

**FILED**

JUL 15 2013

COURT OF APPEALS  
DIVISION III  
STATE OF WASHINGTON  
By \_\_\_\_\_

29513-3-III

COURT OF APPEALS

DIVISION III

OF THE STATE OF WASHINGTON

STATE OF WASHINGTON, RESPONDENT

v.

MERLE W. HARVEY, APPELLANT

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APPEAL FROM THE SUPERIOR COURT

OF SPOKANE COUNTY

---

SUPPLEMENTAL BRIEF OF RESPONDENT

---

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**INDEX**

APPELLANT’S SUPPLEMENTAL ASSIGNMENTS OF ERROR.....1

SUPPLEMENTAL ISSUES PRESENTED .....1

STATEMENT OF THE CASE.....2

ARGUMENT.....4

    A.    THE DEFENDANT’S FAILURE TO OBJECT  
          TO THE PROCESS USED BY THE TRIAL  
          COURT TO SELECT A JURY SHOULD  
          PRECLUDE HIM FROM RAISING THAT  
          ISSUE FOR THE FIRST TIME ON APPEAL  
          PURSUANT TO RAP 2.5(a).....4

    B.    THE TRIAL COURT DID NOT VIOLATE  
          DEFENDANT’S INDIVIDUAL PUBLIC  
          TRIAL RIGHT AS PROVIDED IN WASHINGTON  
          CONSTITUTION ARTICLE I, § 22 IN THE  
          PROCESS USED TO SELECT A JURY.....5

    C.    THE SIDEBAR CONFERENCES AND  
          EXERCISE OF PEREMPTORY CHALLENGES  
          DURING THE JURY SELECTION PROCESS  
          VIOLATED NEITHER THE DEFENDANT’S  
          NOR THE PUBLIC’S RIGHTS TO OPEN  
          PROCEEDINGS .....9

    D.    DEFENDANT WAS PRESENT FOR ALL  
          CRITICAL STAGES OF HIS TRIAL.....13

CONCLUSION.....15

## TABLE OF AUTHORITIES

### WASHINGTON CASES

IN RE PERS. RESTRAINT OF DAVIS, 152 Wn.2d 647, 101 P.3d 1 (2004).....	13
IN RE PERS. RESTRAINT OF LORD, 123 Wn.2d 296, 868 P.2d 835 (1994).....	11
IN RE PERS. RESTRAINT OF ORANGE, 152 Wn.2d 795, 100 P.3d 291 (2004).....	9
IN RE PERS. RESTRAINT OF PIRTLE, 136 Wn.2d 467, 965 P.2d 593 (1998).....	11
STATE V. BESKURT, 176 Wn.2d 441, 293 P.3d 1159 (2013).....	7
STATE V. BONE-CLUB, 128 Wn.2d 254, 906 P.2d 325 (1995).....	6, 12
STATE V. BREMER, 98 Wn. App. 832, 991 P.2d 118 (2000).....	12
STATE V. BRIGHTMAN, 155 Wn.2d 506, 122 P.3d 150 (2005).....	9
STATE V. GUZMAN NUNEZ, 160 Wn. App. 150, 248 P.3d 103 (2011), <i>aff'd</i> , 174 Wn.2d 707, 285 P.2d 21 (2012).....	4
STATE V. IRBY, 170 Wn.2d 874, 246 P.3d 796 (2011).....	14
STATE V. KIRKMAN, 159 Wn.2d 918, 155 P.3d 125 (2007).....	4
STATE V. McFARLAND, 127 Wn.2d 322, 899 P.2d 1251 (1995).....	5

STATE V. MOMAH, 167 Wn.2d 140, 217 P.3d 321 (2009).....	10
STATE V. SCOTT, 110 Wn.2d 682, 757 P.2d 492 (1988).....	4
STATE V. SUBLETT, 156 Wn. App. 160, 231 P.3d 231, <i>affirmed</i> , 176 Wn.2d 58, 292 P.3d 715 (2012).....	12
STATE V. WISE, 167 Wn.2d 1, 288 P.3d 1113 (2012).....	7, 9

**CONSTITUTIONAL PROVISIONS**

ARTICLE I, § 10 .....	1, 6, 7
ARTICLE I, § 22 .....	1, 5, 6, 7, 10

**COURT RULES**

CrR 3.5.....	2
ER 404(b).....	2
RAP 2.5(a).....	1, 4
RAP 2.5(a)(3).....	4

I.

