IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON

STATE OF WASHINGTON,	)	No. 63056-3-I
	)	
Respondent,	)	DIVISION ONE
	)	
v.	)	
	)	
JOHN FRANKLIN PRICE,	)	UNPUBLISHED
	)	
Appellant.	)	FILED: July 25, 2011
	)	
	)	

Cox, J. — Jury selection is a critical stage of a criminal trial, and a defendant's right to be present during this stage is constitutionally protected.[1] Here, John Price did not voluntarily, knowingly, and intelligently waive his right to be present during the portion of jury selection that is at issue in this case. Likewise, he did not invite the error about which he now complains. The State fails to meet its burden to show that Price's absence during this critical stage was harmless beyond a reasonable doubt. We reverse.

The State charged Price with one count of first degree murder for the death of Donald Jessup. During his incarceration while awaiting trial, Price repeatedly contacted the two key witnesses against him, Judith Mahler[2] and Channel Ridley. Consequently, the State amended the information to add two

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[1] State v. Irby, 170 Wn.2d 874, 883-84, 246 P.3d 796 (2011).

counts of witness tampering.

On October 1, 2008, while Price was present in court, the trial judge discussed with respective counsel the process that she intended to use for selecting Price's jury. Counsel first agreed on the wording of the jury questionnaire that was to be distributed to the members of the venire the next day. The discussion then moved to the procedure for selection of the jury.

The judge indicated that she expected a panel of 200 potential jurors and intended to bring them into the courtroom in groups of 50 due to space limitations. She stated that she would read to each group the agreed introductory language and the amended information. She then intended to call for hardships. The judge correctly noted that "this is a critical stage of the proceedings and the defendant needs to be present, even though we're just calling for hardship." She stated that at the end of the day, the remaining panel members would be asked to complete the jury questionnaire, which would then be used during the remaining portion of voir dire.

Following this description by the judge, defense counsel stated that she did not think that it was necessary for Price to be present for the determination of hardships of potential jurors. She then stated that she would speak with Price and get back to the court. The judge and counsel then proceeded to discuss other matters not relevant to this appeal.

[2] At the time of trial Judith Mahler had changed her legal name to Judith Johnson. We adopt the naming convention of the parties to this appeal by referring to her as Judith Mahler in this opinion.

At the end of this hearing, defense counsel stated that Price would not be present for the first day of jury selection. "I've conferred with Mr. Price, and since it's just a hardship part, I certainly don't think it's a critical stage in the proceedings." After the State indicated that it would not have a detective present if Price was not present during this phase, the judge stated "[W]e'll just do hardship."

Jury selection commenced the next day, October 2, 2008. The judge swore in the first group of members of the venire and read to them agreed introductory remarks and the charges. The judge then explained how voir dire would proceed, and called for hardships. The judge repeated this process with each of the remaining groups of panel members.

The judge ultimately dismissed 80 members of the venire. It is undisputed that the majority were dismissed for hardship. But two members of the venire were dismissed for reasons other than hardship. Potential juror number 121 was released because he had some knowledge of the case. Another potential juror, number nine, was released because he indicated that he simply did not "want to be here."[3] It is undisputed that Price was not present during any of this questioning of the venire or the dismissals.

He was present during the remaining examination of the members of the venire, beginning October 7, 2008. A jury convicted him as charged.

Price appeals.

[3] At oral argument the parties agreed that the verbatim report of proceedings incorrectly identifies juror number 9 as juror number 1.

RIGHT TO BE PRESENT DURING JURY SELECTION

Price argues that he was denied his constitutional rights under the federal and state constitutions to be present for a critical stage of trial, jury selection. He also argues that he neither waived these rights nor invited the error he now claims. Finally, he claims that the State fails to show that the claimed error is harmless beyond a reasonable doubt. We agree in all respects.

"A criminal defendant has a fundamental right to be present at all critical stages of a trial."[4] This includes the right to be present during voir dire and empanelling of the jury.[5] The right to be present derives from the Confrontation Clause of the Sixth Amendment and the Due Process Clauses of the Fifth and Fourteenth Amendments.[6] The United States Supreme Court has recognized that this right is protected by the Due Process Clause in situations where the defendant is not actually confronting witnesses or evidence against him.[7] In those situations, the Supreme Court has said that the "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.'"[8] But "because the relationship between the defendant's presence and his 'opportunity

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[4] Irby, 170 Wn.2d at 880 (citing Rushen v. Spain, 464 U.S. 114, 117, 104 S. Ct. 453, 78 L. Ed. 2d 267 (1983)).

