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Supreme Court No. 103551-9

Court of Appeals No. 39348-8-III

IN THE SUPREME COURT OF THE STATE  
OF WASHINGTON

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STATE OF WASHINGTON,

Respondent,

v.

STEPHEN ANTHONY BAILEY,

Appellant.

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ANSWER TO PETITION FOR REVIEW

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## **I. IDENTITY OF PARTY AND DECISION BELOW**

Respondent, State of Washington, by and through Yakima County deputy prosecutor Bret Roberts, appears to address Steven Bailey's Petition for Review of the Court of Appeals' August 27, 2024, opinion in cause number 39348-8-III.

## **II. STATEMENT OF RELIEF SOUGHT**

The State asks the Court to deny Mr. Bailey's Petition for Review of the Court of Appeals August 27, 2024, unpublished opinion.

## **III. RELEVANT FACTS**

In 2008, Stephen Bailey was found guilty of First Degree Assault and Intimidating a Witness. VRP 20. Both were determined to be crimes of domestic violence. VRP 20. Mr. Bailey's original persistent offender sentence was reduced to a standard range sentence of 300 months after resentencing following his direct appeal. VRP 20-21.

Mr. Bailey's 2014 sentence included an offender score point for a single count of simple possession of controlled substances, so his matter came before the superior court of Yakima County in October of 2022 for resentencing pursuant to *State v. Blake*, 197 Wn.2d 170, 481 P.3d 521 (2021). VRP 21. The trial court indicated that it intended to conduct Mr. Bailey's resentencing hearing with him appearing via zoom from a room in the jail adjacent to the courtroom because of security concerns. VRP 18. Mr. Bailey objected. VRP 18-19.

During the resentencing hearing, the trial court heard argument from the prosecutor. It considered written material submitted by both parties. VRP 21, 49-52, 54-55. It heard brief testimony from a detective. VRP 32-33. It heard from the victim, Mr. Bailey's attorney, and from Mr. Bailey himself. VRP 35-52

Mr. Bailey admitted to being very emotional and very selfish. VRP 35. He admitted slapping the victim, holding his hand over her mouth to stop her screaming, and holding her

down. VRP 35-36. He refused to accept responsibility for assaulting her, and claimed he had served fifteen (15) years for a crime he did not commit. VRP 37, 45. He also claimed that a prior Third Degree Rape conviction was wrongful. VRP 36. He claimed that his violent approach to the victim was a product of his upbringing and that, at the time, he saw himself as justifiably “disciplining” the victim. VRP 43-44. He claimed he would scream at her and slap her to “snap her out of it.” VRP 45.

After considering the evidence, the trial court expressed its opinion that the crimes Mr. Bailey committed were insidious crimes of domestic violence involving “...manipulation and control over another person’s activities.” VRP 53-54. The trial court believed that Mr. Bailey may be trying to take responsibility now, but remarked that his comments also were evidence of his ongoing efforts to manipulate the victim of his crimes who was in attendance during the resentencing hearing. VRP 54. The trial court believed Mr. Bailey’s 457 calls from

jail to the victim, who was the protected party in a no contact order, to be evidence of his ongoing efforts to manipulate and control her. VRP 54.

The trial court specifically noted that Mr. Bailey's manipulative activities continued to the present day, as shown by his effort to manipulate another person to introduce contraband in the prison where he was incarcerated. VRP 54-55. The trial was particularly disturbed by the fact that Mr. Bailey instructed the person how to avoid detection. VRP 55.

Ultimately, the Court decided to reduce Mr. Bailey's sentence from 300 months to 288 months, which remained within his standard sentence range of 240-318 months. VRP 52, 56. It reduced the duration of the no contact order from lifetime to 25 years. VRP 57.

Following imposition of sentence, Mr. Bailey was permitted to speak to the trial court further and then speak privately with counsel before his attorney returned to the courtroom to reiterate and clarify Mr. Bailey's various



objections. VRP 58-60, 62-66. Mr. Bailey petitions for review on the basis of the procedure used during his October 26, 2022, resentencing hearing.

