

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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APPEAL FROM THE SUPERIOR COURT FOR KING COUNTY

THE HONORABLE SHARON ARMSTRONG

BRIEF OF RESPONDENT

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A. ISSUES PRESENTED

1. and 2. Whether Price was deprived of his right to be present for a critical stage of the proceedings where the proceedings in question were purely administrative in nature and where Price waived his right to be present in any event.

3. Whether the trial court exercised sound discretion in admitting evidence of Price's affiliation with a motorcycle gang where this evidence was necessary to explain the behavior of the eyewitnesses and was an integral part of the case as a whole.

4. Whether Price received ineffective assistance of counsel due to the decision not to request a limiting instruction where there were legitimate tactical reasons for not requesting such an instruction, and where the failure to give such an instruction is harmless.

B. STATEMENT OF THE CASE

1. PROCEDURAL FACTS

The State charged the defendant, John Price, with murder in the first degree with a firearm enhancement for the December 16, 2004 shooting of Donald Jessup. CP 1-5. Later in the proceedings, the State added two counts of witness tampering as a result of Price's numerous attempts in telephone calls and letters

from the jail to tamper with witnesses Channel Ridley and Judith Mahler¹ -- the only persons other than Price's twin infant sons who were present when Price killed Jessup. CP 175-81.

A jury trial on these charges was held in October and November 2008 before the Honorable Sharon Armstrong. After the evidence was presented, the jury found Price guilty as charged. CP 236-40; RP (11/5/08) 293-99. The trial court imposed a standard-range sentence totaling 420 months in prison. CP 291-99; RP (1/29/09) 15-16. Price now appeals. CP 300-01.

2. SUBSTANTIVE FACTS

Channel Ridley was 14 years old when she started using methamphetamine, and she was 17 years old when she met and began a relationship with John Price. RP (10/13/08) 34-37. John Price, a member of the Ghost Riders motorcycle gang who is 14 years older than Channel Ridley, was also a methamphetamine user. Not surprisingly, therefore, methamphetamine was a big part of their relationship, and they used it almost daily when they were

¹ By the time of trial, Mahler had changed her last name to Johnson. RP (10/16/08) 43-44. Nonetheless, this brief refers to her as "Mahler" because this is the name by which she was known at the time of the events in question, and thus, this is the name the other witnesses used throughout the trial record.

together. RP (10/13/08) 37-39. Price also physically abused Ridley throughout their relationship. RP 10/13/08) 42. Ridley reported only a few of the many beatings she received, and each time she did, Price pressured her to deny that he had assaulted her and to absent herself from the court proceedings. In one instance, Price sent Ridley to Arizona so that the charges would be dismissed. RP (10/13/08) 44-47.

During this dysfunctional relationship, Ridley became pregnant and gave birth to twin baby boys. Shortly thereafter, Price and Ridley found themselves homeless, so they tried to live in Price's van with the babies. RP (10/13/08) 40-41. This arrangement was obviously unacceptable, so in the fall of 2004, they began staying at Judith Mahler's house in Ravensdale. RP (10/13/08) 48-49; RP (10/16/08) 57-59. Mahler knew Price through her son, Rick Mahler, another motorcycle enthusiast who belonged to a gang called the Iron Lords. RP (10/16/08) 57, 60. When Price, Ridley, and the children began staying at the Ravensdale residence, Mahler was preparing to sell it and move to Soap Lake to take care of Rick, who had suffered a serious head injury in a car accident and was no longer able to function well. RP (10/16/08)

51-53. As a result, the Ravensdale house had no heat and very little furniture. RP (10/16/08) 63-64.

By this point, Ridley was beginning to distance herself from Price, and they argued almost constantly. Ridley stayed in Ravensdale with Price and the twins for only about a week before moving out. RP (10/16/08) 59, 62. Nevertheless, Price still held sway over Ridley because he would not allow her to see the babies without him. Thus, Ridley still spent time in Ravensdale in order to spend time with the twins. RP (10/13/08) 49.

Sometime in early December 2004, Ridely was visiting the children in Ravensdale and Price assaulted her. Ridley called a friend, Jason Rebman, and asked him to pick her up. RP (10/13/08) 53-55. Rebman was a fairly high-level methamphetamine dealer and a member of the Iron Lords motorcycle gang with Rick Mahler. RP (10/21/08) 49-55. Rebman was also a major drug supplier for Ridley's mother Deniece, who had been addicted to methamphetamine for over 20 years. RP (10/15/08) 135, 143-45.

In response to Ridley's call, Rebman picked her up and drove her to his house. Ridley stayed at Rebman's for approximately a week, during which they had a sexual encounter.

RP (10/13/08) 56-57. Rebman and Ridley videotaped their encounter, and Rebman later showed the video to a few other people, including Donald Jessup. RP (10/21/08) 79.

Jessup was a former chapter president of the Gypsy Jokers, a large, notorious motorcycle gang. RP (10/22/08) 204-05. Jessup was known by virtually everyone as "Dealer Don." RP (10/13/08) 59; RP (10/15/08) 147; RP (10/16/08) 70. Jessup was known by this nickname not for dealing drugs, but because he would do "all the different types of deals to manipulate people." RP (10/16/08) 71. Jessup was a father figure of sorts to Rick Mahler, and he knew Price due to their shared interests in motorcycles and in Rebman's methamphetamine supply. RP (10/16/08) 71; RP (10/21/08) 57, 59-61, 66-70.

Price had reasons to dislike Jessup. For instance, Jessup had come into possession of a motorcycle that had been stolen from Price, and Jessup demanded \$800 from Price for its return. RP (10/29/08-I) 96-97. Price was upset about Jessup's demand for money, and he told Ronald Funk, another motorcycle enthusiast, that "maybe [he] could pay [Jessup] and then some." RP (10/29/08-I) 98-99. In addition, shortly before the shooting, Judith

Mahler overheard Jessup taunting Price by saying something about turning Channel Ridley into a prostitute. RP (10/20/08) 17.

