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Court of Appeals
Division I
State of Washington

NO. 72565-3-I

COURT OF APPEALS OF THE STATE OF WASHINGTON

DIVISION I

STATE OF WASHINGTON,

Respondent,

v.

ASHANTE GARRETT,

Appellant.

APPEAL FROM THE SUPERIOR COURT FOR KING COUNTY

THE HONORABLE JOHN H. CHUN

BRIEF OF RESPONDENT

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A. ISSUES

1. Due process requires that the State prove every element of a charged crime. Taken in the light most favorable to the State, the evidence established that Garrett physically assaulted his victim, dragged her between rooms, got on top of her and made stabbing motions toward her with a fork, and verbally threatened her life. Did the State prove that the victim, who was visibly distraught when police arrived, had been placed in reasonable fear for her life?

2. Except in cases of manifest and constitutional error an appellant may not raise an issue for the first time on appeal. At trial, the State admitted a municipal court docket for the limited purpose of showing that a no-contact order existed and that Garrett was aware of the order. Garrett failed to cite ER 404(b) to exclude admission of the municipal court docket. Alleged erroneous admission of ER 404(b) evidence is not of constitutional magnitude that can be raised for the first time on review. Has Garrett failed to preserve this error?

3. A defendant who failed to object to alleged prosecutorial misconduct has waived any right to appeal unless the comments were so flagrant and ill-intentioned that they could not have been neutralized by a curative instruction. At trial, the prosecutor did not make an attack on defense counsel, but rather refuted specific defense arguments. Garrett

failed to object to the prosecutor's argument. Is Garrett entitled to a new trial when the arguments were not ill-intentioned and when any prejudice could easily have been avoided by a curative instruction?

4. A defendant has a due process right to be present at all critical stages of a trial. A critical stage is one at which the defendant's presence has a reasonably substantial relationship to his right to defend against the charges. Garrett was not present during a brief logistical discussion arranging defense counsel's interview of a witness who had previously been found to be material. Was Garrett's right to be present during critical stages of the trial violated by his absence?

B. STATEMENT OF THE CASE

1. PROCEDURAL FACTS

Ashante Garrett was charged with two counts of felony violation of a court order (both counts relating to a court order entered on March 6, 2014, in Kent Municipal Court), one count of residential burglary, and one count of felony harassment. CP 9-11. All counts included a domestic violence sentence aggravator. CP 9-11. At trial, Garrett was found guilty as charged. CP 47-50. On a special verdict form the jury also found that Garrett and his victim, Amanda Guzman, were in a dating relationship.

CP 51. Garrett was sentenced to a standard range sentence of 74 months in custody. CP 96.

2. SUBSTANTIVE FACTS

At about midnight on March 7, 2014, police officers went to Guzman's house in response to her 911 call reporting that she had been assaulted. 3 RP¹ 168-69. Officer Walker found Guzman sitting in a chair on the front porch "trying to hug herself." 3 RP 172. "She was rocking back and forth, and just, in general, very, very upset." 3 RP 172. Her breathing was shallow and fast. She was sniffing and her eyes were watery but she was trying not to cry. 3 RP 172. Walker described Guzman as being "fearful," and testified that "...her eyes were darting. She was constantly looking around as if she was looking for somebody." 3 RP 172. In Officer Walker's opinion, based on his experience, Guzman was "displaying signs of emotion and fear." 3 RP 172. At one point Guzman had a panic attack. 3 RP 173. Guzman said she had been assaulted by her boyfriend, Garrett. 3 RP 174. Officer Walker had to tell Guzman "he's not here anymore. You're fine." 3 RP 173.

¹ The verbatim report of trial court proceedings consists of seven volumes, which will be referred to in this brief as follows: 1 RP (7/16/14); 2 RP (7/17/14 & 7/21/14); 3 RP (7/22/14); 4 RP (7/23/14); 5 RP (7/25/14 a.m.); 6 RP (7/25/14 p.m.); 7 RP (7/26/14).