#### **IV. STANDARD OF REVIEW**

Petitions for discretionary review are governed by RAP

13.4. RAP 13.4(b) sets forth the factors considered when determining whether to accept review:

A petition for review will be accepted by the Supreme Court only: (1) If the decision of the Court of Appeals is in conflict with a decision of the Supreme Court; or (2) If the decision of the Court of Appeals is in conflict with a published decision of the Court of Appeals; or (3) If a significant question of law under the Constitution of the State of Washington or of the United States is involved; or (4) If the petition involves an issue of substantial public interest that should be determined by the Supreme Court.

Generally, an error that violates a constitutional right of the accused is presumed to be prejudicial. *State v. Finch*, 137 Wn.2d 792, 859, 975 P.2d 967 (1999) (citing *State v. Stephens*,

93 Wn.2d 186, 607 P.2d 304 (1980) (en banc). “The State bears the burden of showing a constitutional error was harmless.” *State v Easter*, 130 Wn.2d 228, 242, 922 P.2d 1285 (1996). A constitutional error will be found harmless only if the appellate court is “convinced beyond a reasonable doubt” that the outcome would have been the same absent the error. *See Id.*

However, “[a] violation of a court rule is generally not considered constitutional error.” *State v. Grenning*, 169 Wn.2d 47, 58, 234 P.3d 169 (2010) (en banc). Upon review of such an error, the appellate court assesses whether the error materially affected the outcome. *See Id.*

## **V. ARGUMENT FOR DENIAL OF REVIEW**

The trial court’s insistence upon Mr. Bailey’s presence over video for his resentencing, over his objection, was, at worst, a violation of a court rule. He was not denied the right to be present and meaningfully participate during his resentencing hearing. He was denied the right to be physically present in the courtroom due to the trial court’s legitimate security concerns.

VRP 18. Should the Court consider his appearance over video an error of constitutional magnitude, all the evidence available shows the error was harmless beyond a reasonable doubt. If his presence over video is, as the State contends, a technical violation of CrR 3.4, Mr. Bailey fails to demonstrate how that error materially affected the outcome of his resentencing hearing.

A defendant has a constitutional right to be present at sentencing, including a resentencing hearing. *State v. Ramos*, 171 Wn.2d 46, 48, 246 P.3d 811 (2011). Presence, under the applicable court rule, means the physical presence of the defendant unless the rule allows the defendant to appear remotely or through counsel. CrR 3.4(a). The presence of the defendant is required at imposition of sentence. CrR 3.4(b).

Notwithstanding the propriety of the procedure used in his resentencing hearing, the trial court imposed a sentence of 288 months, a reduction of twelve (12) months from Mr. Bailey's 300-month sentence. VRP 56. The trial court's 288-month sentence fell within the standard range of 240-318 months which

was calculated from his offender score of 9. VRP 52. Mr. Bailey did not assign error below to the trial court's offender score calculation or the corresponding standard range.

Because Mr. Bailey's sentence fell within the standard range, he may only allege, on appeal, that the procedure used by the court was somehow defective. RCW 9.94A.585, *State v. Henderson*, 99 Wn.App. 369, 372-73, 993 P.2d 928 (2000) (citing *State v. Ammons*, 105 Wn.2d 175, 182-83, 713 P.2d 719 (1986)). Contrary to Mr. Bailey's assertions, he received a *de novo* resentencing free of error of sufficient magnitude to justify reversal; and he is mistaken regarding the existence of any meaningful question under Washington law regarding availability of a remedy for a defendant when a crime victim's right to participate in a sentencing hearing is somehow infringed.

A. The Trial Court Afforded Mr. Bailey a *De Novo* Resentencing Hearing by Independently Considering the Evidence Before it and Imposing its Own Standard Range Sentence Without Undue Reliance Upon Previous Sentences.

Contrary to Mr. Bailey's assertion, his resentencing hearing was conducted *de novo*, in that it was quite clear on the record that the trial court did not place an undue emphasis on the original sentence, and the parties were "free to advance any and all factual and legal arguments regarding [Mr. Bailey's] offender score and sentencing range. *See State v. Edwards*, 23 Wn.App.2d 118, 514 P.3d 692 (2022) (setting forth principles for *de novo* resentencing following a *Blake* offender score adjustment).