In the evening on December 16, 2004, Price picked up Ridley and drove her to Mahler's house in Ravensdale so that Ridley could visit with the twins. RP (10/13/08) 60-61. Mahler and Jessup were at the house when Price and Ridley arrived. RP (10/13/08) 67. Jessup picked up on cues from Ridley that Ridley did not want Price to know that she already knew Jessup through Jason Rebman. RP (10/13/08) 68. Rebman was in a different motorcycle gang than Price was, and it was "against the rules to be hanging out with another club member." RP (10/13/08) 69.

Price had bought some seafood, so he cooked dinner for everyone. At that point, everyone seemed to be getting along fine. RP (10/13/08) 61, 66, 70-71. But after dinner, when Ridley went to the bathroom to freshen up, Price left the house briefly, came back in, walked into the bathroom, and showed Ridley a gun and a small ax. Price told Ridley he was going to kill Jessup. RP (10/13/08) 72. Ridley did not believe Price's threat, so other than reminding Price that the babies were in the living room, she did nothing to stop him. RP (10/13/08) 73.

Mahler and Jessup were talking in the living room when Mahler saw Price emerge from the bathroom wearing dark clothing, boots, and a stocking cap. Price walked up to Jessup, who was sitting on the floor, and started hitting him in the head with the ax handle. RP (10/16/08) 83. Mahler ran into the bedroom and "cowered against the wall." RP (10/16/08) 84. A few seconds later, both Mahler and Ridley heard a single gunshot. RP (10/13/08) 73; RP (10/16/08) 84.

Mahler ran into the bathroom, screaming. Price came into the bathroom a few moments later, and said, "I'm sorry, I'm sorry it had to happen, I'm sorry." RP (10/13/08) 73. Price then called Ridley into the living room. Ridley saw Price standing over Jessup's body and yelling something about treating him and Rick Mahler like "punk[s]." RP (10/13/08) 24-25. Ridley went back into the bathroom because she did not want to see or hear anything else. RP (10/14/08) 28. Price said to Ridley and Mahler, "nothing happened, I want you to leave." RP (10/16/08) 85.

While Ridley and Mahler were getting the twins ready, Price contacted fellow Ghost Riders Karl Twilleaquer and William "Wick" Renner to help him dispose of Jessup's body. RP (10/16/08) 86; RP (10/14/08) 33-35; RP (10/22/08) 203. Price told them he

needed them to "come and pick up the garbage." RP (10/20/08 a.m.) 24. Price warned Ridley and Mahler to keep quiet about what had happened. As Ridley and Mahler were leaving with the twins, Ridley saw that Jessup's body was covered with a sheet, and that there was a spot of blood on the forehead. RP (10/14/08) 29-31.

Mahler, Ridley and the twins left in Mahler's truck. They drove to a Denny's restaurant and had something to eat. RP (10/14/08) 32, 37. When they returned to the house about two hours later, Wick and Karl were just arriving. RP (10/16/08) 89-90. Price and Ridley started arguing, but Karl and Wick calmed them down. Price told Ridley and Mahler to go to a motel because he was still cleaning up. Price gave them some money he said he had taken from Jessup's pocket. RP (10/16/08) 91-92.

After Ridley and Mahler checked into a motel, Ridley called Price because she needed more money for diapers and cigarettes. Wick and Karl came to the motel. Wick took Ridley to go buy the items, and Karl stayed with Mahler. RP (10/20/08 a.m.) 29. Eventually, Ridley and Mahler got a few hours of sleep, and they left the motel the next day, December 17, 2004, at approximately 10 or 11 a.m. RP (10/20/08 a.m.) 31.

No one was at the house in Ravensdale when Mahler and Ridley returned from the motel. The bedroom carpet had been removed and used to replace about half of the carpet in the living room where Jessup's body had been. RP (10/14/08) 51; RP (10/20/08 a.m.) 32. Price showed up late that afternoon. Price said that he had taken the body to the Cascade Mountains, and that the ground was so muddy that he and Wick had had to re-bury it. RP (10/20/08 a.m.) 35-36. Price said he had hidden the body where no one would find it. RP (10/14/08) 61. Price also said that Jessup had been "playing mind games," and that "it wasn't right for Don to try to sell his own motorcycle back to him." RP (10/20/08 a.m.) 36. Price also noted that Jessup had been "bragging about how he'd pimp [Ridley] out," and that Jessup had had problems with Wick "back in the day[.]" RP (10/14/08) 65.

That night, Mahler was awakened by a conversation between Price and Karl. The conversation indicated that they had gone to Jessup's trailer in Enumclaw, and they were laughing about "taking Don's colors," meaning his Gypsy Joker regalia. RP (2/20/08 a.m.) 38-40. They had also taken a backpack full of sexual devices, which they used to tease Mahler. RP (10/14/08) 67-68.

The next day, December 18, 2004, Ridley asked Mahler to drive her to her mother's house because Price had been beating her again. RP (10/14/08) 66. That same day, Rick Mahler arrived from Soap Lake to help clear out the Ravensdale house and get it ready for sale. RP (10/14/08) 68-69. When Ridley arrived at her mother's place, she told her mother what Price had done to Jessup. She did not go to the police because she was afraid of what Price and the Ghost Riders would do if she did. RP (10/14/08) 70-72.

Shortly before Christmas, Wick showed up at Ridley's mother's place and made her go with him to Marysville where Price and the children were staying. RP (10/14/08) 82-83. After Wick took Ridley away to Marysville, Ridley's mother Deniece told Jason Rebman what Ridley had told her about Jessup's murder. RP (10/15/08) 162. Deniece wanted Rebman to help get Ridley away from Price. RP (10/15/08) 164. Rebman then spoke to members of the Gypsy Jokers about what Deniece had told him, and he set up a meeting between Ridley and a Gypsy Joker known as "Gas Cap." After that meeting, the Gypsy Jokers arranged for Ridley to go to an undisclosed location in Oregon for a while. RP (10/21/08) 90-93.