Walker worked to calm Guzman enough that she was able to tell him what had happened. 3 RP 173-76. On the night of the charged incident Garrett and Guzman were arguing in the home they shared. Garrett had been arrested and jailed on the previous day, and the argument involved Garrett's belief that Guzman had been too involved in discussions with Garrett's brother in arranging bail for Garrett. 3 RP 205. Garrett believed that Guzman had an inappropriate relationship with his brother and he asked her if she had "been with anybody" while he was in jail. 3 RP 205. When she denied the allegation Garrett slapped Guzman behind the ear. 3 RP 206. After slapping her, Garrett grabbed Guzman by her shirt and dragged her from the living room into a back bedroom. 3 RP 207. He threw her on the bed, got on top of her, and pressed down hard on her chest. 3 RP 207. Guzman was able to breathe, but the pressure was "very, very hard" and painful. 3 RP 207. Garrett demanded that Guzman give him money. 3 RP 207. Guzman then threatened to call the police. Garrett responded by saying words to the effect of: "If I'm going to go to jail, I might as well go to jail for killing you." 3 RP 207-08. When Garrett said that, Guzman believed it was a valid threat and that he might kill her. 3 RP 210. Garrett then left the bedroom and returned with a fork. 3 RP 208. When Guzman saw that Garrett had armed himself with a fork she curled up on the bed in a fetal position. 3 RP 208. Garrett got on top

of her and made stabbing motions toward her with the fork. 3 RP 208. Guzman tried to cover her face with her hands but Garrett pulled at her arm as he made the stabbing motions with the fork. 3 RP 210-11. As Garrett made the stabbing motions he was continuing to threaten Guzman's life. 3 RP 212. Guzman was afraid that Garrett might stab her and that he might kill her. 3 RP 213.

Guzman declined to sign a written statement prepared by a responding police officer because she was afraid of retaliation by Garrett or his family or friends. 3 RP 232. After interviewing the victim and photographing the scene, all of the responding law enforcement officers left at about the same time. 3 RP 235.

Approximately two hours later, Officer Rhea went to the same residence after Guzman again called 911. 3 RP 236. The officer saw that Guzman was "visibly upset"; she was crying and trembling. 3 RP 237. Guzman had a red mark on her cheek that had not been there when officers had seen her two hours earlier. 3 RP 237. The right side of her face was red and slightly swollen. 3 RP 241. Guzman told Rhea that Garrett had come back and entered through an unlocked back door. 3 RP 239. He assaulted her, took about \$140 from her, and took her cell phone. 3 RP 239. Garrett was no longer at the scene. 3 RP 326.

Guzman told Officer Rhea that she and Garrett had a room at a local hotel that was paid for but not occupied. 3 RP 243. At the request of the officer, Guzman then called Garrett and arranged for him to meet her at the hotel room, ostensibly to return her money and cell phone. 3 RP 243. Several officers then staked out the hotel and arrested Garrett when he drove into the parking lot. 3 RP 244-45. Arresting officers recovered Guzman's distinctive pink cell phone from the console of Garrett's car. 3 RP 247. The pink cell phone had been in Guzman's possession when officers first responded to her residence that night. 3 RP 259.

C. ARGUMENT

1. GARRETT'S CONVICTION FOR FELONY HARASSMENT IS SUPPORTED BY SUFFICIENT EVIDENCE THAT GARRETT THREATENED GUZMAN'S LIFE AND THAT GUZMAN REASONABLY FEARED FOR HER LIFE.

Garrett contends that his conviction for harassment is not supported by sufficient evidence. This claim should be rejected. Substantial evidence was presented that Guzman was placed in reasonable fear after Garrett threatened her life.

The Due Process Clause of the Fourteenth Amendment to the United States Constitution requires the State to prove every element of a charged crime beyond a reasonable doubt. In re Winship, 397 U.S. 358,

364, 90 S. Ct. 1068, 25 L. Ed. 2d 368 (1970). When an appellant claims that there was insufficient evidence to support his conviction, the reviewing court views the evidence and all inferences that can reasonably be drawn from it in the light most favorable to the State. State v. Salinas, 119 Wn.2d 192, 201, 829 P.2d 1068 (1992). Viewing the evidence in that light, if any rational trier of fact could have found each element of the crime proven beyond a reasonable doubt, then the evidence is sufficient to support the conviction. State v. Green, 94 Wn.2d 216, 221-22, 616 P.2d 628 (1980).