APPELLANT'S SUPPLEMENTAL ASSIGNMENTS OF ERROR

- (1) The trial court violated defendant's constitutional right to a public trial.
- (2) The trial court violated defendant's constitutional right to be present for all critical stages of trial.

II.

SUPPLEMENTAL ISSUES PRESENTED

- (1) Should defendant's failure to object to the jury selection procedure employed by the trial court bar him from raising the issue for the first time on appeal pursuant to RAP 2.5(a)?
- (2) Does the defendant have standing to raise the public's right to open courts provided by Washington Constitution Article I, § 10?
- (3) Did the trial court violate defendant's individual right to a public trial as provided for in Washington Constitution Article I, § 22?
- (4) Did the trial court violate defendant's right to be present for all critical stages of trial?

### III.

#### STATEMENT OF THE CASE

Appellant/defendant Merle Harvey was charged in the Spokane County Superior Court with two counts of first degree murder while armed with a firearm and two counts of unlawful possession of a firearm. CP 1-2 and 51-52. It was alleged that he killed two men during a disagreement regarding a trade of vehicles while unlawfully possessing two firearms. CP 27-39.

The matter was assigned to the Honorable Tari S. Eitzen for trial. RP 1 *et seq.* An extensive number of motions were filed before trial. One was a motion to exclude evidence of defendant's actions post-killing while fleeing the scene of the crime. CP 8-12. A lengthy pre-trial hearing was held pursuant to ER 404(b) concerning the defendant's post-killing actions, including his thefts of vehicles in Idaho and Washington to facilitate his escape from the crime scene. RP 41-80. The trial court entered factual findings and legal conclusions that evidence of defendant's post-killing flight was admissible as part of the *res gestae* of the charged crimes. RP 77-80; 190-192.

After conducting a CrR 3.5 hearing to determine the admissibility of the defendant's statements to law enforcement officers, the trial court

found and held defendant's statements were admissible at trial. CP 400-408. RP 92-179.

The jury convicted the defendant as charged. CP 307, 308, 309, 310, 311, 312. The trial court sentenced the defendant. CP 411-422. Defendant timely appealed. CP 425-438.

This Court affirmed the convictions and sentences in defendant's direct appeal. CP 444-461. The Supreme Court granted defendant's petition for the production of a transcript of the *voir dire* portion of his trial so that he could raise the issue of a violation of *his* right to a public trial.

The transcript of the *voir dire* portion of the trial reveals, and defendant concedes, that the jury selection process occurred in the open courtroom with the defendant and public present. Voir Dire Report of Proceedings "VDRP" 1-303. Defendant claims that the process described in that transcript violated his right to a public trial.

This Court requested supplemental briefing from the parties regarding the alleged violation of defendant's public trial right. This supplemental brief is in response to that request.

#### IV.

#### ARGUMENT

- A. THE DEFENDANT'S FAILURE TO OBJECT TO THE PROCESS USED BY THE TRIAL COURT TO SELECT A JURY SHOULD PRECLUDE HIM FROM RAISING THAT ISSUE FOR THE FIRST TIME ON APPEAL PURSUANT TO RAP 2.5(a).

Mr. Harvey did not object to the *voir dire* process utilized by the trial court at trial, so he is precluded from raising the issue for the first time on appeal. RAP 2.5(a) sets forth the general rule for appellate disposition of issues not raised in the trial court: appellate courts will not entertain such. *State v. Guzman Nunez*, 160 Wn. App. 150, 157, 248 P.3d 103 (2011) (citing *State v. Scott*, 110 Wn.2d 682, 685, 757 P.2d 492 (1988)), *aff'd*, 174 Wn.2d 707, 285 P.2d 21 (2012). This rule exists to afford the trial court an opportunity to correct errors as they are raised, thereby preserving the use of judicial resources. *Scott*, 110 Wn.2d at 685.

Nevertheless, RAP 2.5(a)(3) permits a party to raise a claim of “manifest error affecting a constitutional right” for the first time on appeal. The threshold requirement to establish a manifest constitutional error is that defendant identify a constitutional error *and* show that it negatively affected his rights at trial. *State v. Kirkman*, 159 Wn.2d 918, 926-927, 155 P.3d 125 (2007). It is the condition precedent of showing actual

prejudice which makes the error obvious, clear, “manifest” and permits appellate review under the rule. *Id.* at 927 (citing *State v. McFarland*, 127 Wn.2d 322, 333, 899 P.2d 1251 (1995)). When the facts required to adjudicate the error claimed on appeal are not found in the record, then defendant has failed to satisfy the requisite burden of proof, no actual prejudice is shown and the error is not “manifest.” *McFarland*, 127 Wn.2d at 333.