In early February 2005, detectives with the King County Sheriff's Office contacted Rebman and asked about Jessup's disappearance, which they had begun looking into in January. Rebman did not give them any specific information; however, he did give them one of Price's business cards and told them they "might want to pursue different avenues[.]" RP (10/22/08) 17, 20-21. The next day, on February 3, 2005, Rebman was arrested by the Seattle Police in possession of a large quantity of methamphetamine, marijuana, and prescription pills. RP (10/22/08) 22. Rebman decided to become a cooperating witness for the Seattle Police narcotics squad in an effort to work off his case. RP (10/22/08) 23-26. He also agreed to tell King County Detectives Sue Peters and Kathy Decker what he knew about Donald Jessup's murder. RP (10/22/08) 27-28.

Rebman was released from jail in order to make contact with Channel Ridley so that the detectives could speak with her. The detectives picked up Rebman and Ridley and took them to the Maleng Regional Justice Center. RP (10/22/08) 29. At first, Ridley "froze" and would not speak to the detectives, but Rebman convinced her tell them what she had witnessed at the Ravensdale house on December 16, 2004. RP (10/22/08) 32-33.

Price was arrested for the murder of Donald Jessup on February 12, 2005. RP (10/28/08) 43. After Price was advised of his rights, Price told King County Detective Pavlovich that he was not a member of the Ghost Riders, and that although he had heard "camp fire stories" about a Gypsy Joker known as "Dealer Don," he had never actually met him. RP (10/28/08) 54-57. The next day, however, Detectives Pavlovich and Peters were able to corroborate Channel Ridley's version of events with Judith Mahler, who, although she had previously denied knowing anything about Jessup's disappearance, gave a full statement about the murder after being informed that Price was now in custody and that Ridley had already told them what had happened. RP (10/28/08) 62-64.

After Price was arrested and booked into jail, Ridley began receiving letters from Price "constantly," at a rate of two or three letters a day. RP (10/14/08) 98-99. Ridley responded to Price's letters because she was afraid; she thought that if she did not keep up appearances, Price would send someone to hurt her. RP (10/14/08) 100-01. Price also called Ridley repeatedly from the jail. Ridley accepted the calls and strung Price along because "in that group, if you speak with any cops about anything you're considered

a rat, and when you're considered a rat, it's you know, it's . . . not a good thing at all to them. It's just not good." RP (10/15/08) 8-10.

Price tampered with Ridley relentlessly in his letters and phone calls from the jail. Among other things, Price told Ridley repeatedly to not show up for court, to refuse to testify, to tell his lawyer that she had lied in her statement to the police, and to say that Judith Mahler convinced her to lie to the police in exchange for money. RP (10/14/08) 106-07, 114, 124, 126, 127, 132. The following excerpt from one of Price's letters illustrates the tenor of all of them:

So I guess my only way of winning my case is by the prosecutor dropping you as a witness and Judy not showing up at trial. If they don't drop you, you can still not show up, I will have one of the fellows go over to her house and see what is up. Honey, I am not telling you this to get you stressed, I just want you to understand everything that is going on and how much it means to get you and your testimony dropped. Just remember, they still do not have any other evidence or blood, or even a body. So far as the jury is concerned, this guy's probably out there somewhere, the only reason they think he is dead is because of a questionable story.

RP (10/14/08) 132 (Exhibit 19). In addition, Price repeatedly told Ridley to destroy "the incriminating letters I wrote to you, just the ones that they can say I was telling you what to say[.]" RP (10/14/08) 137 (Exhibit 24). Price wrote to Ridley that if the "pigs"

got these letters, "it will fuck up my defense to the point of me going to prison." RP (10/14/08) 105-06 (Exhibit 3).

Price also wrote letters to and called Judith Mahler from the jail in an effort to tamper with her testimony. RP (10/20/08 a.m.) 66-80. During one of the phone calls, Price told Mahler that she was "the fucking number one fucking piece of evidence against" him, and he instructed her to recant her statement to the police. RP (10/20/08 a.m.) 79. Like Ridley, Mahler tried to go along with Price's efforts to pretend that he had not killed Jessup. RP (10/20/08 a.m.) 74-76. But during one of the phone calls, when Price advised Mahler that he had been charged with first-degree murder, Mahler slipped and said, "it wasn't premeditated at all," and Price replied, "I know, but that's what they're -- they're going for premeditated first degree." RP (10/20/08 a.m.) 80.

Price's efforts to tamper with witnesses did not end when the trial began. During jury selection, Price wrote to Ronald Funk – essentially the only witness other than Ridley, Mahler, and Rebman who could verify that Price knew and disliked Jessup – and stated that if Funk were to testify it would be harmful to him. Price signed the letter with "love and loyalty," although he and Funk barely knew each other. RP (10/29/08) 101-06.

Donald Jessup's body has never been found. When Jessup disappeared, his elderly dog Spooky was left behind without food, and there was still clean laundry in his dryer. RP (10/27/08) 141. Jessup was supposed to spend Christmas 2004 with his friend Norman Gerber, but he never showed up. RP (10/27/08) 138. Jessup's childhood friend Juanita Haley heard from Jessup for the last time on December 15, 2004. If Jessup were still alive, Haley would have heard from him at least once every three or four months. RP (10/27/08) 166-74.

Additional facts of this case will be discussed below as necessary for argument.

C. **ARGUMENT**

1. **THE LIMITED PORTION OF VOIR DIRE FOR WHICH PRICE WAS ABSENT WAS NOT A CRITICAL STAGE OF THE PROCEEDINGS, AND PRICE WAIVED HIS PRESENCE IN ANY EVENT.**

Price first claims that his constitutional right to be present for trial was violated when he was absent for a portion of voir dire. More specifically, Price argues that he must receive a new trial because he was not present when the initial pool of approximately 200 prospective jurors was screened for hardships and given written questionnaires to fill out. Brief of Appellant, at 26-38. This

claim should be rejected on two grounds. First, the limited portion of voir dire for which Price was absent – screening the venire for hardships and handing out questionnaires – was not a critical stage of the proceedings for which Price's presence was required. Second, Price waived his right to be present for this limited portion of voir dire in any event. Accordingly, this Court should affirm.

