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

STATE OF WASHINGTON,	)	No. 66169-8-I
	)	
Respondent,	)	
	)	
v.	)	
	)	
BRIAN TODD RAINEY,	)	UNPUBLISHED OPINION
	)	
	)	FILED: June 18, 2012
Appellant.	)	
	)	

Ellington, J. — In this prosecution for assault, the trial court did not abuse its discretion in excluding statements offered to show the defendant's state of mind at the time of the assault. Nor did the court violate the defendant's right to a public trial or commit manifest constitutional error by resolving jury inquiries in his absence and without public proceedings. We therefore affirm.

FACTS

Based on allegations that Brian Rainey punched William Hall in the face, the State charged Rainey with second degree assault. Prior to trial, the court ordered and received competency evaluations from Western State Hospital. The court ultimately found Rainey competent to stand trial.

The court then held a CrR 3.5 hearing on the admissibility of Rainey's

statements to police. Officer David Bunge testified that he transported Rainey to the police station following his arrest. A video recording taken during transport showed Rainey making statements about "trying to contact the counterterrorism unit and the United Nations," and "about a lawsuit he had against certain news broadcasters."[1] Once at the station, Rainey told Officer Jonathon Chin that the victim, Hall, "grabbed him on his shoulder and wouldn't let go."[2] Rainey said he told Hall to let go, but Hall still did not release him. Rainey then threw a single punch, hitting Hall in the face. Rainey's statement was consistent with what witnesses told police.

The State argued that Rainey's statements to Officer Chin were voluntary and admissible. Defense counsel did not dispute their admissibility, but argued that the statements to Officer Bunge during transport were also admissible to provide context for the statements to Officer Chin. The State countered that the statements to Officer Bunge were relevant only to a possible mental defense, and since the defense was not asserting one, those statements should be excluded. The court agreed with Rainey, ruling that the statements to Officer Chin were admissible, and if they were offered, the defense could cross-examine the officers about Rainey's statements to Officer Bunge to show his state of mind at the time.

Testimony at trial established that Rainey approached Hall outside a Seattle tavern and asked him for a light. Hall handed Rainey a lighter. When Rainey started to leave with the lighter, Hall asked for it back and tapped Rainey on the

[1] Report of Proceedings (RP) (Sept. 2, 2010) at 52.

[2] Id. at 39.

shoulder to get his attention. Rainey immediately punched Hall in the face, knocking him to the sidewalk and fracturing bones in his face and nose. Police arrived a short time later and obtained a description of Hall's assailant. The description included an army duffel bag.

Three days later, police stopped a man carrying a green duffel bag who matched the suspect's description. The man, later identified as Rainey, was eventually apprehended and taken into custody by Officer Bunge.

Michael Henzler and Dale Rierson testified that they witnessed the assault. Both identified Rainey in court as the man who punched Hall in the face. They also testified that Hall did nothing to provoke the assault. The tavern manager, Scott Hembree, testified that he saw a man with a green duffle bag walking swiftly away from the scene of the assault. Henzler and Rierson pointed to the man and said, "That's the guy."[3] Hembree identified Rainey in court as the man he saw leaving the scene.

Shortly before officers Bunge and Chin testified, the prosecutor told the court she would not be offering Rainey's statements to Officer Chin. She said she had informed defense counsel of her decision and that he indicated he still intended to elicit Rainey's statements to Officer Bunge. The prosecutor argued that since the statements to Chin were not coming in, the statements to Bunge were irrelevant and should be excluded. Defense counsel argued that the statements to Bunge on the video showed how Rainey "was perceiving the world at that time" and were relevant

[3] RP (Sept. 7, 2010) at 85.

to his state of mind and claim of self-defense.[4]

The court excluded the statements, stating that they "have to do with Mr. Rainey's state of mind several days later, and there's no evidence that . . . it's the same state of mind as on the day of the assault."[5]

The defense called no witnesses but requested a self-defense instruction. Defense counsel argued that the instruction was justified because "the jury may well be able to logically infer through the lack of any other logical explanation [f]or the swiftness of the punch after the brief interaction . . . that Mr. Rainey did legitimately believe in good faith . . . that he was in actual danger."[6] The court agreed and instructed the jury on self-defense.