Garrett's primary argument in contending that there was insufficient evidence to support his conviction for felony harassment is that the State failed to prove that Guzman, as a result of the threats, believed Garrett would kill her. Garrett misconstrues the legal standard by arguing, in essence, that the victim of felony harassment must believe with certainty that the defendant intends to carry through on the death threat. In fact, what is required is that the words or conduct of the defendant place the victim *in reasonable fear* that the threat to kill would be carried out. RCW 9A.46.020; State v. Mills, 154 Wn.2d 1, 10-11, 109 P. 3d 415 (2004); State v. C.G., 150 Wn.2d 604, 612, 80 P.3d 594 (2003).

Considering all the facts and circumstances of Garrett's words and conduct on the night of the incident, and viewing the evidence in the light

most favorable to the State, it is clear that Garrett's threats to kill put Guzman in reasonable fear for her life. In arguing that the evidence was insufficient, Garrett focuses on the fact that the victim, Guzman, supplied little substantive evidence in her testimony. While it is true that Guzman was an uncooperative witness, Officer Walker testified at length concerning his observations of Guzman's mental and emotional condition, and to her statements to him regarding what she had experienced at the hands of Garrett. Officer Walker's testimony clearly provided sufficient evidence that Guzman, as a result of Garrett's threats, was placed in reasonable fear for her life.

Officer Walker first found Guzman in a state of extreme emotional distress. She was "trying to hug herself" and was "rocking back and forth," and "in general, very, very upset." Her breathing was shallow and he witnessed her having a panic attack. She was clearly fearful and her eyes darted around looking for Garrett. Walker testified that Guzman told him that Garrett had struck her behind the ear and dragged her from room to room. Garrett had then thrown her on the bed, straddled her, and pressed down on her very hard, causing her pain. When Guzman threatened to call police, Garrett responded: "If I'm going to go to jail, I might as well go to jail for killing you." Walker testified that Guzman

told him that she believed that had been a valid threat and that Garrett might kill her.

Garrett then briefly left the bedroom and returned with a fork, which he then used to make stabbing motions toward Guzman's face while sitting on top of her. Walker testified regarding what Guzman told him Garrett was doing while he was on top of her:

A. Okay. As he was making the stabbing motions, he was continuing to threaten her life.

Q. And I'm sorry. I still have a fan buzzing.

A. I'm sorry. As he was making the stabbing motions, he was continuing to threaten her life.

Q. Did he say anything else?

A. No.

Q. Did Amanda indicate how she was feeling in that moment when the stabbing was –

A. She was afraid that he might stab her, he might kill her.

3 RP 212-13. The above passage utterly refutes Garrett's claim that the evidence failed to connect Guzman's fear to a threat to kill made by Garrett.

Garrett, almost in passing, suggests that the State did not prove that Garrett had made a "true threat." A "true threat" does not require that the

defendant actually intend to carry out the threat to kill, but it does require that a reasonable person in the defendant's position would foresee that his statements would be interpreted as a serious statement of intent to inflict death. State v. Kilburn, 151 Wn.2d 36, 48, 84 P.3d 1215 (2004).

Considering the context of Garrett's threats to kill -- a brutal domestic violence assault in which the victim was struck, dragged between rooms, and threatened with a fork -- it cannot seriously be argued that Garrett did not make a "true threat."

Garrett's claim that there was insufficient evidence to convict him of felony harassment must be rejected. Considering Garrett's conduct and all the circumstances surrounding his threats to Guzman's life, and taking the evidence in the light most favorable to the State, certainly there was a basis for a rational trier of fact to find that Garrett's threats had placed Guzman in reasonable fear for her life.

2. GARRETT IS NOT ENTITLED TO APPELLATE REVIEW OF THE ADMISSION OF THE MUNICIPAL COURT DOCKET BECAUSE AT TRIAL HE FAILED TO CITE ER 404(b) IN OBJECTION TO ITS ADMISSION.