It is axiomatic that a criminal defendant has the constitutional right to be present during all critical stages of the trial. Illinois v. Allen, 397 U.S. 337, 338, 90 S. Ct. 1057, 25 L. Ed. 2d 353 (1970). What constitutes a "critical stage," however, is not always easily defined. Unquestionably, the core of this right is the right to be present when evidence is being presented. United States v. Gagnon, 470 U.S. 522, 526, 105 S. Cr. 1482, 84 L. Ed. 2d 486 (1985). Beyond that, the defendant has a "right to be present at a proceeding 'whenever his presence has a relation, reasonably substantial, to the fullness of this opportunity to defend against the charge'" Gagnon, 470 U.S. at 526 (quoting Snyder v. Massachusetts, 291 U.S. 97, 54 S. Ct. 330, 78 L. Ed. 674 (1934)).

In determining what is a critical stage and what is not, courts focus on the nature and purpose of the proceedings in question. If a proceeding is ministerial, administrative, or concerns legal

matters that do not depend on the resolution of disputed facts, it is not a critical stage where the defendant's presence is required.

See State v. Rivera, 108 Wn. App. 645, 652-53, 32 P.3d 292 (2001), rev. denied, 146 Wn.2d 1006 (2002); State v. Bremer, 98 Wn. App. 832, 835, 991 P.2d 118 (2000); In re Personal Restraint of Pirtle, 136 Wn.2d 467, 484, 965 P.2d 593 (1998).

Under this test, excusing prospective jurors for hardship reasons is an administrative action within the discretion of the trial court, not a legal question that depends on the resolution of disputed facts. Hardship excusals are governed by RCW 2.36.100, which states in relevant part:

(1) Except for a person who is not qualified for jury service under RCW 2.36.070, no person may be excused from jury service by the court except upon a showing of undue hardship, extreme inconvenience, public necessity, or any reason deemed sufficient by the court for a period of time the court deems necessary.

RCW 2.36.100. This statute establishes an administrative rule for excusing prospective jurors for hardship (as opposed to for cause or pursuant to a peremptory challenge) and vests the discretion for accomplishing this administrative task solely with the court.

Moreover, the fact that excusals for hardship are an administrative responsibility of the court is further illustrated by the

fact that the court may delegate the function of excusing prospective jurors for hardship to court staff or the court clerk. See GR 28(1) (stating that "[t]he judges of a court may delegate to court staff and county clerks their authority to disqualify, postpone, or excuse a potential juror from jury service"); see also State v. Rice, 120 Wn.2d 549, 844 P.2d 416 (1993) (where court clerk's office excused 450 of 600 prospective jurors summoned, court properly rejected defendant's claim that only a judge may excuse prospective jurors).

In sum, hardship excusals are a purely administrative task addressed solely to the discretion of the court, or, if so delegated, to the discretion of the court clerk or staff. This task does not involve the resolution of disputed facts, the taking of evidence, or any other event constituting a critical stage of the proceedings.

In this case, the record reflects that on the first day of voir dire, the initial pool of approximately 200 prospective jurors came into the courtroom in groups of about 50 at a time, whereupon the trial court gave each group a preliminary instruction and a definition of what constituted an "undue hardship," heard from prospective jurors claiming an undue hardship, spoke with counsel at sidebar, and announced hardship excusals for each group. Lastly, the trial

court distributed questionnaires to the remaining prospective jurors with instructions to return the following Monday. This procedure was performed four times in precisely the same way with each group. RP (10/2/08) 2-59. The trial court also explained to each group that Price had been excused from the proceedings that day "because we are going to ask only a few preliminary questions and then he will be present in the courtroom on Monday." RP (10/2/08) 2; *see also* RP (10/2/08) 15, 43-44, 45. Price was then present for the remaining, substantive portions of voir dire. RP (10/6/08)²; RP (10/7/08).

Based on this record, Price was not deprived of the right to be present for a critical stage of the proceedings when he was absent for hardship excusals and handing out questionnaires. As explained above, excusing prospective jurors for hardship is an administrative task within the sole discretion of the court, and thus, not a critical stage. Price's right to be present for trial was not violated, and this Court should affirm.

Nonetheless, Price suggests that his presence was required for hardship excusals because voir dire "is substantially related to

² This volume is mislabeled "November 6, 2008."

the defense and allows the defendant to give advice or suggest or even to supersede his lawyers." State v. Wilson, 141 Wn. App. 597, 604, 171 P.3d 501 (2007) (internal quotation marks omitted) (citation omitted); Brief of Appellant, at 27-28. Although this is certainly the case with the *substantive* portions of voir dire, for which Price clearly was present, hardship excusals are administrative and within the trial court's sole discretion. Therefore, even if Price's opinion of what constituted an undue hardship differed from that of his lawyer or the court, it would be of no moment to the case. Price's claim is without merit.

But even if this Court were to conclude that excusals for hardship and handing out questionnaires comprise a critical stage of a criminal trial, Price is still not entitled to reversal because he waived his presence for the first day of voir dire in any event.

The day before voir dire began, the trial court described the procedure for what would take place on the first day:

And then we will be bringing [the prospective jurors] into our courtroom about 50 at a time -- I expect about 200 or so. And so, we will go through the introductory language, probably reading the information, and hardships, and the purpose of doing it that way is we do not want to have people we're excusing for hardship do a questionnaire. So, once we've culled that group, they would go back to the main room and complete the questionnaire. Once

they've completed the questionnaire, then we excuse them until Monday.