Here, defendant contends that the trial court violated his right to a public trial by dismissing prospective jurors: at sidebar conferences; by stipulation of the parties; and by peremptory challenges exercised on a chart not readily available for the public to view. Nevertheless, defendant has not, and cannot, establish by relevant portions of the factual record before the trial court that a constitutional error occurred or that he suffered actual prejudice from the process in which his counsel readily participated to select the jury herein.

**B. THE TRIAL COURT DID NOT VIOLATE  
DEFENDANT’S INDIVIDUAL PUBLIC TRIAL  
RIGHT AS PROVIDED IN WASHINGTON  
CONSTITUTION ARTICLE I, § 22 IN THE  
PROCESS USED TO SELECT A JURY.**

Defendant claims the trial court violated his right to a public trial by the manner in which it conducted portions of the jury selection process.

Defendant contends that the dismissal of prospective jurors at sidebar, by stipulation, and peremptory challenges all violated his right to a public trial despite his concession that the entire process occurred in open court with the public and defendant present. Defendant properly cites that the jury selection process is subject to his public trial right pursuant to Washington Constitution Article I, § 22, yet then attempts to overcome the record by incorporating the protections of Article I, §10 to support his claim.

Defendant cites to *State v. Bone-Club*, 128 Wn.2d 254, 906 P.2d 325 (1995), to support his use of Article I, § 22 case law to assert a violation of the public right to open administration of its courts as a basis for challenging the jury selection process. However, the Court in *Bone-Club* clearly recognized that the defendant's right to a public trial is distinct from the public's right to the open administration of justice. In *Bone-Club*, one of the factors that a trial court must fulfill prior to closing any portion of a trial is to weigh the competing interests of the proponent and the public. Obviously, if the defendant's right to a public trial was the same as the public's right to an open court, then there would be no reason to distinguish between the rights. The article I, § 22 right to a public trial is individual to the defendant to be raised or waived based upon his individual actions and decisions. By contrast, the article I, § 10 right to

the open administration of justice was specifically set out by the Drafters of the Washington Constitution as a means of providing the public with the right to observe and object, when necessary, to preserve its right to open courts.

Defendant cites to the reasoning in *State v. Wise*, 167 Wn.2d 1, 288 P.3d 1113 (2012), that a violation of a public trial right is a structural error, presumed prejudicial, that may be raised for the first time on appeal and is not subject to a harmless error analysis. Defendant thereby seeks to sidestep the fact that the entire jury selection process in this case was conducted in the open courtroom before the public with the defendant present. The circumstances reflected in the record of this case clearly do not qualify for analysis under *Bone-Club* because the courtroom was never closed in violation of the defendant's Article I, § 22 right to a public trial.

Defendant claims that whenever members of the public cannot see or hear a process or procedure in open court, then the public's Article I, § 10 rights are violated. However, this position fails to acknowledge that: "[T]hough related and often overlapping a defendant's and the public's rights are separate." *State v. Beskurt*, 176 Wn.2d 441, 446, 293 P.3d 1159 (2013). Claiming that a violation of Article I, § 10 necessarily violates the Article I, § 22 right to public trial conflates a defendant's rights with those of the public. *Id.* "Whenever a defendant raises a public trial right issue,

the inquiry is whether his section 22 rights were violated.” *Id.* Absent a section 22 violation, a new trial is not warranted. *Id.* Mr. Harvey may not legally rely on the public’s right to open proceedings to obtain a new trial.

Here, defendant concedes in his statement of the case that both he and the public were in the open courtroom during the jury selection process, hence, the courtroom was not closed so there was no Article I, § 22 violation. The record reflects that the public was present in the courtroom when the prospective jurors were excused for cause and by peremptory challenge. The defendant’s contention begs the question of how far do we extend the public’s right to open proceedings?