Garrett argues that the trial court violated ER 404(b) by admitting the Kent Municipal Court docket. But at trial Garrett did not cite ER 404(b) in objecting to the admission of the docket. Garrett objected

only that the docket shouldn't be admitted under the public records exception to the hearsay rule. Appellate courts generally will not consider an issue that is raised for the first time on appeal. State v. Kirkman, 159 Wn.2d 918, 926, 155 P.3d 125 (2007). Pursuant to RAP 2.5, Garrett's argument that admission of the Kent Municipal Court docket violated ER 404(b), which he attempts to raise for the first time on appeal, should not be considered by this reviewing court.

The admissibility of the certified docket record from Kent Municipal Court had not been the subject of a pre-trial motion in limine.² At trial the docket was offered by the State under the certified public records exception to the hearsay rule for the limited purpose of establishing that the no contact order had been served on the defendant at a specific municipal court hearing. 4 RP 265. Defense counsel for Garrett objected to the admission of the court docket, arguing only that it should not be admitted under the certified public records hearsay exception because municipal court staff may have recorded some unspecified information incorrectly. 4 RP 266-73. Defense counsel did not object to the admissibility of the docket on the basis of ER 404(b). An objection in

² The Kent Municipal Court docket was not addressed in the State's written motion in limine. CP 125-30. The State moved only to admit pursuant to ER 404(b) evidence that Garrett had previously broken down a hotel room door in Guzman's presence. Nor was the docket addressed in the oral argument on the ER 404(b) motion in limine. 1 RP 10-17.

the trial court on different grounds than those argued on appeal is not sufficient to preserve the alleged error. Trueax v. Ernst Home Ctr., Inc., 124 Wn.2d 334, 339, 878 P.2d 1208 (1994); State v. Ferguson, 100 Wn.2d 131, 138, 667 P.2d 68 (1983) (appellate court will not reverse trial court's evidentiary ruling on the basis that the trial court should have ruled differently "under a different rule which could have been, but was not, argued at trial.").

Garrett's contention that the trial court erroneously admitted the docket pursuant to ER 404(b) does not fall under a limited exception that would allow the claim to be raised for the first time on review. In order to have a claim reviewed for the first time on appeal a defendant must demonstrate that the error is (1) manifest, and (2) of constitutional dimension. State v. O'Hara, 167 Wn.2d 91, 98, 217 P.3d 756 (2009); RAP 2.5. The erroneous admission of ER 404(b) evidence is a non-constitutional error. State v. Gunderson, 181 Wn.2d 916, 926, 337 P.3d 1090 (2014); State v. Gresham, 173 Wn.2d 405, 433, 269 P.3d 207 (2012); State v. Jackson, 102 Wn.2d 689, 695, 689 P.2d 76 (1984). Therefore, Garrett is not entitled to appellate review of his claim that the trial court erred in admitting the municipal court docket.

It is unsurprising that Garrett at trial did not object to the admissibility of the court docket on the basis of ER 404(b), which

prohibits admission of “evidence of other crimes, wrongs, or acts” to prove a person’s character “in order to show action in conformity therewith.” ER 404(b). The docket was not offered for such purpose. The docket, which established that the defendant had been present in court on March 6, 2014, and had been provided a copy of the no contact order, was offered for the specific and limited purpose of establishing Garrett’s knowledge of the order, which is an element of the charged offense. RCW 26.50.110(1)(a); 4 RP 265; Ex. 33 at 1. ER 404(b) was simply inapplicable to preclude this direct evidence of an element of the charged crime.

Moreover, if Garrett was in any way prejudiced by the jury’s exposure to the entirety of the municipal court docket it is his own fault. The prosecutor brought to the trial court’s attention the possibility of prejudice from other aspects of the municipal court docket. 4 RP 265-66. The State recommended redactions be made to the exhibit to eliminate the possibility of prejudice. 4 RP 266. When the trial court ruled that the docket was admissible under the public records exception, the court asked defense counsel if he wanted to propose a redacted version. 4 RP 273. Defense counsel declined any redactions, responding: “Your Honor, if the Court is going to admit it, then I think the whole thing has to be admitted.” 4 RP 273. Under the invited error doctrine, the appellate courts will not

review a party's assertion of an error to which the party "materially contributed" at trial. In re Dependency of K.R., 128 Wn.2d 129, 147, 904 P.2d 1132 (1995).