After hearing from the parties, defense counsel's synopsis of the victim's sentiments, and Mr. Bailey himself, the trial court imposed a reduced sentence, *even though his offender score remained nine (9), and the standard sentencing range did not change*. Notwithstanding the reduced sentence imposed by the trial court, Mr. Bailey asserts that the Court of Appeals decision in his case conflicts with the decision in *State v. Dunbar*, 27 Wn.App.2d 238, 532 P.3d 652 (2023). He is mistaken.

In *Dunbar*, the issue on appeal was whether "the resentencing court committed reversible error by failing to

exercise necessary discretion when imposing the new sentence.” *Id.* at 243. There was no discussion regarding Dunbar’s physical presence during resentencing. *Id.* at 238-250. So, to the extent that he seeks discretionary review by this court, it cannot rest upon a purported RAP 13.4(b)(2) conflict between the Court of Appeals’ decision in the instant matter and its decision in *Dunbar* because his petition does not claim that the trial court placed undue reliance/emphasis on the previous sentences when rendering its decision during resentencing.

In *State v. Griffin*, 30 Wn.App.2d 164, 544 P.3d 524 (2024), the Court of Appeals had occasion to consider the impact of a virtual resentencing hearing over the defendant’s objection. It is important to acknowledge that the homicide resentencing in *Griffin* occurred in September of 2022 while the Court’s COVID-19 procedural order modifying court operations was in effect. *Id.* at 167. Although against the COVID-19 backdrop in *Griffin*, the trial court in Mr. Bailey’s matter was similarly “in the best position to ‘perceive and structure its own proceedings’

based on its unique knowledge of its ‘own courtroom facilities and resources’...” *See Id.* at 172. The trial court here was best able to balance the security risks posed by Mr. Bailey and the resources it had to ensure the safety of court staff, the public, and perhaps most importantly, the domestic violence victim who was present to observe and participate in the resentencing hearing.

The trial court determined that Mr. Bailey’s offender score was reduced from 10 to 9 by virtue of the removal of a conviction for possession of methamphetamine from his criminal record. VRP 52. His *Blake*-adjusted offender score still qualified him for the top of the standard sentencing range, which provides for a sentence between 240 and 318 months. VRP 52. The trial court indicated its typical practice when imposing sentence was to start with a midrange sentence and then adjust it based upon aggravating and mitigating factors. VRP 52.

The trial court indicated that, although it personally knew the previous judges who sentenced Mr. Bailey, its ruling was “...based upon the evidence that’s been presented to me today.”

VRP 53. The trial court correctly exercised its independent discretion during Mr. Bailey's resentencing hearing.

The trial court elected to conduct the resentencing hearing with Mr. Bailey appearing via video from a room adjacent to the jail courtroom. His attorney could request breaks to consult with Mr. Bailey, and corrections staff could facilitate delivery of any written communication. VRP 18-19, 64. Mr. Bailey had easy access to his attorney and was able to effectively participate in the proceedings via video. The State has shown that Mr. Bailey's presence at his hearing via videoconference did not have any prejudicial impact upon the outcome. Regarding his virtual appearance for resentencing, Mr. Bailey has failed to establish that he was denied a *de novo* resentencing hearing.

B. To the Extent that his Physical Presence in the Courtroom was Governed by Court Rule, Mr. Bailey Fails to Show that his Resentencing Hearing was "Materially Affected" by the Trial Court's Alleged Violation of CrR 3.4(f).

Violations of procedural rules generally do not rise to constitutional magnitude, so appellate courts review such matters



to assess whether the outcome of the proceeding was “materially affected.” *Grenning*, 169 Wn.2d at 58.

Under CrR 3.4, remote appearance or appearance through counsel may establish the defendant’s “presence,” so the actual *physical* presence of the defendant in the courtroom is not the exclusive means by which “presence” can be achieved.

