IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON

DIVISION II

STATE OF WASHINGTON, Respondent, v. ZACHARIAH GARRISON, Appellant.	No. 39173-2-II UNPUBLISHED OPINION

Penoyar, C.J. — Zachariah Garrison appeals his convictions of first degree burglary with a deadly weapon enhancement (domestic violence), felony harassment (domestic violence), and fourth degree assault (domestic violence). Garrison argues that the trial court erred by admitting prior recorded testimony of an unavailable witness. Next, he contends that there is insufficient evidence to support his felony harassment conviction. He also asserts that the prosecutor committed misconduct during his closing and rebuttal arguments and that the trial court violated his right to be free from double jeopardy. Additionally, he raises numerous claims in his statement of additional grounds (SAG).[1] We affirm.

FACTS

I. Background

On August 18, 2008, Garrison went to Jessee Guizzotti's apartment to pick up some of his belongings. The two had recently ended their two month relationship. During the visit, Garrison called Guizzotti derogatory names and she asked him to leave. In response, Garrison grabbed Guizzotti from her couch, picked her up, and dropped her on the floor. He then dragged

[1] RAP 10.10.

her across the living room carpet and yelled into her ear that he would not hurt her. Guizzotti again asked Garrison to leave, which he did.

Later that day, Guizzotti heard a tapping at her apartment door. She looked through her peephole and did not see anyone. She opened her door and saw Garrison. He pushed against the door, entered Guizzotti's apartment, and locked the dead bolt. She yelled at Garrison, asking him to leave. Garrison held a pocket knife, with a three or four inch blade, and pointed it at Guizzotti. He cornered her and said, "If I was going to do anything to you this would be the best place because your head would bounce off three walls." Report of Proceedings (RP) at 70. Garrison told Guizzotti that he wanted to kill her. He had previously told her that he had 26 felonies and 13 misdemeanors, and that he had injured an ex-girl friend's boyfriend after she had called the police on Garrison.

Guizzotti reached for her cellular phone and her car keys, but Garrison smashed her phone on the ground and threw her keys. Eventually, Garrison calmed down, apologized, offered to fix Guizzotti's phone, and left her apartment.

Guizzotti left her apartment for the night and called the police. Around the time of the incident, Garrison also sent Guizzotti text messages, including profane text messages and a message with a picture of his hands holding a rifle. Guizzotti showed these messages to a police officer.

II. Procedural History

On October 9, 2008, the State charged Garrison with first degree burglary while armed with a deadly weapon (domestic violence), residential burglary (domestic violence), felony harassment (domestic violence), and fourth degree assault (domestic violence). On December 17,

2008, the State filed an amended information, dropping the residential burglary (domestic violence) charge and charging Garrison with attempted residential burglary (domestic violence).

In the first trial, which commenced on December 17, 2009, Guizzotti was brought to the courthouse to testify pursuant to a material witness warrant. The trial court declared a mistrial due to inclement weather.

At the second trial, the State moved, over defense counsel's objection, to admit Guizzotti's testimony from the first trial.[2] On January 21, 2009, the State filed a new subpoena to require Guizzotti to appear at the scheduled second trial. Cowlitz County Sheriff's Deputy Joseph Conner went to the address listed on the subpoena and found that Guizzotti had been evicted and thus was unable to serve her with a subpoena. The State described its efforts to find Guizzotti. The State had contacted Guizzotti's former neighbor, and she did not have a phone number or a last known address for Guizzotti. The State also attempted to contact Guizzotti's sister, but the phone number did not work. The State spoke to the father of one of Guizzotti's children, who provided the State with a phone number for Guizzotti that did not work. He did not have an address for Guizzotti but indicated that "she may be able to be found in the Highlands [of Longview]." RP at 8. The last address listed for Guizzotti in the local law enforcement databases was outdated. The prosecutor had not obtained a material witness warrant to hold Guizzotti in custody, because it "would [not] have been particularly effective . . . in that the Court is not going to detain for two months for the trial to come up again. She would have been released and we would be in the same situation as we are here today." RP at 9. Further, the prosecutor reasoned that "[w]ithout an address where the sheriff can serve the warrant and arrest

[2] The second trial began on February 10, 2009.

her, a warrant really isn't of much use to the State." RP at 13. The trial court allowed the admission of Guizzotti's testimony, finding that she was unavailable to testify and that the State used reasonable available means to locate her.