Finally, Garrett cannot show prejudice from the admission of the docket. Although Garrett did not request a limiting instruction, at the State's request the court instructed the jury that the court docket could be considered "only for the purpose of whether a court order existed and whether the defendant was aware of the order." 4 RP 344-46; CP 72. Jurors are presumed to follow the court's instructions. Kirkman, 159 Wn.2d at 937.

3. GARRETT IS NOT ENTITLED TO A NEW TRIAL BECAUSE HE CANNOT ESTABLISH THAT THE PROSECUTOR'S COMMENTS WERE FLAGRANT, ILL-INTENTIONED, AND PREJUDICIAL.

Garrett claims that in closing argument the State committed prosecutorial misconduct and contends that reversal is required. Garrett is incorrect. The State's argument was not improper. Further, Garrett did not object to the State's argument, and to the extent that any argument may have been improper, it was not so flagrant and ill-intentioned that reversal is required.

The United States and Washington Constitutions guarantee every defendant a fair trial. U.S. Const. amend. V, VI; WA Const. art. I, § 3. A defendant who claims on appeal that prosecutorial error or misconduct deprived him of a fair trial bears the burden of establishing that the conduct was both improper and prejudicial. State v. Fisher, 165 Wn.2d 727, 747, 202 P.3d 937 (2009). Improper comments will be deemed prejudicial only if there is a substantial likelihood that the comments affected the jury's verdict. State v. McKenzie, 157 Wn.2d 44, 52, 134 P.3d 221 (2006). Further, a defendant who did not object to an allegedly improper comment has waived any claim on appeal unless the comment was so flagrant and ill-intentioned that it caused an enduring prejudice that could not have been neutralized by a curative instruction. Fisher, 165 Wn.2d at 747 (citing State v. Gregory, 158 Wn.2d 759, 841, 147 P.3d 1201 (2006)). Thus, Garrett, who did not object at trial to the prosecutor's remarks in closing argument, must establish both that any improper argument would have likely affected the jury's verdict, and that the argument was so flagrant and ill-intentioned that a curative instruction would have been insufficient.

Garrett, citing State v. Gonzalez, 111 Wn. App. 276, 283-84, 45 P.3d 205 (2002), argues that the prosecutor's use of three specific phrases, "red herring," "distraction," and "muddying the waters," amounts to

misconduct that requires reversal. But Gonzalez does not support Garrett's proposition. Gonzalez did not, as in this case, involve a complaint regarding a few stray remarks used to rebut specific defense arguments in closing. In Gonzalez, the prosecutor had specifically "disparaged the role of defense counsel and sought to draw a 'cloak of righteousness' around the State's position." Gonzalez, 111 Wn. App. at 282. (In Gonzalez, the prosecutor had stated: 'I have a very different job than the defense attorney. I do not have a client, and I do not have a responsibility to convict. I have an oath and an obligation to see that justice is served.' Id. at 283.) Moreover, contrary to Garrett's argument, Gonzalez was not reversed for prosecutorial misconduct, but rather for a constitutional error in the selection of the jury. Id. at 282. The Gonzalez court addressed the prosecutorial misconduct issue to ensure it did not arise again on remand. Id. at 282. The court did not determine that reversal was required because of prosecutorial misconduct. Id. at 284.

In any event, there was no misconduct. It is improper for a prosecutor to disparagingly comment on defense counsel's role or impugn the defense lawyer's integrity. State v. Thorgerson, 172 Wn.2d 438, 451, 258 P.3d 43 (2011). In Thorgerson, the prosecutor "impugned defense counsel's integrity, particularly in referring to his presentation of his case as 'bogus' and involving 'sleight of hand.'" Id. at 451-52. Further,

because the “sleight of hand” argument was planned in advance, the Thorgerson court concluded it was flagrant and ill-intentioned conduct. Id. at 452. In the case at bar, the prosecutor attacked neither the role of defense counsel nor the integrity of the attorney, but rather focused on the evidence in refuting a specific defense argument.