[5] Diaz v. United States, 223 U.S. 442, 455, 32 S. Ct. 250, 56 L. Ed. 500 (1912).

[6] Id.

[7] Irby, 170 Wn.2d at 880-81 (quoting United States v. Gagnon, 470 U.S. 522, 526, 105 S. Ct. 1482, 84 L. Ed. 2d 486 (1985)).

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.'"[9]

This court reviews de novo whether a defendant's constitutional right to be present has been violated.[10]

State v. Irby[11] is dispositive. There, the charges included first degree felony murder with aggravating circumstances, first degree felony murder, and first degree burglary.[12] During a pretrial hearing, the State and Irby both agreed to the trial judge's suggestion that neither party needed to attend the first day of jury selection.[13] Both sides agreed that they would appear and begin questioning jurors on the following day.[14]

As agreed, on the first day of jury selection, the judge swore in the members of the venire and then gave them a jury questionnaire to fill out.[15] After

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[8] Id. at 881 (quoting Snyder v. Commw. of Mass., 291 U.S. 97, 105-06, 54 S. Ct. 330, 78 L. Ed. 674 (1934), overruled in part on other grounds sub nom by Malloy v. Hogan, 378 U.S. 1, 84 S. Ct. 1489, 12 L. Ed. 2d 653 (1964)).

[9] Id. (quoting Snyder, 291 U.S. at 106-07).

[10] Id. at 880 (citing State v. Strode, 167 Wn.2d 222, 225, 217 P.3d 310 (2009)).

[11] 170 Wn.2d 874, 246 P.3d 796 (2011).

[12] Id. at 877.

[13] Id.

[14] Id.

[15] Id.

all of the potential jurors submitted their completed questionnaires, the judge sent an e-mail to the prosecuting attorney and defense counsel suggesting that 10 venire members be removed from the panel for various reasons. Four had been excused after one week by the court administrator.[16] One home schooled, and the court stated "3 weeks is a long time."[17] One had "a business hardship."[18] And four "had a parent murdered."[19] The judge asked for the thoughts of counsel, indicating that if any were going to be let go, he would like to do it that day.[20]

Irby's counsel agreed to the release of all ten potential jurors.[21] The prosecutor objected to the release of three of the four potential jurors who indicated they had a parent murdered, and then the court released the remaining seven identified in the e-mail.[22] Irby was in custody at the time of this exchange between the court and counsel and the record provided no indication that he was consulted about the dismissal of any of the potential jurors.[23]

Jury selection continued on the following day in Irby's presence.[24] At the

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[16] Id. at 878.

[17] Id.

[18] Id.

[19] Id.

[20] Id.

[21] Id.

[22] Id.

[23] Id. at 878-79.

conclusion of trial, the jury convicted him of the crimes charged.[25]

Irby appealed to this court, arguing that the trial court's dismissal of the seven potential jurors via e-mail exchange violated his right to be present at all critical stages of trial.[26] This court agreed.[27]

The supreme court granted the State's petition for review.[28] It held that conducting a portion of jury selection in Irby's absence violated his Fourteenth Amendment and article I, section 22 rights and that this violation was not harmless beyond a reasonable doubt.[29]

"[J]ury selection is 'a critical stage of the criminal proceeding, during which the defendant has a constitutional right to be present.'"[30] "[I]t is 'the primary means by which a court may enforce a defendant's right to be tried by a jury free from ethnic, racial, or political prejudice, or predisposition about the defendant's culpability.'"[31] "[A] defendant's presence at jury selection 'bears, or

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[24] Id. at 878.

[25] Id. at 879.

[26] Id.

[27] Id.; see also State v. Irby, noted at 147 Wn. App. 1004, 2008 WL 4616712.

[28] Id. at 880; see also State v. Irby, 166 Wn.2d 1014, 210 P.3d 1019 (2009).

[29] Id. at 887.

[30] Id. at 883-84 (quoting Gomez v. United States, 490 U.S. 858, 873, 109 S. Ct. 2237, 104 L. Ed. 2d 923 (1989)).

