

NO. 63056-3-I

COURT OF APPEALS OF THE STATE OF WASHINGTON

DIVISION I

STATE OF WASHINGTON,

Respondent,

v.

JOHN PRICE,

Appellant.

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STATE OF WASHINGTON
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APPEAL FROM THE SUPERIOR COURT FOR KING COUNTY

THE HONORABLE SHARON ARMSTRONG

SUPPLEMENTAL BRIEF OF RESPONDENT

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A. ISSUE PRESENTED

Whether the Washington Supreme Court's recent decision in State v. Irby, ___ Wn.2d ___ (No. 82665-0, filed 1/27/11) (hereinafter "Slip Op.") impacts this case.

B. STATEMENT OF THE CASE

The defendant, John Price, was convicted of murder in the first degree with a firearm enhancement. CP 291-99. Among Price's claims on appeal is the claim that he was denied his constitutional right to be present in court for a "critical stage" of the proceedings when the trial court allowed Price to waive his presence for the first day of jury selection, during which the only order of business was excusing prospective jurors from the venire on grounds of hardship. Opening Brief of Appellant, at 26-38.

This Court granted Price's motion to stay his appeal pending the Washington Supreme Court's decision in State v. Irby. After the court issued its decision in Irby, this Court directed the parties to file supplemental briefs addressing the impact, if any, of the Irby decision on this case.

The procedural and substantive facts of this case are set forth in detail in the Brief of Respondent. Those facts will be further discussed here only as necessary for argument.

C. ARGUMENT

As a preliminary matter, the Irby decision is not yet final; the State filed a motion for reconsideration and rehearing on February 15, 2011. See State v. Irby, No. 82665-0 (docket); RAP 12.5(c)(2). Therefore, this Court should be aware that the Irby decision as currently written may not be the last word on the issues addressed therein. But in any event, even as written, Irby does not provide a basis to reverse Price's conviction.

**1. EXCUSING PROSPECTIVE JURORS FOR
HARDSHIP IS STILL NOT A CRITICAL STAGE OF
THE PROCEEDINGS AT WHICH THE
DEFENDANT'S PRESENCE IS REQUIRED.**

Price's primary contention is that excusing prospective jurors for hardship is a critical stage of the proceedings at which his presence was required. Opening Brief of Appellant, at 26-38. But as argued in the Brief of Respondent, excusing prospective jurors for hardship is an administrative function addressed solely to the discretion of the trial court. As such, it is not a critical stage and the defendant's presence is not required. Brief of Respondent, at 15-20. Irby changes nothing in this regard.

In Irby, the court addressed whether an email exchange between the trial court and the lawyers regarding excusing potential jurors constituted a proceeding at which the defendant's presence

was required. In deciding that it was, the 5-justice majority emphasized that the email exchange did not only address excusing potential jurors for hardship, but excusing some of them for cause because their parents had been murdered:

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, Slip Op. at 7 (emphasis supplied). The majority then distinguished Irby's case from cases involving purely administrative matters. Slip Op. at 8 (citing Wright v. State, 688 So.2d 298, 300 (Fla. 1997), and Commonwealth v. Barnoski, 418 Mass. 523, 530, 638 N.E.2d 9 (1994)). Both of the cases cited by the majority expressly hold that excusing potential jurors solely on the basis of hardship is a preliminary administrative procedure that does not require the defendant's presence. Wright, 688 So.2d at 300-01; Barnoski, 418 Mass. at 528-31.

That the majority distinguished Irby's case from cases involving only hardship excusals shows that hardship excusals are not a critical stage at which the defendant's presence is required. Furthermore, as discussed in much more detail in Chief Justice Madsen's dissent, state and federal courts have held universally

that screening potential jurors for hardship is an administrative function, not a substantive proceeding, and thus, it is not a critical stage. Irby, Slip Op. at 3-14 (Madsen, C.J., dissenting).

Accordingly, Irby does not provide a basis to reverse in this case.