And then the argument went she called police back the second time and again claimed choking, even though she didn't, according to the officer, when she somehow claimed choking a second time because she was savvy by then. And so what she did -- did he hurt her cheek instead of her neck? Nothing on her neck? It doesn't make sense, that argument. Again, it's a distraction, muddying the water, but it's not an issue. She never claimed choking to those officers. Never.

4 RP 375. In the context of the case, the prosecutor's argument was not misconduct. If it was at all inappropriate it was certainly not flagrant and ill-intentioned.

Likewise, a single use of the phrase “red herring” in rebutting an argument that police should have held the victim's phone as evidence rather than photographing it and releasing it to the victim, if inappropriate at all, is de minimis. 4 RP 374. None of the prosecutor's comments complained of by Garrett are of the type that our state supreme court has held to be inflammatory. See State v. Brett, 126 Wn.2d 136, 180, 892 P.2d 29 (1995). Therefore, there is no possibility that the prosecutor's statements engendered an “inflammatory effect.” See State v. Perry, 24

Wn.2d 764, 770, 167 P.2d 173 (1946). See, e.g., State v. Belgarde, 110 Wn.2d 504, 506-07, 755 P.2d 174 (1988) (prosecutor stated the American Indian group with which defendant was affiliated was “a deadly group of madmen ” and “butchers,” and told them to remember “Wounded Knee, South Dakota ”); State v. Reed, 102 Wn.2d 140, 143-44, 684 P.2d 699 (1984) (prosecutor repeatedly called the defendant a liar, stated the defense had no case, said the defendant was a “murder two,” and implied the defense witnesses should not be believed because they were from out of town and drove fancy cars).

Garrett also contends that it was misconduct for the State in both opening statement and closing argument to have referred to evidence that was not admitted. In each, the State referred to Garrett having asked Guzman whether she knew what it felt like to be stabbed 1000 times. 2 RP 100; 4 RP 356. Garrett did not object to the reference in opening statement or in closing argument. Garrett does not contend that the reference in opening statement was made in bad faith. He acknowledges that “the State apparently believed it would be able to prove” what the prosecutor referred to in opening statement. Brief of Appellant at 19-20.

Regarding the prosecutor’s same reference in closing argument, there’s no basis to conclude that it was either flagrant or ill-intentioned. Officer Rhea testified and used his written report at times to refresh his

recollection. Rhea's report was marked but not admitted into evidence. CP 115; Ex. 30. In his report, describing what Guzman had told him about Garrett's threats while he straddled her and made stabbing motions toward her, Rhea wrote:

He jumped on me and straddled me. He was talking about stabbing my eyes out. I was covering my face with my arms and he was trying to pry my arms away from my face. He said, "If you call the police, I'm going to go to jail for life. I might as well kill you." He also asked if I knew what it felt like to be stabbed 1,000 times. He was holding the fork over his head and repeatedly bringing the fork down in a stabbing motion, but was not touching me with the fork.

Ex. 30 at 3. As previously discussed in this brief, much of Garrett's conduct and threats toward Guzman were admitted through the testimony of Officers Walker and Rhea. There is no reason to believe that the prosecutor in closing argument did not simply make an honest mistake in losing track of what had been admitted. Moreover, the trial court instructed the jury that the lawyers' statements are not evidence, and that the jury was to disregard any "remark, statement, or argument" that was not supported by the evidence. CP 59. The jury is presumed to follow the instruction that counsel's arguments are not evidence. State v. Warren, 165 Wn.2d 17, 29, 195 P.3d 940 (2008); State v. Stenson, 132 Wn.2d 668, 729-30, 940 P.2d 1239 (1997).

Garrett has failed to meet his burden to show that the prosecutor's comments, of which he complains now for the first time on appeal, were flagrant, ill-intentioned, and prejudicial.