RP (10/1/08) 11. After further discussion, the following exchange took place between the trial court and Price's defense attorney, who questioned the trial court's assumptions as to whether Price's presence would be necessary:

THE COURT: All right. But we're doing it this way because I'm assuming the defendant -- this is a critical stage of the proceedings and the defendant needs to be present, even though we're just calling for hardship.

MS. GAISFORD: And that was -- I guess that was part of my question. I've done it where none of us are present, and we -- it's -- the hardship was passed out, but --

THE COURT: I think it's better to have a good coverage [sic]. But if he doesn't -- if he doesn't want to be here, you know, it makes it a little easier, because then we can do it in those two big rooms, and we don't have to do it four time[s].

MS. GAISFORD: Okay. I'll -- let me just address that with him as we finish this afternoon.

RP (10/1/08) 13-14.

Just before the proceedings ended for the day, Price's counsel indicated that she had spoken with Price, and that Price did not wish to be present for the first day of voir dire so long as the case detective also was not present:

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 [the] hardship part, I certainly don't think it's a critical stage in the proceedings.

And then [Price] 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?

RP (10/1/08) 47 (emphasis supplied). After the prosecutor stated that the detective would not be present, Price's defense attorney confirmed that Price would not be present, either. RP (10/2/08) 48.

This record shows that Price waived his presence for the first day of voir dire after consulting with his attorney. Therefore, even assuming that anything that happened on the first day of voir dire could be considered a critical stage of the proceedings, Price is still not entitled to a new trial. Indeed, to conclude otherwise would suggest that the trial court should have required that Price be present, even though Price clearly did not wish to be present, and even though Price's experienced defense counsel correctly advised him that he did not need to be present. This Court should reject Price's claims, and affirm.

Nonetheless, Price argues that he did not waive his presence because his attorney incorrectly advised him that

hardship excusals were not a critical stage, and therefore, that his decision to be absent was involuntary. Brief of Appellant, at 31-33. This argument is specious for at least a couple of reasons.

First, the argument is improperly framed. In order for Price to raise the argument that he was prevented from making a valid waiver of his presence due to erroneous advice from trial counsel, such an argument should be raised as a claim of ineffective assistance of counsel. Second, Price's argument is specious because the situations he claims are analogous are, in fact, wholly inapposite. See City of Bellevue v. Acrey, 103 Wn.2d 203, 207, 691 P.2d 957 (1984) (*implied* waiver of the right to a jury trial, made *without* the advice of counsel, was not valid); City of Seattle v. Klein, 161 Wn.2d 554, 559, 166 P.3d 1149 (2007) (*forfeiture* of right to appeal, *inferred* from defendants' failure to appear at future court proceedings, not valid); State v. Thomason, 70 Wn. App. 200, 206, 852 P.2d 1104 (1993), *aff'd*, 123 Wn.2d 877, 872 P.2d 1097 (1994) (defendant voluntarily absented himself from the proceedings, which requires *inferring* a waiver from mere fact of absence). This is not a case where the trial court inferred a waiver or a forfeiture of a bedrock constitutional right by a defendant who did not have an attorney, and Price's argument fails for this reason as well.

Price also relies on cases where defendants were given erroneous advice prior to a guilty plea in support of his argument. See Brady v. United States, 397 U.S. 742, 748, 90 S. Ct. 1463, 25 L. Ed. 2d 747 (1970); State v. Mendoza, 157 Wn.2d 582, 587, 141 P.3d 49 (2006). However, a guilty plea involves a waiver of *all* of the defendant's constitutional trial rights. Thus, the failure to appreciate the consequences of a plea is very different from what occurred here. Whether a defendant is told he has the *right* to be present has no bearing on whether the defendant *wants* to be present, so long as the defendant is not *prevented* from being present if he wants to be. In this respect, the right to be present is like the right to testify at trial, i.e., so long as the defendant is not *prevented* from exercising it, no error has occurred. See State v. Thomas, 128 Wn.2d 553, 910 P.2d 475 (1996). Here, no one prevented Price from being present for hardship excusals and handing out questionnaires. Rather, he simply and quite reasonably decided he would rather not be there. This decision was valid, and Price's claims to the contrary are wholly without merit.

Lastly, Price claims that allowing him to be absent for hardship excusals and handing out questionnaires is a so-called

"structural" error that should result in the automatic reversal of his conviction and is not subject to a harmless error analysis. This claim should be rejected as well.

So-called "structural errors" are errors that "infect the entire trial process," Brecht v. Abramson, 507 U.S. 619, 630, 113 S. Ct. 1710, 123 L. Ed. 2d 353 (1993), such that they "necessarily render a trial fundamentally unfair," thus necessitating a new trial. Rose v. Clark, 478 U.S. 570, 577, 106 S. Ct. 3101, 92 L. Ed. 2d 460 (1986). Such an error affects "the framework within which the trial proceeds, rather than simply an error in the trial process itself." Neder v. United States, 527 U.S. 1, 8, 119 S. Ct. 1827, 144 L. Ed. 2d 35 (1999). Accordingly, structural errors are not subject to a harmless error analysis because their impact on the proceedings is so pervasive.

Structural errors are rare. In fact, in the last century of its jurisprudence, the United States Supreme Court has identified only six of them. See Sullivan v. Louisiana, 508 U.S. 275, 113 S. Ct. 2079, 124 L. Ed. 2d 182 (1993) (defective jury instruction defining reasonable doubt); Vasquez v. Hillery, 474 U.S. 254, 106 S. Ct. 617, 88 L. Ed. 2d 598 (1986) (racial discrimination in selection of grand jury); Waller v. Georgia, 467 U.S. 39, 104 S. Ct. 221, 81 L.

Ed. 2d 31 (1984) (denial of the right to a public trial); McKaskle v. Wiggins, 465 U.S. 168, 104 S. Ct. 944, 79 L. Ed. 2d 122 (1984) (denial of the right of self-representation); Gideon v. Wainwright, 372 U.S. 335, 83 S. Ct. 792, 9 L. Ed. 2d 799 (1963) (denial of the right to counsel); Tumey v. Ohio, 273 U.S. 510, 47 S. Ct. 437, 71 L. Ed. 2d 749 (1927) (biased trial judge).