2. THE DEFENDANT WAIVED HIS PRESENCE, AND ANY POSSIBLE ERROR WAS INVITED.

This case differs from Irby in another crucial respect: Price waived his presence for the preliminary hardship excusals after consulting with his attorney. Therefore, Price has waived this claim on appeal, and the error he alleges was invited.

In Irby, the majority focused on the fact that the record did not establish either that Irby had agreed to excuse any potential jurors outside his presence or that he had been consulted prior to excusing them. Irby, Slip Op. at 10. Accordingly, the court found that "conducting jury selection in Irby's absence" via email violated his constitutional rights. Slip Op. at 10-11. In this case, by contrast, Price was fully informed in advance that potential jurors would be excused for hardship, and he decided of his own accord with the advice of counsel that he would not be present for that procedure.

The day before the potential jurors arrived, the trial court informed the parties that the jurors would be brought into the courtroom in four groups of approximately 50 apiece. With each group, the court stated that it would give an introductory instruction, inform them of the charges, and then entertain hardship claims. After excusing those with legitimate hardships, the court would then instruct the remaining potential jurors to complete a questionnaire and return on Monday for voir dire. RP (10/1/08) 11-12.

The trial court assumed that this preliminary procedure was a critical stage of the proceedings for which Price would be present. Price's trial counsel disagreed. RP (10/1/08) 13. The trial court then indicated that if Price did not want to be present for the hardship challenges, it could make things easier logistically. RP (10/1/08) 13-14. Price's counsel stated that she would discuss the issue with Price before the end of the day. RP (10/1/08) 14.

When the issue was re-addressed, the following exchange ensued:

MR. O'TOOLE: Thank you.

Your honor, do you anticipate an extraordinarily active role for the lawyers during the hardship portion? I mean, I don't think that's normally your practice.

THE COURT: Right.

MR. O'TOOLE: If that helps Ms. Gaisford's client make a decision.

MS. GAISFORD: If we could inquire if there will be no detective and Mr. O'Toole will have an empty chair, *I've conferred with Mr. Price*, and since it's just a hardship part, I certainly don't think it's a critical stage in the proceedings.

And then he could appear Monday when we have it down to a panel. We will all be reintroduced on Monday. But I don't want to be put in a situation where there's a detective here and then I've got an empty chair. That's all. Make sense?

THE COURT: Mr. O'Toole, you might have a detective here?

MR. O'TOOLE: I wasn't planning on it, but now that you mention it.

....

THE COURT: All right.

MR. O'TOOLE: I will not have a detective.

THE COURT: So, you won't have a detective, *your client will not be called tomorrow?*

MS. GAISFORD: *Right.*

THE COURT: *And we'll just do hardship.*

RP (10/1/08) 46-48 (emphasis supplied).

The next day, the trial court employed the procedure outlined above with the four groups of potential jurors. RP (10/2/08). With

three of the four groups, the trial court specifically informed the potential jurors that Price was not present in court because they were only addressing "preliminary" matters. RP (10/2/08) 2, 15, 45. Throughout these preliminary proceedings, there were no objections from either of the attorneys regarding the trial court's decisions as to which jurors to excuse for hardship. RP (10/2/08). Price was then present in court on Monday morning, and substantive voir dire commenced. RP (10/6/08).

In contrast to Irby, the record in this case establishes that Price waived his presence. See Brief of Respondent, at 20-24. In addition, even if this Court were to find that it was error not to require Price's presence, any such error was invited. The invited error doctrine dictates that a party who sets up an error at trial cannot claim it as error on appeal. State v. Henderson, 114 Wn.2d 867, 868, 792 P.2d 514 (1990). This rule applies even when the alleged error is of constitutional magnitude. City of Seattle v. Patu, 147 Wn.2d 717, 720, 58 P.3d 273 (2002); Henderson, 114 Wn.2d at 871. Here, the trial court assumed that Price's presence was necessary, yet Price argued to the contrary. Price cannot now complain that his constitutional rights were violated because the trial court granted his request not to be present.