After the prosecutor finished its closing and rebuttal arguments, defense counsel moved for a mistrial, citing as grounds prosecutorial misconduct.[3] The trial court reserved ruling, stating that it would only consider the argument if it was submitted in writing.

The jury found Garrison guilty of first degree burglary with a deadly weapon enhancement (domestic violence), felony harassment (domestic violence), and fourth degree assault (domestic violence). The jury found Garrison not guilty of attempted residential burglary. The jury also returned a special verdict that Garrison was armed with a deadly weapon while committing first degree burglary.

Garrison moved to dismiss his convictions for prosecutorial misconduct. The trial court denied the motion and sentenced Garrison to 111 months of confinement. Garrison appeals.

ANALYSIS

I. Admission of Guizzotti's Former Testimony

First, Garrison argues that the trial court erred when it admitted Guizzotti's prior recorded testimony because the State did not make reasonable efforts to secure Guizzotti at the second trial. Garrison asserts that the State "only took the step of issuing a new subpoena, a step it knew from its prior dealing with [Guizzotti] would not secure her presence at trial, even were it served." Appellant's Br. at 15. We disagree.

[3] Defense counsel did not make objections during the prosecutor's closing and rebuttal arguments.

A. Standard of Review

A trial court's decision to admit evidence is reviewed to determine if the trial court's exercise of its discretion is manifestly unreasonable or based upon untenable grounds or reasons. *State v. DeSantiago*, 149 Wn.2d 402, 411, 68 P.3d 1065 (2003); *State v. Neal*, 144 Wn.2d 600, 609, 30 P.3d 1255 (2001) (quoting *State v. Stenson*, 132 Wn.2d 668, 701, 940 P.2d 1239 (1997)).

B. Unavailable Witness

ER 804(b)(1) allows for the admission of prior testimony of an unavailable witness. The following is not excluded by the hearsay rule if the declarant is unavailable as a witness:

> Testimony given as a witness at another hearing of the same or a different proceeding, or in a deposition taken in compliance with law in the course of the same or another proceeding, if the party against whom the testimony is now offered, or, in a civil action or proceeding, a predecessor in interest, had an opportunity and similar motive to develop the testimony by direct, cross, or redirect examination.

ER 804(b)(1). "'Unavailability as a witness' includes situations in which the declarant: . . . [i]s absent from the hearing and the proponent of the statement has been unable to procure the declarant's attendance . . . by process or other reasonable means." ER 804(a)(5).

"A good faith effort to obtain the presence of the witness at trial requires that the proponent use the means available to compel attendance of the witness at trial." *State v. Sweeney*, 45 Wn. App. 81, 86, 723 P.2d 551 (1986). A prosecutor offering a witness's out-of-court statement must show it made an effort to secure the witness's voluntary attendance at trial. *DeSantiago*, 149 Wn.2d at 412 (quoting *Rice v. Janovich*, 109 Wn.2d 48, 57, 742 P.2d 1230 (1987)).

Garrison relies on *Sweeney*, 45 Wn. App. 81.. In *Sweeney*, this court concluded that the State did not make a proper showing of unavailability of an uncooperative witness when it did not attempt to procure the witness's presence by using the procedures for securing attendance of out-of-state witnesses under chapter 10.55 RCW. 45 Wn. App. at 82. Before trial, the State moved to preserve the victim's testimony by deposition because of concern that the victim might not appear at trial if released to her mother's custody in California. *Sweeney*, 45 Wn. App. at 86. The victim then refused to come to Washington to testify. *Sweeney*, 45 Wn. App. at 84-85.

This case is distinguishable from *Sweeney*. Here, the prosecutor did not know Guizzotti's location. The prosecutor attempted to contact and did contact several individuals who knew Guizzotti, but those individuals were unable to assist the prosecutor in locating her. The issuance of a material witness warrant would have been futile, as there was no known address for Guizzotti. Given the State's inability to locate Guizzotti after good faith and reasonable efforts, we affirm the trial court's finding that the witness was sufficiently unavailable to satisfy ER 804(b)(1).

II. Sufficiency of the Evidence

Next, Garrison argues that insufficient evidence supports his felony harassment conviction. Specifically, he asserts that the State did not prove that Guizzotti had a subjective belief that Garrison would kill her. We disagree.