Even assuming that what occurred in this case was an error, it in no way resembles the six structural errors as set forth above. Far from infecting the entire framework of the trial such that a new trial is necessary, the defendant's absence from the hardship excusals had no effect whatsoever. None of the excusals were contested, and in any event, they were within the sole discretion of the trial court. Accordingly, the harmlessness of any possible error is evident, and Price's claim of structural error should be rejected.

2. PRICE WAIVED HIS PRESENCE WHEN THE DELIBERATING JURY WAS LISTENING TO AUDIO EXHIBITS IN THE COURTROOM, AND IN ANY EVENT, ANY ERROR WAS HARMLESS.

Price also claims that his right to be present was violated because he was absent when the jurors were listening to recorded exhibits in the courtroom during deliberations. He claims that his attorney had no authority to waive his presence, and that his

absence requires a new trial. Brief of Appellant, at 38-41. This claim should also be rejected, because Price waived his presence, and in any event, any possible error was harmless.

The Washington Supreme Court has held that a criminal defendant has the right to be present when recordings are replayed in the courtroom for the jury during deliberations.³ State v. Rice, 110 Wn.2d 577, 613-14, 757 P.2d 889 (1988); State v. Caliguri, 99 Wn.2d 501, 508, 664 P.2d 466 (1983). This right is limited, however, and is subject to both waiver and harmless error analysis. In addition, the nature of the error identified in these cases is the impropriety of *ex parte* contact between the court and the deliberating jury. State v. Russell, 25 Wn. App. 933, 946-48, 611 P.2d 1320 (1980). Therefore, if the defendant's counsel and counsel for the State are present when the audio exhibits are replayed, then by definition there cannot be *ex parte* contact between the court and the jury.

³ As a preliminary matter, the State questions the soundness of this holding, given that no one other than the deliberating jurors has the right, or indeed, the ability to be present during deliberations, which are secret and not to be intruded upon. However, the State realizes that this Court is not the forum in which to be challenging these cases.

Here, the record is clear that counsel for both parties were present when the recordings of Price's telephone calls to Judith Mahler were replayed in the courtroom at the jury's request during deliberations. RP (11/5/08) 285-92. In addition, Price's attorney stated that she saw "no reason for [Price] to be brought up" to the courtroom, and stated that she was "specifically waiving his presence." RP (11/5/08) 286. Again, Price does not claim that his attorney rendered ineffective assistance of counsel, and there is no indication in the record that counsel waived Price's presence against his wishes or without his permission. Price's presence was properly waived, and this Court should reject Price's suggestions to the contrary.

Lastly, even if any error did occur in spite of the presence of counsel and the express waiver of Price's presence, any such error is clearly harmless beyond any reasonable doubt. The only prejudice Price has attempted to identify is that the jury could have drawn a negative inference from his absence while the recordings were replayed. Brief of Appellant, at 39-40. This is mere speculation. Moreover, in Caliguri (a case where neither the defendant nor counsel were present), the jury heard portions of a tape that had been excluded from the trial. Caliguri, 99 Wn.2d at

509. If this was found harmless beyond a reasonable doubt, then Price's inchoate claim of prejudice fails as well. This Court should reject Price's arguments, and affirm.

3. THE TRIAL COURT EXERCISED SOUND DISCRETION IN ADMITTING EVIDENCE THAT PRICE AND OTHERS INVOLVED IN THIS CASE WERE MEMBERS OF MOTORCYCLE GANGS.

Price next claims that the trial court erred in admitting evidence that he was a member of the Ghost Riders motorcycle gang. He claims that this evidence was improperly admitted as proof of his propensity for violent criminal behavior. Brief of Appellant, at 41-48. This claim should be rejected. Proof of Price's membership in the Ghost Riders was properly admitted to prove why no one reported Donald Jessup's murder to the authorities. Additionally, given that other key people in this case, including Donald Jessup and Jason Rebman, were also affiliated with motorcycle gangs, Price's affiliation was an essential component of the case as a whole. The trial court properly exercised its discretion in admitting this evidence, and therefore, this Court should affirm.

Under ER 404(b), evidence of the defendant's other crimes, wrongs, or acts is admissible if it is relevant to prove identity,

motive, preparation, plan, absence of mistake or accident, or for any purpose other than showing the defendant's criminal character or propensity. State v. Russell, 125 Wn.2d 24, 66, 882 P.2d 747 (1994). Before admitting evidence under this rule, the trial court should find by a preponderance of the evidence that the prior acts occurred, identify the purpose for which the evidence is offered, determine its relevancy for this purpose, and weigh its probative value against the prejudicial effect. State v. Foxhoven, 161 Wn.2d 168, 175, 163 P.3d 786 (2007). Relevant evidence should be disallowed only if its probative value is outweighed substantially by the danger of unfair prejudice in the context of the trial as a whole. ER 403; State v. Stackhouse, 90 Wn. App. 344, 356, 957 P.2d 218, rev. denied, 136 Wn.2d 1002 (1998).

The trial court's decision to admit evidence under ER 404(b) is reviewed for manifest abuse of discretion. State v. Dennison, 115 Wn.2d 609, 627-28, 801 P.2d 193 (1990). The trial court abuses its discretion only if its decision is based on untenable grounds or is made for untenable reasons. State ex rel. Carroll v. Junker, 79 Wn.2d 12, 26, 482 P.2d 775 (1971). Put another way, the trial court's decision will be overturned on appeal only if no

reasonable judge would have ruled as the trial court did. State v. Thang, 145 Wn.2d 630, 642, 41 P.3d 1159 (2002).

