

[J-113-2011][M.O. – McCaffery, J.]
IN THE SUPREME COURT OF PENNSYLVANIA
MIDDLE DISTRICT

COMMONWEALTH OF PENNSYLVANIA,	:	No. 57 MAP 2011
	:	
Appellee	:	Appeal from the Order of the Superior
	:	Court dated July 20, 2010, reconsideration
	:	denied September 23, 2010, at No. 2980
	:	EDA 2009 affirming the Bucks County
v.	:	Court of Common Pleas, Criminal
	:	Division, order dated September 21, 2009
	:	at No. 09-CR-0007762-2005
	:	
CHRISTIAN HUNSBERGER,	:	
	:	
Appellant	:	SUBMITTED: October 26, 2011

CONCURRING OPINION

MR. JUSTICE SAYLOR

DECIDED: November 21, 2012

The majority initially frames the question presented as whether a defendant’s personal ability to hear all voir dire is “categorically mandate[d].” Majority Opinion, slip op. at 1. I agree that it is not. I have difficulty, however, to the extent that the majority’s holding is framed in terms which may be taken as an approval of the practice of “sidebar” voir dire. See Majority Opinion, slip op. at 12 (“[W]e conclude that although a defendant has the clear right to participate in the jury selection process, that right is not compromised where, as here, the defendant, who was in the courtroom, was not present at sidebar where his counsel was questioning several venirepersons outside the range of his hearing.”).

In my view, sidebar voir dire is a problematic practice which should not be routinized and, where necessary, should be handled with special care by trial judges

and counsel.¹ It seems evident to me at least that counsel confronted with a trial court's practice of conducting "sidebar" voir dire should consult with the client to determine whether a timely objection should be interposed. To the extent that Appellant's trial counsel failed to do so in this case, I would find arguable merit in the claim of deficient stewardship. Accordingly, my support for the affirmance of the Superior Court's order is based on the application of the prejudice criterion.

¹ As to the decisions pertaining to general sidebar conferences among a trial judge and counsel, I do not see the relevance here, since the practice of conducting voir dire out of the hearing of the defendant raises an entirely different set of concerns.