[31] Id. at 884 (quoting Gomez, 490 U.S. at 873).

may fairly be assumed to bear, a relation, reasonably substantial, to his opportunity to defend' because 'it will be in his power, if present, to give advice or suggestion or even to supersede his lawyers altogether.'"[32] This right attaches from the time the work of empanelling the jury begins.[33]

The court distinguished Irby from other cases where courts have concluded that a defendant's absence from a portion of jury selection does not implicate the right to be present.[34] The court explained that

> the e-mail exchange was a portion of the jury selection process. We say that because this novel proceeding did not simply address the general qualifications of 10 potential jurors, but instead tested their fitness to serve as jurors in this particular case.
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> The fact that jurors were being evaluated individually and dismissed for cause distinguishes this proceeding from other, ostensibly similar proceedings that courts have held a defendant does not have the right to attend.[35]

The court concluded that the fact that the decision making took place after the venire was sworn in indicated that it was part of the jury selection process.[36] "[C]onducting jury selection in Irby's absence was a violation of his right under

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[32] Id. at 883 (quoting Snyder, 291 U.S. at 106 (citing Lewis v. United States, 146 U.S. 370, 13 S. Ct. 136, 36 L. Ed. 1011 (1892))).

[33] Id. (internal citations and quotation marks omitted).

[34] Id. at 881-82 (citing Wright v. State, 688 So.2d 298, 300 (Fla. 1996) (distinguishing general qualification of the jury from the qualification of a jury to try a specific case and holding that the general qualification process is not a critical stage of the proceedings requiring the defendant's presence); Commw. v. Barnoski, 418 Mass. 523, 530-31, 638 N.E.2d 9 (1994) (distinguishing preliminary hardship colloquy from individual, substantive voir dire)).

[35] Id. at 882.

[36] Id. at 882, 884.

the due process clause of the Fourteenth Amendment to the United States Constitution to be present at this critical stage of trial."[37]

Here, like in Irby, the court and counsel discussed, in advance, the procedures that were to be followed for jury selection. Unlike in Irby, the trial judge here correctly recognized that jury selection is a critical stage of trial and that Price's presence would be required even when determining hardship of potential jurors. Nevertheless, Price was absent from court when the judge dismissed potential jurors for hardship and other reasons.

In all material respects, this case and Irby are indistinguishable. Price was absent from court during a critical stage of his criminal trial. During his absence, the judge called for hardships, and members of the venire responded with their reasons. The judge then excused members of the venire both for hardship and other reasons. This violated Price's Fourteenth Amendment due process right to be present as well as his right under article I, section 22, of our state constitution.

The State argues that we should not follow Irby for various reasons. None are persuasive.

The State urges, as a preliminary matter, that the decision is not final because of a pending motion for reconsideration and rehearing that have not, as of this writing, been decided by the supreme court. The State suggests the current decision "may not be the last word" on the issues that we decide today.

[37] Id. at 884.

We decline to speculate on how the supreme court may rule when it decides the pending motions. Rather, we proceed to decide this case on the current, binding, precedent from that court.

The State next argues that excusing potential jurors for hardship is an administrative function and not a critical stage of the trial. But the majority in Irby expressly rejected this argument. The court clearly stated that a defendant's right to be present attaches when the work of empanelling the jury begins, which is when the court administers the oath.[38] Moreover, the potential jurors that the court dismissed here included at least two panel members who were excused for reasons other than hardship. In short, the dismissals here exceeded the hardship exception that the State urges.

The State also argues that Price waived his right to be present during the preliminary hardship excusals. We disagree because there is no evidence in this record of a voluntary, knowing, and intelligent waiver by Price of his constitutional right to be present during this critical stage of the trial proceedings.

A defendant may waive his rights under the Constitution, provided such waiver is "voluntary, knowing, and intelligent."[39] This includes his right to be present at trial.[40] But, in order to knowingly and intelligently waive a

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[38] Irby, 170 Wn.2d at 882-84.

[39] Campbell v. Wood, 18 F.3d 662, 671 (9th Cir. 1994) (citing Johnson v. Zerbst, 304 U.S. 458, 464, 58 S. Ct. 1019, 82 L. Ed. 1461 (1938)).

[40] Id. (citing Taylor v. United States, 414 U.S. 17, 19-20, 94 S. Ct. 194, 38 L. Ed. 2d 174 (1973)).

constitutional right, the defendant must be aware of the right at issue.[41]

Here, it appears that defense counsel misinformed Price that the first day of jury selection was not a critical stage of the trial based on her belief that hardship dismissals did not qualify. The trial judge expressly stated that such dismissals were included within the scope of critical stages at trial, but deferred to counsel's representation that Price did not wish to be present. There is no indication in the record of any colloquy between the court and Price to explore what he understood about his rights in this respect. On this record, we conclude that Price did not make a knowing, intelligent, and voluntary waiver of his constitutional rights.