When reviewing a claim of insufficient evidence, we view the evidence in the light most favorable to the State in order to determine whether any rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt. *State v. Brockob*, 159 Wn.2d 311, 336, 150 P.3d 59 (2006) (quoting *State v. Hughes*, 154 Wn.2d 118, 152, 110 P.3d 192 (2005),

abrogated on other grounds by Washington v. Recuenco, 548 U.S. 212, 126 S. Ct. 2546, 165 L. Ed. 2d 466 (2006)). We draw all reasonable inferences in the State's favor and interpret the evidence most strongly against the defendant. *State v. Hosier*, 157 Wn.2d 1, 8, 133 P.3d 936 (2006). Circumstantial evidence is as reliable as direct evidence. *State v. Delmarter*, 94 Wn.2d 634, 638, 618 P.2d 99 (1980). We defer to the factfinder on issues that involve conflicting testimony, witness credibility, and the persuasiveness of the evidence. *State v. Thomas*, 150 Wn.2d 821, 874-75, 83 P.3d 970 (2004).

A person is guilty of harassment if, without lawful authority, he knowingly threatens to cause bodily injury immediately or in the future to the person threatened; and the person by words or conduct places the person threatened in reasonable fear that the threat will be carried out. RCW 9A.46.020(a)(i), (b). A person who harasses another is guilty of a class C felony if the person harasses another person by threatening to kill the person threatened. RCW 9A.46.020(b)(ii). In order to convict an individual of felony harassment based upon a threat to kill, the State must prove that the person threatened was placed in reasonable fear that the threat to kill would be carried out as an element of the offense. *State v. C.G.*, 150 Wn.2d 604, 612, 80 P.3d 594 (2003). Garrison threatened to kill Guizzotti and she testified that she "believed anything he said that was bad."[4] RP at 74. The jury chose to believe Guizzotti's testimony.

[4] At the first trial, Guizzotti testified as follows:

> [THE STATE]: [W]hen he threatened to kill you did you believe that he would do that?
>
> MS. GUIZZOTTI: At that point, I believed anything he said that was bad.
>
> . . . .
>
> [THE STATE]: Jessee did you believe that he would kill you?
>
> MS. GUIZZOTTI: Maybe not kill me but I sure believed that he would hurt me after that. He'd never acted like he would hurt me at all and he said he wouldn't.

Viewed in the light most favorable to the State, this evidence is sufficient to support Garrison's felony harassment conviction.

III. Prosecutorial Misconduct

Garrison argues that the prosecutor committed misconduct during his closing and rebuttal arguments. We disagree.

To show misconduct, the defendant must show that the prosecutor did not act in good faith and the prosecutor's conduct was both improper and prejudicial. *State v. Manthie*, 39 Wn. App. 815, 820, 696 P.2d 33 (1985). A prosecuting attorney's allegedly improper remarks must be reviewed in the context of the total argument, the issues in the case, the evidence addressed in the argument, and the instructions given to the jury. *State v. Russell,* 125 Wn.2d 24, 85-86, 882 P.2d 747 (1994). A prosecutor may not refer to evidence not presented at trial; however, in closing argument, a prosecutor has wide latitude to draw reasonable inferences from the evidence and to express such inferences to the jury. *State v. Magers*, 164 Wn.2d 174, 192, 189 P.3d 126 (2008). Prejudice occurs if there is a substantial likelihood that the misconduct affected the jury's verdict. *State v. Dhaliwal*, 150 Wn.2d 559, 578, 79 P.3d 432 (2003) (quoting *State v. Pirtle*, 127 Wn.2d 628, 672, 904 P.2d 245 (1995)).

If defense counsel does not object, move for mistrial, or request a curative instruction, then a prosecutor's allegedly improper argument cannot be urged as error on appeal unless the

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> [THE STATE]: Did you just say that you believed any -- before that did you say that you believed anything he would say at that point?
>
> MS. GUIZZOTTI: Before that point I didn't think that he would ever lay a hand on me but after the living room incident, I believed everything he said.
>
> [THE STATE]: You believed that he would do what he said?
>
> MS. GUIZZOTTI: (Witness nods.)