4. GARRETT'S RIGHT TO BE PRESENT DURING ALL CRITICAL STAGES OF THE PROCEEDING WAS NOT VIOLATED BY HIS BRIEF ABSENCE DURING A LOGISTICAL DISCUSSION.

Garrett contends that he was excluded from a critical stage of the proceeding and that reversal is required. Garrett's claim is without merit. Garrett was not in the courtroom while the trial court briefly addressed an issue relating to a material witness arrest warrant. That brief hearing was not a critical stage of the proceeding, and, even if it were, any error was harmless.

a. Relevant Facts.

After jury selection but before opening statements or testimony, the prosecutor, with the defendant present, informed the court that he believed the victim, Ms. Guzman, would be present to testify later that day. 2 RP 78. The parties and trial court then discussed arranging an opportunity for defense counsel to interview Guzman before her testimony, and other witness scheduling matters. 2 RP 78-83. The court

then swore in and instructed the jury. 2 RP 83-90. The jury exited the courtroom and the parties and trial court agreed that the court would be in recess until the bailiff was contacted by the parties regarding timing of the defense interview of Guzman. 2 RP 91. The defendant was then removed and recess taken. 2 RP 91.

When court was reconvened neither the defendant nor the jury were present. The court and parties discussed the logistics of defense counsel's interview of Guzman and it was determined that the interview would take place in the courtroom. 2 RP 91-94. It was acknowledged that the trial court, in signing the material witness warrant ex parte, had previously made a finding as to materiality. 2 RP 91-92. The only statement on the record by the trial court was: "Thank you. And to the extent there's any lack of clarity, I do find she's a material witness." 2 RP 92. Defense counsel stated "for the record" that his client was not present, but did not assert that his client had a right to be present. 2 RP 92. Defense counsel did not contest in any way the trial court's finding that Guzman was a material witness. During Garrett's absence, Guzman was not questioned by the parties and the court made no evidentiary rulings relating to her anticipated testimony.

b. Garrett Had No Right To Be Present During The Brief Ministerial Hearing.

A criminal defendant has a fundamental right to be present at all critical stages of a trial. State v. Irby, 170 Wn.2d 874, 879, 246 P.3d 796 (2011) (citing Rushen v. Spain, 464 U.S. 114, 117, 104 S. Ct. 453, 78 L. Ed. 2d 267 (1983)). Although the right to be present is rooted to a large extent in the Confrontation Clause of the Sixth Amendment to the United States Constitution, the United States Supreme Court has recognized that this right is also “protected by the Due Process Clause in some situations where the defendant is not actually confronting witnesses or evidence against him.” Irby, 170 Wn.2d at 800 (citing United States v. Gagnon, 470 U.S. 522, 526, 105 S. Ct. 1482, 84 L. Ed. 2d 486 (1985)). In that vein, the supreme court has said that a defendant has a right to be present at a proceeding “whenever his presence has a relation, reasonably substantial, to the fullness of his opportunity to defend against the charge.” Irby, 170 Wn.2d at 800 (citing Snyder v. Massachusetts, 291 U.S. 97, 105-06, 54 S. Ct. 330, 78 L. Ed. 674 (1934), overruled in part on other grounds sub nom. Malloy v. Hogan, 378 U.S. 1, 84 S. Ct. 1489, 12 L. Ed. 2d 653 (1964)). However, because the relationship between the defendant’s presence and his “opportunity to defend” must be “reasonably substantial,” a defendant does not have a right to be present when his or

her “presence would be useless, or the benefit but a shadow.” Irby, 170 Wn.2d at 800 (citing Snyder v. Massachusetts, 291 U.S. at 106-07). Thus, it is fair to say that the due process right to be present is not absolute; rather “the presence of a defendant is a condition of due process to the extent that a fair and just hearing would be thwarted by his absence.” Irby, 170 Wn.2d at 800 (citing Snyder v. Massachusetts, 291 U.S. at 107-08). Whether a defendant’s constitutional right to be present has been violated is a question of law, subject to de novo review. Irby, 170 Wn.2d at 880.