The State also argues that even if it was error to hold the first day of jury selection in Price's absence, this error was invited. We disagree.

The basic premise of the invited error doctrine is that a party who sets up an error at trial cannot claim it as error on appeal.[42] The invited error doctrine applies even when the alleged error is of constitutional magnitude.[43]

Here, the State argues that Price invited the error when his attorney suggested that he need not attend the hardship portion of voir dire and he affirmatively agreed. The invited error doctrine does not apply here.

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[41] State v. Sargent, 111 Wn.2d 641, 655, 762 P.2d 1127 (1988); see also United States v. Gordon, 829 F.2d 119, 125 (D.C. Cir. 1987) (holding that if a defendant wants to waive his constitutional right to be present he must be advised of the right and then permitted to make an on-the-record waiver in open court).

[42] State v. Henderson, 114 Wn.2d 867, 868, 792 P.2d 514 (1990).

[43] City of Seattle v. Patu, 147 Wn.2d 717, 720, 58 P.3d 273 (2002).

As discussed above, in addition to dismissing potential jurors for hardship on October 2, 2008, the trial court also dismissed two members of the venire for other reasons. The record is clear that even if Price did agree to be absent during the hardship portion of voir dire, he did not agree to be absent if potential jurors were dismissed for other reasons. Here, two members of the venire were dismissed for reasons other than hardship. For this reason the error was not invited.

Finally, the State argues that any violation of Price's right to be present is harmless beyond a reasonable doubt. We disagree.

"A violation of the due process right to be present is subject to harmless error analysis."[44] The State bears the burden of proving beyond a reasonable doubt that the error is harmless.[45]

In Irby, the court found that the defendant's absence from the portion of jury selection at issue was not harmless.[46]

> [T]he State has not and cannot show that three of the jurors who were excused in Irby's absence . . . had no chance to sit on Irby's jury. Those jurors fell within the range of jurors who ultimately comprised the jury, and their alleged inability to serve was never tested by questioning in Irby's presence. . . . Had [those jurors] been subjected to questioning in Irby's presence . . . the questioning might have revealed that one or more of these potential jurors were not prevented by reasons of hardship from participating on Irby's jury. . . . Therefore, the State cannot show beyond a reasonable doubt that the removal of several potential jurors in Irby's absence [was harmless].[47]

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[44] Irby, 170 Wn.2d at 885 (internal citations omitted).

[45] Id. at 886.

[46] Id.

Here, the facts are similar to Irby. The court excused 80 potential jurors on October 2, 2008. Of these potential jurors—1, 2, 5, 7, 9, 13, 20, 21, 31, 32, 33, 36, 37, 38, 40, 43, 46, 50, 52, 57, 62, 63, and 64 fell within the range of those potential jurors who were ultimately selected to hear the case. The final person seated was potential juror 65.

Significantly, like in Irby, at least one of the potential jurors that was dismissed for a reason other than hardship fell within the range of jurors ultimately seated. Here, potential juror number 9 indicated only "I just don't want to be here."

> [The court]: "You understand that as a citizen it is your obligation?"
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> [Juror 9]: Exactly.
>
> [The court]: And you just don't want to be inconvenienced of it [sic] or what?
>
> [Juror 9]: Yeah.[48]

The court dismissed potential juror number 9 for hardship despite that juror's failure to articulate any hardship that would have prevented him from serving on Price's jury. Because the State cannot show that the potential jurors who were excused in Price's absence had no chance to sit on his jury, it cannot show that Price's absence during this critical stage was harmless beyond a reasonable doubt.

The State argues that the court's harmless error analysis in Irby is

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[47] Id. at 886-87.

[48] Report of Proceeding (Oct. 2, 2008) at 7-8.

erroneous because it is not supported by precedent. Whether this assertion is true is irrelevant. We are bound by the decisions of our supreme court, and the State has not provided us any persuasive reason to depart from that core principle in this case.[49]

The State also argues that Irby is distinguishable on the issue of harmless error because, there, the excused venire members were never questioned at all, whereas here, Irby's attorney was present to represent his interests. That distinction is not material to the proper analysis of the right at issue.

The fundamental purpose of a defendant's right to be present during jury selection is to allow him or her to give advice or suggestions to counsel or even to supersede counsel's decisions.[50] Here, because Price was not present for this portion of jury selection, he was unable to exercise that right. Saying that counsel was present to protect his rights does nothing to deal persuasively with the right at issue.