Generally, the State represents the very “public” whose right is guaranteed by Article I, § 10, so throwing open all aspects of a trial to public scrutiny inures to the benefit of the State’s position. Opening all aspects of the trial process to public scrutiny usually does not inure to the benefit of a defendant because of the concern that the defendant’s constitutional right to a fair trial by an impartial jury be preserved. For example, it has occurred often enough in open court that the prosecutor has advised the trial court that it accepts the prospective jurors seated in the box for cause and waives all its peremptory challenges. Thereafter, any further removal of prospective jurors is squarely on the defendant which most defendants, their counsel, and the court find unacceptable.

C. THE SIDEBAR CONFERENCES AND EXERCISE OF PEREMPTORY CHALLENGES DURING THE JURY SELECTION PROCESS VIOLATED NEITHER THE DEFENDANT'S NOR THE PUBLIC'S RIGHTS TO OPEN PROCEEDINGS.

Defendant contends that the manner in which the jury selection process was conducted violated his right to a public trial. Defendant cites several cases in support of his position, including: *Bone-Club*, where the trial court summarily granted the State's request to clear the courtroom for the pretrial testimony of an undercover officer; *State v. Brightman*, 155 Wn.2d 506, 511, 122 P.3d 150 (2005) where the trial court ordered, *sua sponte*, that the courtroom be cleared for the entire two and one-half days of *voir dire*, excluding the defendant's family and friends; *In re Pers. Restraint of Orange*, 152 Wn.2d 795, 100 P.3d 291 (2004), where the trial court summarily ordered the defendant's family and friends excluded from *all voir dire* proceedings; and *State v. Wise*, 176 Wn.2d 1, 288 P.3d 1113 (2012), where the trial court closed courtroom when it privately questioned jurors during *voir dire* without conducting *Bone-Club* analysis.

Defendant argues that physical closure of the courtroom is not required for a violation of the defendant's public trial right to occur. However, in each of the cases relied upon by defendant to support his position, a courtroom closure was found to have either been directly

ordered or indirectly caused by the trial court's action. Here, the courtroom was never closed, nor was anyone *de facto* excluded since all substantive matters were conducted in open court. Accordingly, the cases cited by Mr. Harvey are not controlling in this case because the courtroom was never closed as contemplated by Article I, § 22. *See State v. Momah*, 167 Wn.2d 140, 217 P.3d 321 (2009).

Here, the brief conferences at issue were not “proceedings” that triggered the public trial right. The cases defendant relies upon construe the defendant's public trial right under Article I, § 22 and concern situations in which all or part of an important substantive proceeding was shielded from public view.<sup>1</sup> Here, the sidebar conferences at issue were brief in duration and purely ministerial in subject matter.

The side bars concerned the removal of the prospective jurors “for cause.” The trial court identified the prospective jurors that were being excused for cause and documented the reasons for their removal from the venire. The public record clearly reflects the reasons for those individuals being excused for cause. The public record reflects that defendant was either the party moving for the prospective juror being excused for cause or was in full accord with the trial court's action. Prospective juror

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<sup>1</sup> *Bone-Club* (pretrial testimony); *Orange*, (voir dire); *Brightman* (voir dire); *Easterling* (pretrial hearing); *Wise* (voir dire of selected jurors).

number 19 was excused due to hardship. VDRP 164-165. Prospective juror number 43 was excused due to his inability to deal with graphic evidence and sitting in judgment of another person. VDRP 245, 247-248, 257-258, 292-293. Prospective juror number 77 was excused due to her inability to reconcile her faith with sitting in judgment of another person. VDRP 247, 258, 274, 292-293. Finally, prospective juror number 60 was excused due to hardship. VDRP 190-191, 273.

Here, the proceedings were in the open courtroom and the trial court explained on the record all of its procedures pertinent to juror hardship matters. The resolution of hardship requests during a sidebar conference were not adversary proceedings and did not concern the excused jurors' qualifications to serve impartially. The sidebar discussions focused solely to hardship matters governed by the trial court's discretion and did not involve resolution of disputed facts. The sidebar discussions were most akin to a trial court's discussion of legal matters during a sidebar, the substance to which the defendant and members of the public have traditionally not been privy. *In re Pers. Restraint of Pirtle*, 136 Wn.2d 467, 483-484, 965 P.2d 593 (1998) (defendant's presence not required for in-chambers discussion of jury sequestration, wording of jury instructions, and ministerial matters); *In re Pers. Restraint of Lord*, 123 Wn.2d 296, 306, 868 P.2d 835 (1994) (defendant's presence not

required for in-chambers or bench conferences between court and counsel on legal matters); *State v. Sublett*, 156 Wn. App. 160, 181-182, 231 P.3d 231 (public trial right inapplicable to court's conference with counsel regarding jury's purely legal question submitted during deliberations), *affirmed*, 176 Wn.2d 58, 77-78, 292 P.3d 715 (2012); *State v. Bremer*, 98 Wn. App. 832, 834-835, 991 P.2d 118 (2000) (defendant had no right to be present during in-chambers conference for legal inquiry about jury instruction). Such matters do not trigger analysis under *Bone-Club*.