Garrett’s right to confrontation was clearly not implicated during his brief absence from court, thus any right to be present must be found in the Due Process Clause. Garrett’s characterization of the portion of the proceeding he contends was critical as a “material witness hearing” is a stretch.³ While Garrett was absent from court the discussion related primarily to logistical matters. Even so, Garrett cites no authority that a material witness hearing is a critical stage of a proceeding that would require a defendant’s presence. “Where no authorities are cited in support of a proposition, the court is not required to search out authorities, but may

³ Under CrR 4.10(b) and (c), a mandatory material witness hearing requires that the court inform the witness of his or her right to an attorney and that one will be appointed if the subject is indigent. It is also required that the court set conditions of release for the material witness pursuant to CrR 3.2. In the case at bar, none of this occurred, indicating that the court and the parties did not consider the brief discussion in question to be a material witness hearing.

assume that counsel, after diligent search, has found none.” DeHeer v. Seattle Post-Intelligencer, 60 Wn.2d 122, 126, 372 P.2d 193 (1962) (quoted in State v. Logan, 102 Wn. App. 907, 911 n.1, 10 P.3d 504 (2000)).

Garrett’s claim that his due process rights were violated by his brief absence from court fails because his presence at the hearing was not substantially related to his opportunity to defend against the charges. Garrett was absent for what was merely a logistical discussion of the timing of anticipated witness testimony. Garrett’s absence did not affect his opportunity to defend against the charges he faced, and there is no basis to conclude that a fair and just **hearing** was thwarted by his absence. Garrett’s absence during a discussion of the timing of upcoming witness testimony had no impact on the fairness of his trial, nor did the fact that he was not present to hear the trial court merely reiterate that Guzman had previously been found to be a material witness.

The case at bar is not dissimilar to State v. Benn, 134 Wn.2d 868, 920, 952 P.2d 116 (1998), in which the supreme court held that the defendant did not have a right to be present during a hearing on a motion for a continuance. The Benn court stated:

[Benn’s] absence during that hearing did not affect his opportunity to defend the charge. The motion for continuance involved no presentation of evidence, nor was

the purpose of the hearing to determine the admissibility of evidence or the availability of a defense or theory of the case.

Benn, 134 Wn.2d at 920. Similarly, a defendant does not have a right to be present during in-chambers or bench conferences between the court and counsel on legal matters. In re the Personal Restraint of Lord, 123 Wn.2d 296, 306, 868 P.2d 835 (1994). Likewise, a defendant has no right to be present for “ministerial matters” such as jury sequestration. In re the Personal Restraint of Pirtle, 136 Wn.2d 467, 484, 965 P.2d 593 (1998). Garrett was absent during a discussion of when and where defense counsel would interview Guzman before she testified. This was nothing more than a ministerial matter for which Garrett had no due process right to be present.

There was no violation of Garrett’s due process right to be present during a critical stage of the proceedings. However, even if a violation were found, such a violation is subject to harmless error analysis. Irby, 170 Wn.2d at 885. The State has the burden of proving harmless error beyond a reasonable doubt. Irby, 170 Wn.2d at 886. The harmless error analysis is essentially the same as the due process analysis. Benn, 134 Wn.2d at 921 (“The same factors which support the conclusion that the defendant had no right to be present at the hearing also compel us to conclude that, if any such right existed, his absence was harmless.”).

Garrett's absence during a brief portion of the proceedings wherein witness scheduling was discussed and the trial court referenced that a witness had previously been found to be material had no impact on the outcome of Garrett's trial.

D. CONCLUSION

For the foregoing reasons, the State respectfully asks this Court to affirm Garrett's convictions.

DATED this 21 day of October, 2015.

Respectfully submitted,

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Certificate of Service by Electronic Mail

Today I directed electronic mail addressed to the attorney for the appellant, Jan Trasen, containing a copy of the Brief of Respondent, in STATE V. ASHANTE GARRETT, Cause No. 72565-3-1, 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.

A handwritten signature in black ink, consisting of several loops and a long horizontal stroke, positioned above a solid horizontal line.

Done in Seattle, Washington

10-21-15
Date : October 21, 2015