RULE 404(b)

Price argues that the trial court abused its discretion under Evidence Rule (ER) 404(b) by admitting evidence of his membership in the Ghost Riders motorcycle gang. He argues that the testimony that he was a member of a motorcycle gang suggested he was associated with gangs and, therefore, had a

[49] MP Medical, Inc. v. Wegman, 151 Wn. App. 409, 417, 213 P.3d 931 (2009).

[50] Irby, 170 Wn.2d at 883 (quoting Snyder, 291 U.S. at 106 (citing Lewis, 146 U.S. at 370)).

propensity for violent, criminal behavior.

Because this issue is likely to arise again on remand, we address it. We conclude that the trial judge properly exercised her discretion to admit the evidence and took proper precautions to minimize its prejudicial effects.

With certain exceptions, "[e]vidence of other crimes, wrongs, or acts is not admissible to prove the character of a person in order to show action in conformity therewith" on a particular occasion.[51] Evidence that a defendant belongs to a gang can be highly prejudicial and is often held to be inadmissible under ER 404(b).[52] But evidence of gang membership may be admissible for another purpose.[53]

This court reviews a trial court's ruling on the admissibility of evidence for abuse of discretion.[54] A trial court abuses its discretion if it acts on untenable grounds or for untenable reasons.[55]

Here, prior to trial, defense counsel moved in limine to preclude the admission of evidence that Price was a member of a motorcycle gang. The State argued for admission of the gang evidence, contending that it was relevant to why Mahler and Ridley, the prosecution's two key witnesses, initially denied

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[51] ER 404(b).

[52] See, e.g., State v. Ra, 144 Wn. App. 688, 702, 175 P.3d 609 (2008).

[53] ER 404(b); ER 403.

[54] State v. Magers, 164 Wn.2d 174, 181, 189 P.3d 126 (2008).

[55] State v. Fualaau, 155 Wn. App. 347, 356, 228 P.3d 771, review denied, 169 Wn.2d 1023 (2010), cert. denied, 131 S. Ct. 1786 (2011).

any knowledge of Price's involvement in the murder. The court ruled that because both witnesses knew about Price's membership in the Ghost Riders, and about motorcycle gangs in general, that evidence was relevant to demonstrate why they initially avoided speaking to the police. However, the court limited the testimony to the two main gangs at issue: the Ghost Riders and the Gypsy Jokers. The court also required witnesses to refer to the gangs as "groups," in order to avoid the immediate impression of criminal activity associated with the word "gang."

At trial, the State introduced evidence that Jessup was a past member of the Gypsy Jokers, and that Price was a member of the Ghost Riders. The State also called King County Sheriff's Detective Michael Brown as an expert on motorcycle gangs. He testified generally about the Ghost Riders and the Gypsy Jokers.

Price argues that the trial court erred for several reasons. First, he argues that the State could have demonstrated that Mahler and Ridely were fearful of speaking to the police without admitting evidence of his gang membership. While this may be the case, Price's argument is insufficient to demonstrate that the trial court abused its discretion in determining that the evidence of Price's membership in the Ghost Riders was relevant to explain Mahler and Ridley's initial silence.

Next, Price argues that the court's attempt to limit the prejudice associated with the gang testimony by directing witnesses to refer to the motorcycle gangs as "groups" was an ineffective attempt to balance the

probative value of the evidence against its prejudicial nature. This argument is also without merit. This is not a case where gang affiliation was peripheral to the issues at trial. Jessup, Price, and many of the parties that testified were members of various motorcycle gangs. This lifestyle was pervasive among the parties involved. As a result, excluding all reference to motorcycle gangs would have been nearly impossible. Under these facts, the trial court did not abuse its discretion in attempting to limit any undue prejudice by instructing the parties and witnesses to refer to the gangs as "groups" or "clubs."

The trial court did not abuse its discretion in admitting the evidence of Price's membership in the Ghost Riders on this record because the evidence was relevant to explain Mahler and Ridley's fear of reporting the murder to the police and their initial silence when questioned by the police. The trial court's limitations on the extent of the gang testimony were reasonable under the circumstances.

OTHER MATTERS

Price also raises several other matters. He argues that he was denied his constitutional right to be present when the court replayed several recorded telephone calls for the jury during deliberations. He argues that he was denied effective assistance of counsel because his attorney failed to request a limiting instruction with respect to the motorcycle gang evidence. He also raises several issues in his Statement of Additional Grounds for Review. We decline to reach these arguments because it is unnecessary to do so in view of the above disposition.

We reverse and remand for a new trial.

Cox, J.

WE CONCUR:

Leach, A.C.J.

Ellington, J.