Although evidence of a defendant's gang affiliation is generally prejudicial, it is nonetheless admissible if it is relevant and probative of a material issue at trial. See, e.g., State v. Boot, 89 Wn. App. 780, 789-90, 950 P.2d 964, rev. denied, 135 Wn.2d 1015 (1998) (gang evidence was admissible to establish motive and premeditation); State v. Campbell, 78 Wn. App. 813, 822, 901 P.2d 1050, rev. denied, 128 Wn.2d 1004 (1995) (gang evidence was admissible to prove that a territorial dispute with a rival gang resulted in murder).

In this case, the trial court acted within its discretion in ruling that evidence of Price's affiliation with the Ghost Riders was admissible to explain why Channel Ridley and Judith Mahler did not report Donald Jessup's murder. Moreover, given that several people involved in this case, including Jessup himself, were involved in motorcycle gangs, the fact of Price's affiliation was a necessary aspect of the case as a whole. The trial court exercised sound discretion in admitting this evidence, and Price's claims to the contrary are without merit.

In considering this claim, it is necessary to discuss additional procedural and substantive facts from the trial record as follows.

First, it is important to note that in ruling on this issue, the trial court disallowed use of the term "motorcycle gang," and required that a more "neutral" term (such as "group") be used. RP (8/21/08) 111, 117. Although Price's brief identifies a couple of slip-ups in the course of a trial lasting several weeks, the witnesses were remarkably scrupulous in adhering to this aspect of the trial court's ruling, thus reducing the potential for unfair prejudice.

Moreover, the trial court correctly found that both Ridley and Mahler were very familiar with the motorcycle gangs at issue from personal experience, and that this knowledge was relevant because "they had an expectation of what their cooperation with the police would mean" in terms of their personal safety. RP (8/21/08) 118. Also, the court properly allowed Detective Mike Brown of the King County Sheriff's Office to testify as an expert on these gangs because such knowledge is not within the common experience of the average juror. RP (8/21/08) 119.

Channel Ridley testified that Price always wore a vest adorned with the Ghost Rider "colors" to signify his membership in the group. RP (10/13/08) 39. Ridley not only failed to report

Jessup's murder, but she continued to pretend that everything was fine because she was afraid Price would send other Ghost Riders to hurt her. RP (10/14/08) 100-01. She further explained that she lied to Price on the telephone when she accepted his calls from the jail because being considered a "rat" was "not a good thing at all to them," meaning the Ghost Riders. RP (10/14/09) 10. After Ridley finally told the police what she knew, Jason Rebman (a member of another motorcycle gang, the Iron Lords) was so concerned for her safety that he arranged for her to go into hiding temporarily with members of Jessup's club, the Gypsy Jokers. RP (10/21/08) 92-93.

Judith Mahler was also well aware that Price was a Ghost Rider, and her son Rick was a member of the Iron Lords with Jason Rebman. RP (10/16/08) 60. After Jessup's murder, she overheard Price and Karl laughing about stealing Jessup's Gypsy Joker "colors." RP (10/20/08 a.m.) 40. Mahler also explained that Price was required to meet with the president of the Ghost Riders in Portland after the murder to explain what had happened with Jessup. Price was "very agitated" when he returned from this meeting. RP (10/20/08 a.m.) 49-51. Mahler was very concerned by the fact that this case involved motorcycle gang members, and she feared retaliation from Price or other Ghost Riders if she

reported what she knew. RP (10/20/08) 57, 61. Mahler's friend Karen Baker heard Price tell Mahler that "people who know too much get hurt." RP (10/21/08) 26.

Detective Mike Brown testified to his extensive knowledge of the motorcycle gangs involved in this case. He explained that each club has a "strong bond, extremely strong loyalty" among its members, and that talking to or cooperating with law enforcement is a "big violation" of their code. RP (10/22/08) 206-07. In addition, he explained that if a member of one club committed an offense against a member of a rival club, the clubs would handle it between themselves rather than report it to the authorities. RP (10/22/08) 207-08.

This record demonstrates that the trial court exercised sound discretion in ruling that Price's gang affiliation was relevant, probative evidence regarding material issues other than criminal propensity. As the trial court found, the evidence was admissible to explain why Ridley and Mahler did not report the murder they had witnessed, but tried to pretend that nothing had happened. In addition, given that the affiliations of several individuals involved in this case were important to the case as a whole, the evidence was necessary to explain these relationships to the jury. In sum, Price

cannot show a manifest abuse of the trial court's discretion.

Therefore, this Court should affirm.

4. THE FAILURE TO REQUEST A LIMITING INSTRUCTION WAS A TACTICAL DECISION, AND IN ANY EVENT, IT WAS HARMLESS.

Finally, Price contends that he received ineffective assistance of counsel because his attorney did not request a limiting instruction regarding the evidence of his affiliation with the Ghost Riders. Brief of Appellant, at 48-53. This claim should be rejected. Price's attorney made a reasonable tactical decision not to request a limiting instruction because it would have unnecessarily highlighted the evidence, and because it arguably would have limited similar evidence regarding Donald Jessup, Jason Rebman, and others. In addition, the admission of this evidence without a limiting instruction was harmless, because the prosecution used this evidence properly, and because the other evidence against Price was overwhelming. This Court should affirm.

A criminal defendant has the constitutional right to effective assistance of counsel. Strickland v. Washington, 466 U.S. 682, 686, 104 S.Ct. 2052, 80 L.Ed.2d 674 (1984). The benchmark for judging a claim of ineffective assistance of counsel is whether counsel's

conduct "so undermined the proper functioning of the adversarial process that the trial cannot be relied on as having produced a just result." Strickland, 466 U.S. at 686.

The defendant bears the burden of establishing ineffective assistance of counsel. Strickland, 466 U.S. at 687. To carry this burden, the defendant must meet both prongs of a two-part test. Specifically, the defendant must show: 1) that counsel's representation was deficient, meaning that it fell below an objective standard of reasonableness considering of all the circumstances (the "performance prong"); and 2) that the defendant was prejudiced, meaning that there is a reasonable probability that the result of the trial would have been different but for counsel's unprofessional errors (the "prejudice prong"). Strickland, 466 U.S. at 687; State v. McFarland, 127 Wn.2d 322, 334-35, 899 P.2d 1251 (1995). If the court decides that either prong has not been met, it need not address the other prong. State v. Garcia, 57 Wn. App. 927, 932, 791 P.2d 244, rev. denied, 115 Wn.2d 1010 (1990).