Even applying the “experience and logic test” adopted by the Supreme Court in *Sublett*, to determine whether a *Bone-Club* analysis must be conducted does not support concluding that a violation of the public trial right herein. The test is administered to determine whether the core values of the public trial right are implicated.

[T]he experience prong, asks ‘whether the place and process have historically been open to the press and general public.’... The logic prong asks ‘whether public access plays a significant positive role in the functioning of the particular process in question.’...If the answer to both is yes, the public trial right attaches and the...*Bone-Club* factors must be considered before the proceeding may be closed to the public. (citations omitted).

*Id.*, 176 Wn.2d at 73.

Here, the entire procedure was open to the public as reflected by the record, so the need for a *Bone-Club* analysis was never triggered.

D. DEFENDANT WAS PRESENT FOR ALL CRITICAL STAGES OF HIS TRIAL.

In his direct appeal, defendant contended that his right to be present at all “critical stages” of trial was violated when the trial court responded to a jury question during deliberations without him present. In the unpublished opinion, this Court ruled that defendant’s “presence did not have a reasonably substantial relationship to his defense of the charges,” so his right to be present was not violated. Now, defendant has recast the issue of his right to be present in the context of the sidebar conferences when prospective jurors were excused for cause.

A ‘new’ issue is not created merely by supporting a previous ground for relief with different factual allegations or with different legal arguments. For example, [a] defendant may not recast the same issue as an ineffective assistance claim; simply recasting an argument in that manner does not create a new ground for relief or constitute good cause for reconsidering the previous rejected claim.

*In re Pers. Restraint of Davis*, 152 Wn.2d 647, 671, 101 P.3d 1 (2004) (footnote omitted).

Defendant should not be permitted to re-litigate the issue of his right to be present simply by shifting the focus to a different aspect of the trial. Alternatively, defendant has not established that his right to be

present at all critical stages of his trial was violated by the jury selection process.

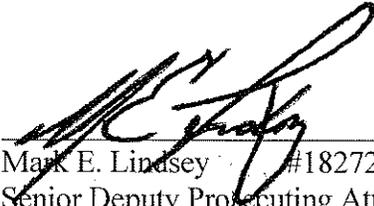
The defendant cites to the decision in *State v. Irby*, 170 Wn.2d 874, 246 P.3d 796 (2011), in support of his claim that his right to be present was violated during the jury selection process. As noted, the defendant's "due process right to be present is not absolute; rather 'the presence of a defendant is a condition of due process to the extent that a fair and just hearing would be thwarted by his absence.'" *Id.*, 170 Wn.2d at 881. In *Irby*, the issue of the defendant's presence focused on his absence from the process of dismissal of prospective jurors via an email exchange. Here, no such exclusion occurred. The dismissals for cause were on the record in the defendant's presence in an open courtroom. VDRP 1-303. The process used to record peremptory challenges was likewise conducted in the defendant's presence in an open courtroom. Defendant has failed to establish that he was not present during the jury selection process. The suggestion that the record does not reflect that defendant was present during the jury selection process is simply not supported by the record and contrary to defendant's own supplemental brief in which he states that he and the public were present during the entire jury selection process.

V.

CONCLUSION

For the reasons stated, the convictions should be affirmed.

Respectfully submitted this 15<sup>th</sup> day of July, 2013.



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**FILED**

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COURT OF APPEALS  
DIVISION III  
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IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON

DIVISION III

STATE OF WASHINGTON,	)	
	)	
Respondent,	)	NO. 29513-3-III
v.	)	
	)	CERTIFICATE OF MAILING
MERLE W. HARVEY,	)	
	)	
Appellant,	)	

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I certify under penalty of perjury under the laws of the State of Washington, that on July 15, 2013, I e-mailed a copy of the Respondent's Supplemental Brief in this matter, pursuant to the parties' agreement, to:

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7/15/2013  
(Date)

Spokane, WA  
(Place)

*Kathleen S. Owens*  
(Signature)