”); In re Coe, 175 Wn.2d at 509-10 (no right to confront declarants of hearsay statements relied upon by experts; face-to-face confrontation is not required to satisfy due process in SVP cases); In re Morgan, 180 Wn.2d at 320-22 (SVP detainees need not be competent to stand trial; “we find the existing protections nevertheless robust”); In re Detention of Law, 146 Wn. App. 28, 42-48, 204 P.3d 230 (2008), review denied, 165 Wn.2d 1028 (2009) (right against self-incrimination and the presumption of innocence do not apply; existing SVP trial procedures comport with due process); In re Detention of Leck, 180 Wn. App. 492, 503-08, 334 P.3d 1109, review denied, 181 Wn.2d 1008 (2014) (prohibition against submitting uncharged alternative means to the jury does not apply to SVP proceedings; the State's failure to amend the SVP petition created no risk of erroneous deprivation of liberty).

In summary, Washington law is clear that although SVP detainees are undisputedly entitled to due process of law, the constitutional trial rights expressly conferred upon criminal

defendants—including the right to confrontation, the right against self-incrimination, and the presumption of innocence, among others—do not apply in SVP cases, which are civil in nature. Washington law is also clear that in order to show a due process violation that rendered the civil commitment proceedings fundamentally unfair, an SVP detainee must show a substantial risk of erroneous deprivation of liberty and a need for additional procedural safeguards under the second Mathews factor—a difficult hurdle in light of the robust procedural safeguards already provided by the SVP statute.

From these principles, it necessarily follows that although an SVP detainee has a general right under procedural due process to be present for trial, the enumerated right to be present for every “critical stage” of a trial is expressly conferred upon criminal defendants, not civil litigants. See State v. Irby, 170 Wn.2d 874, 880-83, 246 P.3d 796 (2011) (criminal defendants have the right to be present for jury selection under article I, section 22). It also follows from the authorities cited above that Black’s absence from half a day of hardship excusals and individual questioning was not prejudicial because it created no risk that he was erroneously deprived of his liberty. To the contrary, Black’s experienced

attorneys were entirely capable of conducting these tasks, and there is no evidence in the record that any of the jurors who were seated to hear the case were incapable of hearing it fairly. Black has not shown any risk of an erroneous deprivation of his liberty, nor could such a showing be made under these circumstances. Black was absent by choice for the entire first day of hardship excusals, individual questioning, and challenges for cause based on that questioning. His absence for those same tasks the next morning raises no specter that he was civilly committed in error.

Nonetheless, although the Court of Appeals agreed with the State that the “critical stage” analysis from Irby does not apply in civil cases, the court’s decision conflates the “critical stage” analysis from Irby with the due process analysis that applies in civil cases.⁹ This error merits correction.

In Irby, this Court considered whether an email exchange between the trial court and the attorneys about excusing prospective jurors in a murder case constituted a critical stage of the proceedings at which the defendant’s presence was required.

⁹ To be clear, the State is not suggesting that SVP detainees do not have any right to be present as a matter of due process; rather, the State’s position is that the “critical stage” analysis in criminal cases is fundamentally different from the due process analysis in civil cases, and that the Court of Appeals erred in conflating them in this case.

In deciding that it was a critical stage, the Court emphasized that the email exchange was not limited to excusing potential jurors for hardship, which is an administrative task, but it also addressed excusing some of them for cause for case-specific reasons:

In our judgment, the e-mail exchange was a portion of the jury selection process. We say that because this novel proceeding did not simply address the general qualifications of 10 potential jurors, but instead tested their fitness to serve as jurors in this particular case.

Irby, 170 Wn.2d at 882. Citing article I, section 22, which expressly guarantees that “the accused shall have the right to appear and defend in person, or by counsel,” this Court held that Irby’s right to be present for jury selection was violated, and that the State could not meet its burden of showing that this constitutional error was harmless beyond a reasonable doubt. Irby, 170 Wn.2d at 884-87. The Court reached this conclusion because the State could not show that all of the jurors who were excused for cause via email “had no chance to sit on Irby’s jury.” Id. at 886.

In this case, while acknowledging that Irby is a criminal case, the Court of Appeals applied the “critical stage” analysis from Irby nonetheless. The court focused on the individual questioning that continued on the second day of voir dire, and held that Black was deprived of due process because Black did not “exercise his

personal judgment” or “consult with counsel” about the prospective jurors who were questioned and then either excused or retained. In re Black, 189 Wn. App. at 652. Although Black and his lawyers had decided that Black would not be present for individual questioning on the first day in order to obtain more “open and honest” information from the jurors,¹⁰ the Court of Appeals stated:

[W]e cannot conclude that the existing procedural safeguards during this phase [of jury selection] were sufficient. To the contrary, we conclude that there was an erroneous risk of deprivation of Black’s right to his physical liberty by his exclusion from participation in this portion of jury selection.