RP at 73-74.

comment was so flagrant and ill-intentioned that the prejudice could not have been cured by an instruction. *State v. Dunaway*, 109 Wn.2d 207, 221, 743 P.2d 1237, 749 P.2d 160 (1987) (quoting *State v. Kendrick*, 47 Wn. App. 620, 638, 736 P.2d 1079 (1987)). Courts presume jurors follow instructions to disregard improper evidence. *Russell*, 125 Wn.2d at 84.

During closing argument, the prosecutor argued the following:

> Now, what is that when you say I want to kill you and you burst into somebody's home and you are waving a knife in their face? Is that a threat? Is reasonable person going to think that is a threat? Of course. Somebody does that, you better believe they are serious because they are in your house. They've got a knife. And, what do you know about them? Well, what does -- does [Guizzotti] just say, "Well, this is just some guy." Is he a Boy Scout? Well, that's not what he has told [Guizotti]. He has told [Guizzotti] that he has had these 26 felonies, these 13 misdemeanors. He showed her the statements that the other girlfriends had written. The ones that apparently wrote statements to the police before. And, what does he tell her about those other girls? You know what? These are the girls that snitched on me. They ratted me out to the cops and they got what was theirs. Are we seeing a pattern -- seeing a pattern here?

RP at 211. Defense counsel did not object. Garrison contends that the prosecutor committed misconduct, because he "directly pointed out prior alleged misconduct . . . and invited the jury to convict on the current charges based upon [Garrison's] 'pattern' or 'propensity' for committing such acts." Appellant's Br. at 27. Here, the prosecutor argued, "Is reasonable person going to think that is a threat. Of course." RP at 211. He then discussed the prior acts to demonstrate to the jury that it was reasonable for Guizzotti to be fearful of Garrison's threats. The prosecutor's statements did not constitute misconduct.

During rebuttal argument, the prosecutor argued:

> Does she make [Garrison] send her the text messages? The ones that say he is "on his way for revenge. Don't f[***] with convicts. Let me in. I'm on my way to your apartment."
>
> When I first -- in my first closing I said, there's no explanation for those. There is no good explanation for the text messages. Well, we never heard one. We never heard an explanation for the text messages. Text messages are pretty damning. And, the text messages are not -- are these the text messages of a man who has dumped a girl and is trying to get rid of her? Or, are they the messages of a guy that's angry, that wants to keep her, that wants to hold onto her? . . . [T]hat's what these text messages are.

RP 227-28.

Drawing attention to a defendant's failure to testify is constitutional error. *State v. Scott*, 58 Wn. App. 50, 56, 791 P.2d 559 (1990). However, "[t]he prosecutor may comment upon the fact that certain testimony is undenied, without reference to who may or may not be in a position to deny it; and, if that results in an inference unfavorable to the accused, he must accept the burden, because the choice to testify or not was wholly his." *State v. Ashby*, 77 Wn.2d 33, 38, 459 P.2d 403 (1969) (quoting *State v. Litzenberger*, 140 Wash. 308, 311, 248 P. 799 (1926). The prosecutor may also comment that evidence is undisputed when these comments are so brief and subtle that they do not emphasize the defendant's testimonial silence. *State v. Crawford*, 21 Wn. App. 146, 152, 584 P.2d 442 (1978). Here, the prosecutor did not reference Garrison; he merely commented on the fact that there was no explanation for the text messages. The prosecutor did not commit misconduct.[5]

IV. Double Jeopardy

Garrison also argues that the trial court violated his right to be free from double jeopardy when it added a sentencing enhancement that was also an element of the underlying crime charged. We disagree.

Double jeopardy claims are questions of law we review de novo. *State v. Kelley*, 168 Wn.2d 72, 76, 226 P.3d 773 (2010). The double jeopardy clause of the Fifth Amendment to the United States Constitution provides that "[n]o person shall . . . be subject for the same offense to be twice put in jeopardy of life or limb." Article I, section 9 of the Washington State Constitution provides that "[n]o person shall . . . be twice put in jeopardy for the same offense." The two

[5] This conclusion makes it unnecessary to address the State's argument that Garrison waived the issue by failing to object during closing and rebuttal argument.

clauses provide the same protection. *State v. Weber*, 159 Wn.2d 252, 265, 149 P.3d 646 (2006) (quoting *In re Pers. Restraint of Davis*, 142 Wn.2d 165, 171, 12 P.3d 603 (2000)). The double jeopardy provision bars multiple punishments for the same offense. *Kelley*, 168 Wn.2d at 76. No double jeopardy violation occurs when additional punishment is imposed based upon the defendant's use of a firearm or other deadly weapon during a crime, and this is true when use of the firearm or other weapon is an element of the underlying, or base, offense. *Kelley*, 168 Wn.2d at 78. The trial court did not violate the prohibition against double jeopardy.