Judicial scrutiny of counsel's performance must be highly deferential. Strickland, 466 U.S. at 689. As the United States Supreme Court has warned, "[i]t is all too tempting for a defendant to second-guess counsel's assistance after conviction or adverse

sentence, and it is all too easy for a court, examining counsel's defense after it has proved unsuccessful, to conclude that a particular act or omission of counsel was unreasonable." Strickland, 466 U.S. at 689. Therefore, every effort should be made to "eliminate the distorting effects of hindsight," and to judge counsel's performance from counsel's perspective at the time. Strickland, 466 U.S. at 689.

In judging counsel's performance, courts must engage in a strong presumption of competence. Strickland, 466 U.S. at 689. This presumption of competence includes the presumption that the challenged actions were the result of a reasonable trial strategy. Strickland, 466 U.S. at 689-90. Legitimate trial strategy or tactics cannot be the basis of a claim of ineffective assistance of counsel. State v. Garrett, 124 Wn.2d 504, 520, 881 P.2d 185 (1994). In any given case, effective representation may be provided in countless ways, with many different tactics and strategic choices. Strickland, 466 U.S. at 689.

In addition to overcoming the strong presumption of competence and showing deficient performance, the defendant must also affirmatively show material prejudice. Strickland, 466 U.S. at 693. Prejudice is not established by a showing that an error by counsel had some conceivable effect on the outcome of the trial.

Strickland, 466 U.S. at 693. If the standard were so low, virtually any act or omission would meet the test. Strickland, 466 U.S. at 693. Therefore, the defendant must establish a reasonable probability that, but for counsel's unprofessional errors, the result of the trial would have been different. Strickland, 466 U.S. at 694.

Here, Price cannot meet the performance prong or the prejudice prong, and thus, his claim fails.

First, as to the performance prong, it was a legitimate tactical decision for Price's counsel not to have requested a limiting instruction regarding the motorcycle gang evidence in order to avoid highlighting it. As this Court has observed,

It is not unusual for able trial counsel to not request a limiting instruction regarding evidence that counsel believes is damaging to the client. Counsel may conclude that more damage may be done by calling the jury's attention to the evidence.

State v. Barber, 38 Wn. App. 758, 771 n.4, 689 P.2d 1099 (1984), rev. denied, 103 Wn.2d 1013 (1985). In addition, as noted above, Price was not the only person involved in this case who was a member of a motorcycle gang. Rick Mahler and Jason Rebman were members of the Iron Lords. Donald Jessup was a past chapter president of the Gypsy Jokers -- a much larger and far more notorious gang than the Ghost Riders. Price's counsel would have

wanted the jury to consider these individuals' motorcycle gang memberships for multiple purposes, and likely decided that asking for a limiting instruction would have this downside as well. In sum, Price cannot meet his burden of showing a deficient performance because there were strategic reasons not to request a limiting instruction in this case.

Price cannot meet the prejudice prong, either. First, nowhere in the State's closing arguments did the prosecutor suggest that the jury should consider Price's membership in a motorcycle "group" in an improper way. See RP (11/4/08) 124-228, 275-81. Moreover, the evidence against Price was overwhelming. Although this case might otherwise have been more difficult, given the lack of a body or any physical evidence, and given that both eyewitnesses to the murder had obvious strikes against them from a credibility standpoint, Price essentially proved his own guilt beyond a reasonable doubt with his relentless letters and telephone calls from the jail. Although Price never came right out and said "I killed Donald Jessup" in these letters and calls, this was certainly the only reasonable inference to be

drawn from the statements that Price made.⁴ In sum, particularly in light of Price's relentless campaign of witness tampering, there is no reasonable probability that the outcome of the trial would have been different if a limiting instruction had been given with respect to Price's membership in the Ghost Riders. Accordingly, this Court should affirm.

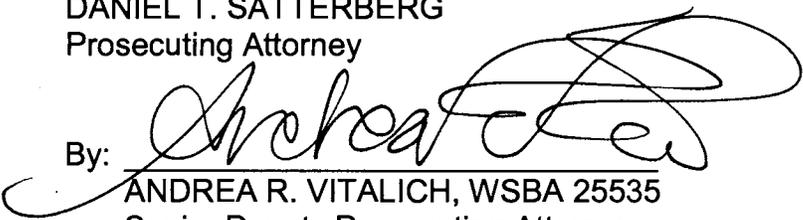
D. CONCLUSION

For all of the foregoing reasons, the State asks this Court to affirm Price's convictions for murder in the first degree with a firearm enhancement and two counts of witness tampering.

DATED this 22nd day of April, 2010.

RESPECTFULLY submitted,

DANIEL T. SATTERBERG
Prosecuting Attorney

By: 

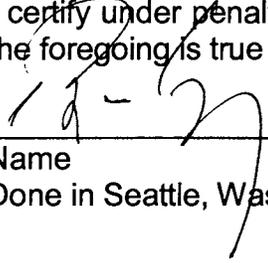
ANDREA R. VITALICH, WSBA 25535
Senior Deputy Prosecuting Attorney
Attorneys for the Respondent

⁴ For instance, Price told Ridley that the State could not make its case without her testimony because "they still do not have any other evidence or blood, or even a body." RP (10/14/08) 132 (Exhibit 19). When Mahler told Price that she did not think Jessup's murder was premeditated, he said, "I know, but that's what they're -- they're going for premeditated first degree." RP (10/20/08 a.m.) 80.

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 Brief of Respondent, in STATE V. JOHN PRICE, Cause No. 63056-3-1, 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.



Name

Done in Seattle, Washington

04-22-10

Date