Id. The court based this conclusion on the fact that some of the jurors who were individually questioned on the second day were excused while others were retained for general voir dire. Id. However, even more jurors were individually questioned on the first day and then either excused or retained without Black’s input as well. There is no basis to differentiate between the proceedings on the first day and the proceedings on the second day from a due process standpoint.

Also, in rejecting the State’s argument that Black’s experienced attorneys were able to represent his interests, thus

¹⁰ RP (9/26/13) 42-43.

ensuring a fundamentally fair trial, the Court of Appeals incorrectly applied the “critical stage” analysis from Irby to find a due process violation and prejudice:

But as Irby explained, the right to be present for jury selection is important to the opportunity to defend because of the power to “give advice or suggestion or even to supersede . . . lawyers altogether.” As this explanation makes clear, counsel’s judgments about suitable jurors do not supplant those of the client.¹¹

In re Black, at 653 (alteration in original). This analysis is inapposite in a civil case, where a showing of actual prejudice is required, not presumed.

In summary, the Court of Appeals erred when it applied the “critical stage” analysis from Irby to find a due process violation and prejudice in a civil commitment trial. It is difficult to envision how the individual questioning on the first day of jury selection could proceed in Black’s absence, yet the individual questioning that took place on the second half-day of jury selection created such a risk of erroneous deprivation of liberty that it rendered the trial fundamentally unfair. The Court of Appeals also required no

¹¹ This holding also conflicts with this Court’s decision in State v. Cross, 156 Wn.2d 580, 606, 132 P.3d 80 (2006), reaffirming the long-standing principle that matters of trial strategy and tactics are addressed to the attorney’s judgment, not the client’s. This principle applies in SVP cases. See In re Detention of Hatfield, 191 Wn. App. 378, 398, 362 P.3d 997 (2015).

showing of actual prejudice to set aside the jury's verdict. Rather, the court applied the Irby analysis, which requires the State to prove that the error was harmless beyond a reasonable doubt, and then inferred prejudice merely from the fact that three particular prospective jurors who were questioned on the second day remained in the venire temporarily.¹² In re Black, at 652. In short, the Court of Appeals erred both in its reasoning and in its remedy.

The Court of Appeals stretched Irby's reasoning well beyond its intended boundaries in this case. Stated simply, an SVP detainee's absence from less than three hours of jury selection without any credible showing of prejudice does not constitute a due process violation that merits a new trial.

Black was represented by two experienced attorneys who fully participated in selecting the jury and who advocated for Black's interests throughout the proceedings. Black had a trial at which the State was held to its burden of proof beyond a reasonable doubt

¹² Of the three prospective jurors specifically identified in the Court of Appeals' opinion, one (Juror 7) was excused for cause the next morning when Black was present at the defense's request, another (Juror 48) was excused with a peremptory challenge by the State, and the third (Juror 70) never had a chance of being on the jury because of a high juror number. RP (10/23/13, voir dire, opening stmts.) 51-57, 124-29. In addition, Black used only six of his eight potential peremptory challenges. RP (10/17/13) 110; RP (10/23/13, voir dire, opening stmts.) 124-29. This record plainly does not support a finding of prejudice.

and the jury was required to reach a unanimous verdict. The Court of Appeals' decision conflicts with this Court's prior decisions holding that the constitutional trial rights expressly conferred upon criminal defendants do not apply in SVP cases, and that SVP trials involve robust procedural safeguards that afford SVP detainees their right to due process of law. This Court should correct the misapplication of its precedent in this case.

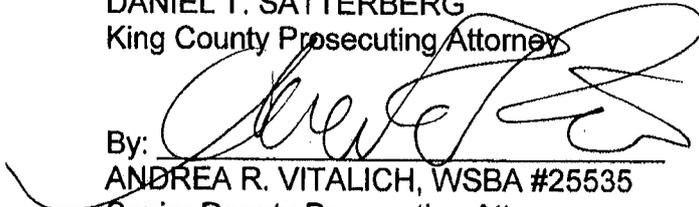
D. CONCLUSION

This Court should hold that the issue of Black's absence from half a day of jury selection was not preserved, that it is not a manifest error affecting a constitutional right, and that it does not constitute a due process violation that merits a new trial. This Court should reverse and remand to the Court of Appeals for consideration of Black's remaining appellate claims.

DATED this 1st day of April, 2016.

Respectfully submitted,

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Please accept for filing the attached Supplemental Brief of Petitioner in In re the Detention of Mark Black, No. 92332-9.

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