V. Statement of Additional Grounds

A. Issues Already Addressed by Appellate Counsel

Garrison raises several arguments that appellate counsel addresses in this appeal, including the propriety of the admission of Guizzotti's prior testimony[6] and double jeopardy. We do not address SAG arguments that simply repeat or paraphrase arguments presented in appellate counsel's brief. *State v. Johnston*, 100 Wn. App. 126, 132, 996 P.2d 629 (2000).

B. Right to a Jury at Sentencing

Garrison also asserts that he was denied his right to be sentenced by a jury, citing *Blakely v. Washington*, 542 U.S. 296, 124 S. Ct. 2531, 159 L. Ed. 2d 403 (2004). Garrison misreads *Blakely*, which held that any fact a court uses to increase a penalty beyond the statutory maximum

[6] In regards to the prior testimony, Garrison does raise an argument that his appellate counsel does not raise. Garrison argues that the former testimony was not admissible under the confrontation clause of the Sixth Amendment. "Where testimonial evidence is at issue . . . the Sixth Amendment demands . . . unavailability and a prior opportunity for cross-examination." *Crawford v. Washington*, 541 U.S. 36, 68, 124 S. Ct. 1354, 158 L. Ed. 2d 177 (2004). Crawford's confrontation clause rights were not violated, as the trial court properly found that Guizzotti was unavailable, and Garrison had a prior opportunity to cross-examine Guizzotti at the first trial.

must first be submitted to a jury and proved beyond a reasonable doubt. *See* 542 U.S. at 301. Garrison did not receive an exceptional sentence; also, here, he has no right to be sentenced by a jury.

C. Speedy Trial

Garrison contends that the trial court violated his constitutional right to a speedy trial because he was not brought to trial within 60 days. While Garrison does not cite CrR 3.3(b), it appears that he means to argue that the State did not bring him to trial within 60 days of his arraignment as required by CrR 3.3. We disagree.

CrR 3.3(b)(1) provides that a criminal defendant detained in jail must be brought to trial within 60 days of the date of arraignment. If a defendant is in custody, he must be arraigned within 14 days after the information is filed. CrR 4.1(a)(1). A new commencement date is established, and the elapsed time is reset to zero, if the trial court enters an order granting a mistrial or new trial. CrR 3.3(c)(2)(iii). Then, the new commencement date is the date the order granting a mistrial is entered. CrR 3.3(c)(2)(iii).

The State filed the first information on October 9, 2008. The record does not show on what day the court arraigned Garrison. Garrison's first trial commenced on December 17, 2008. The trial court declared a mistrial on January 7, 2009. Garrison's second trial started on February 10, 2009. The second trial occurred within 60 days of the trial court's declaration of a mistrial, and the record is insufficient to properly address whether Garrison's first trial occurred within 60 days of his arraignment. Here, Garrison's claim is without merit.

D. Failure to Preserve Evidence

Garrison also argues that his due process rights were violated by the State's failure to preserve Guizzotti's cellular phone.[7] Due process under the Fourteenth Amendment requires the State to preserve material exculpatory evidence for use by the defense. *State v. Wittenbarger*, 124 Wn.2d 467, 475, 880 P.2d 517 (1994). To be material and exculpatory, the evidence's exculpatory value must have been apparent before it was destroyed and must be of such a nature that comparable evidence could not be reasonably obtained. *Wittenbarger*, 124 Wn.2d at 475. If the evidence is only potentially useful, the failure to preserve it does not deny due process unless the defendant can show the State acted in bad faith. *Wittenbarger*, 124 Wn.2d at 477. Garrison fails to explain the exculpatory value of this evidence. Under these circumstances, failure to preserve Guizzotti's phone did not violate Guizzotti's Fourteenth Amendment rights.