In sum, Irby is inapposite because Irby did not waive his presence or invite the error alleged. Price has both waived his presence and invited the error alleged.

3. ANY POSSIBLE ERROR IS HARMLESS.

In his opening brief, Price argued that a violation of the defendant's right to be present for voir dire is a structural error, i.e., an error that is not subject to a harmless error analysis. Opening Brief of Appellant, at 33-36. Irby conclusively defeats this argument. See Irby, Slip Op. at 13 ("[a] violation of the due process right to be present is subject to harmless error analysis," and "[t]he same can be said of the right to 'appear and defend'" under the state constitution).

However, the Irby majority then proceeded to employ a faulty harmless error analysis that is not supported by existing precedent. Specifically, the Irby majority found that the error was not harmless based on a theoretical possibility that some of the jurors excused via email could have been on Irby's jury if they had been questioned in court. Slip Op. at 13-14. As noted by the dissent, "for at least a hundred years it has been the law that doubts about whether a potential juror was rejected on sufficient grounds do not require a new trial unless as a result an unqualified jury was

selected." Irby, Slip Op. at 14-15 (Madsen, C.J., dissenting). But in any event, even under the majority's erroneous reasoning, any error in this case is still harmless.

As noted above, the Irby majority found that the State could not demonstrate that the error was harmless because some of the jurors who were excused via email might have been able to serve if their reasons for excusal had been tested by questioning in court. Slip Op. at 13-14. In this case, all of the potential jurors who claimed hardship did so on the record, and they were thoroughly questioned by the trial court in the presence of both attorneys. There were no objections to the trial court's decisions as to which jurors to excuse. RP (10/2/08).

Unlike Irby, the reasons for excusing the potential jurors in this case were fully set forth on the record, and Price's interests were protected by the presence of his trial attorney. Price has not argued in his opening brief that any of the potential jurors were excused erroneously. Indeed, such an argument would be unavailing, as the record shows that the trial court exercised sound discretion in considering the jurors' hardship claims and in excusing those whose claims were legitimate.

4. IRBY IS INCORRECT AND HARMFUL.

Lastly, in the event that the State's motion for reconsideration and rehearing is denied, and if Price's case later reaches the Washington Supreme Court, the State will be arguing that the Irby decision should be overruled because it is incorrect and harmful. State v. Devin, 158 Wn.2d 157, 168-72, 142 P.3d 599 (2006); State v. Barber, ___ Wn.2d ___ (No. 83640-0, filed 1/20/11). As noted by the dissent, the Irby decision departs from well-established precedent and employs a severely flawed harmless error analysis. Irby, Slip Op. at 1-2 (Madsen, C.J., dissenting).

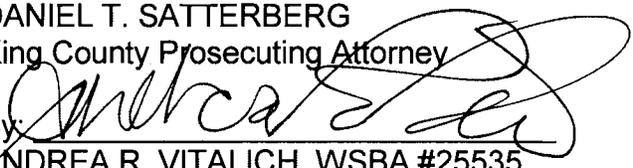
D. CONCLUSION

For the reasons stated above and in the Brief of Respondent, Price's conviction for murder in the first degree with a firearm enhancement should be affirmed.

DATED this 25th day of February, 2011.

Respectfully submitted,

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By: 

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Certificate of Service by Mail

Today I deposited in the mail of the United States of America, postage prepaid, a properly stamped and addressed envelope directed to David Koch, the attorney for the appellant, at Nielsen Broman & Koch, P.L.L.C., 1908 E. Madison Street, Seattle, WA 98122, containing a copy of the Supplemental Brief of Respondent, in STATE V. JOHN PRICE, Cause No. 63056-3-I, in the Court of Appeals, Division I, for the State of Washington.

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

U Brame
Name
Done in Seattle, Washington

2/25/11
Date