Because the conditions of Mr. Bailey’s video appearance from a room in the county jail adjacent to the courtroom complied with CrR 3.4(e)(3), he was “present” for his resentencing, even though he appeared via videoconference in an arguable violation of CrR 3.4(e)(1).

The trial court determined that Mr. Bailey “could participate through the monitor” due to security concerns. VRP 18. Trial courts have broad discretion regarding “provision for the order and security of the courtroom, because the trial court is generally in the best position to perceive and structure its own proceedings.” *State v. Bejar*, 18 Wn.App.2d 454, 460-61, 491 P.3d 229 (2021) (citing *State v. Dye*, 178 Wn.2d 541, 547-48,

309 P.3d 1192 (2013). A trial court's ruling regarding security measures is reviewed for abuse of discretion. *Id.* at 461.

Notably, Mr. Bailey did not assign error to the trial court's discretionary determination in briefing to the Court of Appeals, regarding the security risk it believed he presented. Mr. Bailey did not ask for a continuance of his resentencing hearing to allow for sufficient security to permit his physical presence in the courtroom rather than over videoconference. Stated another way, he appears to have accepted the sentencing process over videoconference rather than trying to move his resentencing hearing to a date and location where he could be in the courtroom seated next to counsel.

Mr. Bailey's participation throughout the resentencing hearing revealed he could see everyone and hear what was said. Because Mr. Bailey was housed in the local county jail, immediately adjacent to the courtroom, Mr. Bailey's attorney was able to obtain written notes that Mr. Bailey had prepared for him. VRP 19. Moreover, Mr. Bailey's attorney made it clear that

they could confer privately, as needed. VRP 19 (“If you need to talk to me in private, I’ll come back and confer with you as the hearing goes.”). Mr. Bailey acknowledged that he understood this. VRP 19. Mr. Bailey demonstrated his ability and willingness to exercise the right when he interrupted the proceedings to meet with his attorney privately. VRP 64. (“Okay, so could we have a pause in this for a minute so I can speak with my attorney...”)

The record reflects that Mr. Bailey was given ample opportunity to speak to the trial court before it pronounced sentence. VRP 35-46. During that time, Mr. Bailey spoke essentially uninterrupted by anyone but his own attorney and by a single clarifying question from the trial court. Even after it pronounced sentence, the trial court allowed Mr. Bailey to speak until Mr. Bailey’s attorney decided to cut him off. VRP 58-59, 62-64.

Mr. Bailey fails to address any meaningful argument to the central question regarding how his resentencing hearing was

“materially affected” by virtue of it being conducted with him present via videoconference, in a jail room adjacent to the courtroom. Mr. Bailey claims a violation of the rules without any argument regarding how he was prejudiced thereby.

There is no basis to believe that Mr. Bailey’s resentencing was “materially affected” by his participation via videoconference.

C. Even if Mr. Bailey’s Presence at Resentencing via Videoconference was Constitutional Error, it was Harmless Beyond a Reasonable Doubt.

There is legal authority indicating that, “[a] violation of the due process right to be present is subject to harmless error analysis.” *See e.g. State v. Irby*, 170 Wn.2d 874, 885, 246 P.3d 796 (2011). In *Irby*, however, the defendant was not present in any way, shape, or form when the court reviewed jury questionnaires, and communicated via email with the prosecution and defense counsel suggesting that certain jurors be excused. *Id.* at 877-78. Our situation is distinguishable in that

Mr. Bailey was present, even though his body was not in a seat in the courtroom.

In *Irby*, while discussing the parameters of a defendant's due process right to be present, this Court noted that, "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.'" *Id.* at 881 (citing *Snyder v. Massachusetts*, 291 U.S. 97, 105-106, 54 S.Ct. 330, 78 L.Ed.2d 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 674 (1934)).

Mr. Bailey provides no argument regarding how the trial court's procedure prejudiced him. Nonetheless, the State must persuade the Court, beyond a reasonable doubt, that the outcome would have been the same in the absence of the purported error if the Court views this matter through the lens of constitutional harmless error.