E. Prosecutorial Misconduct

In addition to the claims of prosecutorial misconduct raised by appellate counsel, Garrison argues, in his SAG, that the prosecutor committed misconduct by presenting video testimony from the first trial when Guizzotti "made it clear on the record that she was not the victim;" committing perjury; refusing to disclose Guizzotti's criminal history; soliciting Garrison's criminal history from Guizzotti; and making various comments during his closing and rebuttal arguments. SAG at 17. He also asserts that he was not aware of a sidebar conversation regarding the admission of text messages, violating his constitutional right to be present at all stages of the trial. These claims are without merit.

[7] Deputy Shelton testified regarding the content of the text messages Garrison sent to Guizzotti.

With regard to Garrison's first contention, the State had the right to present Guizzotti's testimony. Further, Garrison misreads the record; Guizzotti testified that she did not want to come to court; she never stated that she was not the victim. Next, Garrison claims that the prosecutor committed perjury by saying, during a sidebar with the trial court, "[Garrison] admitted to the text messages." SAG at 18. Credibility determinations are for the trier of fact and are not subject to our review. *Thomas*, 150 Wn.2d at 874. Additionally, the record is insufficient to properly address Garrison's argument.

In regards to Garrison's claim that the prosecutor refused to disclose Guizzotti's criminal history, the State had no affirmative duty to disclose such information. Additionally, the State properly solicited information regarding Garrison's prior acts from Guizzotti in order to prove the felony harassment claim.

Garrison's assertion that the prosecutor committed misconduct by making various comments during closing and rebuttal arguments also fails.[8] Appellate counsel addressed some of

[8] These comments include, "[Garrison] has told [Guizzotti] that he has had these 26 felonies, these 13 misdemeanors," RP at 211; "[Cowlitz County Sheriff's] Deputy Shelton sees [Guizzotti's cellular phone] broken," RP at 214; "another important piece of evidence is the text messages that Deputy Shelton sees, that Deputy Shelton writes down," RP at 215; "he sends her a picture of his hand holding a rifle," RP at 215; "[i]f in your deliberations . . . you have a belief in his guilt that endures throughout your deliberations . . . it becomes your duty to find him guilty," RP at 216-17; "given what [Guizzotti] knows about [Garrison], about what he has told her, about his record," RP at 226; "[d]oes [Guizzotti] break her own cell phone," RP at 227; and "in my first closing I said, there's no explanation for those. There is no good explanation for the text messages. Well, we never heard one," RP at 227-28.

Garrison also contends that the prosecutor committed misconduct in rebuttal argument, calling attention to Garrison's failure to testify, when he said, "[W]e didn't hear from the boyfriend, we didn't hear from her sister, the sister's boyfriend." RP at 229. Read in the context of both the prosecutor's and defense counsel's arguments, it appears that the prosecutor was referencing to the boyfriend of Guizzotti's sister when he made this comment. We conclude that the prosecutor did not commit misconduct.

these comments in this appeal, and we decline to address SAG arguments that simply repeat or paraphrase arguments presented in the appellate counsel's brief. Further, defense counsel did not make a timely objection to the prosecutor's statements that appellate counsel did not address in his brief. These comments were not so flagrant and ill-intentioned that the prejudice could not have been cured by an instruction; therefore, he waived any error.

Finally, Garrison had no right to be present during the sidebar conference. The 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 Pers. Restraint of Lord*, 123 Wn.2d 296, 306, 868 P.2d 835, 870 P.2d 964 (1994) (citing *United States v. Williams*, 455 F.2d 361, 365 (9th Cir. 1972)). The sidebar involved discussion between the court and counsel on a matter of law, the admissibility of the text messages through Cowlitz County Sheriff's Deputy Tory Shelton's testimony.[9]

F. Rules of Professional Conduct

Finally, Garrison appears to allege that that the prosecutor and defense counsel violated several of the Rules of Professional Conduct (RPC). His SAG does not point out any specific instances in the record that support his assertion. We are not required to search the record to find support for the defendant's claims. RAP 10.10(c). Further, we do not review allegations that an attorney has violated the RPCs; that is left to the Washington State Bar Association and our Supreme Court. Because there is no record or authority to support Garrison's assertion, this argument fails.

[9] Further, it is unclear from the record whether Garrison was absent from the sidebar. The record merely reflects that the trial court conducted the sidebar in the hallway.

We affirm.

A majority of the panel having determined that this opinion will not be printed in the Washington Appellate Reports, but will be filed for public record pursuant to RCW 2.06.040, it is so ordered.

Penoyar, C.J.

We concur:

Worswick, J.

Sweeney, J.