This Court warned against casually applying the constitutional harmless error standard to mere rules violations because it may result in reversals even where no prejudice has occurred. *See Grenning*, 169 Wn.2d at 59. With the enhanced quality of videoconference equipment and the pressures caused by pandemics, staffing shortages, security concerns, and other logistical challenges, granting trial courts some flexibility to use videoconference proceedings is warranted; and erroneous use of such proceedings should not result in an automatic reversal.

The record reveals that Mr. Bailey could fully participate in his resentencing hearing. He could receive effective assistance from counsel and had the ability to confer privately with his attorney. At the conclusion of this resentencing hearing, the trial court reduced Mr. Bailey's sentence by one year and modified the no contact order from the duration of his lifetime to a period of twenty-five (25) years. VRP 56-57. It should be remembered that Mr. Bailey's standard sentencing range did not change following application of *Blake*, so the trial court was in no way

obligated to reduce Mr. Bailey's sentence or modify the duration of the lifetime no contact order. (VRP 52).

The trial court's decision to reduce Mr. Bailey's sentence and shorten the duration of the no contact order revealed that it considered Mr. Bailey's rehabilitative efforts, even if it had serious concerns that he was continuing his manipulative ways and presented a danger to the community and, specifically, the victim. Nothing about the resentencing hearing, either substantively or procedurally, suggests that Mr. Bailey would have received a different outcome if he had been seated in the courtroom instead of in a secure adjacent jail room appearing via videoconference. Constitutional error, if found by this Court, was harmless beyond a reasonable doubt.

D. Mr. Bailey Cannot Claim Error Regarding the  
Trial Court's Handling of the Victim's  
Participation in his Resentencing Hearing.

“With the adoption of article I, section 35, crime victims have constitutional rights during the sentencing phase of a defendant's trial.” *State v. Lindhal*, 114 Wn.App. 1, 14, 56 P.3d

589 (2002) (citing *State v. Gentry*, 125 Wn.2d 570, 262, 888 P.2d 1105 (1995)). “This constitutional amendment expressly provides that it ‘shall not constitute a basis for error in favor of a defendant in a criminal proceeding.’” *Id.* (citing CONST.ART. I, § 35). Mr. Bailey adduced no legal authority suggesting that he is entitled to some remedy due to the trial court’s management of the victim’s participation in his resentencing hearing. Similarly, Mr. Bailey has offered no legal decision from this Court, or the Courts of Appeal, suggesting that alleged error regarding the victim’s participation during sentencing gives rise to a defendant’s claim of error on resentencing. He should not receive discretionary review on this issue.

## **VI. CONCLUSION**

This Court should deny review of Mr. Bailey’s sentence because any purported error associated with his appearance via videoconference in violation of CrR 3.4 did not materially affect the resentencing proceeding. Moreover, if any purported error regarding his presence is deemed to be of constitutional



magnitude by this Court, the State has demonstrated that any such error was harmless beyond a reasonable doubt. Mr. Bailey had ample opportunity to present mitigation evidence in response to the significant aggravating evidence which supported his sentence. Mr. Bailey provides no argument that would give this Court reason to expect a different outcome if the trial court had taken the security risk to have him in the courtroom. The defense did not move to continue the matter to allow for prearrangement of security sufficient for Mr. Bailey's physical presence in the courtroom. The matter should be remanded so that the trial court can take the ministerial actions of striking the crime victim's compensation legal financial obligation and correcting the scrivener's errors in Mr. Bailey's criminal history.

Respectfully submitted this 26<sup>th</sup> day of February, 2025

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### VIII. RAP 18.17(b) WORD COUNT CERTIFICATION

The undersigned certifies the number of words contained in this document, as counted by word processing software complies with the provisions of RAP 18.17(c)(6). The relevant total number of words contained in the State's Response Brief is 3517.

Respectfully submitted this 26<sup>th</sup> day of February 2025,

/s/ Bret Roberts  
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<b>SERVICE</b>	Service was electronic, or if no email address appears at left, via U.S. Mail. I certify under penalty of perjury under the laws of the State of Washington that the foregoing is true and correct.
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