During deliberations, the jury sent out three questions: (1) "Can we open the green duffle and examine contents?"; (2) "Can we take the defendant's behavior in the courtroom into account (as evidence) in our deliberation?"; and (3) "Can we see the police reports from the Crescent Tavern on August 8, 2009?"[7] The court contacted counsel by phone and discussed all three questions in a conference call. Counsel also provided input regarding question (2) via e-mail. No one contacted Rainey.

The parties agreed that the court should answer "No" to questions (1) and (3) because the police report had not been admitted as evidence and the duffel bag was

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[4] Id. at 120.

[5] Id.

[6] RP (Sept. 8, 2010) at 47.

[7] Clerk's Papers at 52, 54.

never intended to be opened. The court's answer to question (2) was "No. Please refer to the instructions as to what is evidence."[8] Instruction 1 stated that "[t]he evidence that you are to consider during your deliberations consists of the testimony that you have heard from witnesses and the exhibits that I have admitted during the trial."[9]

The jury convicted Rainey as charged. He appeals.

DISCUSSION

Rainey first contends the trial court abused its discretion in excluding the statements he made to officers Bunge and Chin following his arrest. He claims the statements were admissible under ER 803(a)(3) to show his "then existing state of mind, emotion, sensation, or physical condition." We disagree.

Contrary to Rainey's assertions, defense counsel did not seek to admit his statements to Officer Chin. When the court indicated the State was not introducing those statements, defense counsel did not ask the court to admit them and instead pressed the court to admit the statements to Officer Bunge to show how Rainey "was perceiving the world at that time."[10] The court ruled the statements were inadmissible because they were made three days after the assault and no evidence linked Rainey's mental state during the transport with his mental state at the time of the offense. This ruling was within the court's discretion.[11]

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[8] Clerk's Papers at 55.

[9] Clerk's Papers at 33.

[10] RP (Sept. 7, 2010) at 120.

[11] See State v. Stubsjoen, 48 Wn. App. 139, 146, 738 P.2d 306 (1987)

Rainey also argues that the exclusion of his statements to Bunge violated his constitutional right to present a defense. But the right does not extend to inadmissible evidence.[12] Because the statements were not admissible, the court's ruling did not violate Rainey's right to present a defense.

For the first time on appeal, Rainey contends the court violated both his right to be present under the federal constitution and his state constitutional right to appear and defend in person when it responded to jury inquiries in his absence.[13] We generally will not review a claim of error raised for the first time on appeal.[14] An exception exists, however, for "manifest" errors affecting a constitutional right.[15]

(statements made by defendant after kidnapping properly excluded because "the relevant state of mind was when [the incident occurred], not her state of mind 1½ hours later."); Ensley v. Mollmann, 155 Wn. App. 744, 754-55, 230 P.3d 599, review denied, 170 Wn.2d 1002, 243 P.3d 551 (2010) (statements about accident made several days later were not statements of then existing state of mind, but rather were statements of memory or belief); 5C Karl B. Tegland, Washington Practice: Evidence Law and Practice § 803.16, at 61-62 (5th ed. 2007) ("Occasionally, a party will attempt to offer statements made after the pertinent time; i.e., as circumstantial evidence of the declarant's state of mind some time before the statement was made. The admissibility of such statements turns on general principles of relevance. The statement may be irrelevant if it is too far removed from the time at which the declarant's [state] of mind was pertinent.").

[12] State v. Aguirre, 168 Wn.2d 350, 363, 229 P.3d 669 (2010) (although defendant has "a constitutional right to present a defense, the scope of that right does not extend to the introduction of otherwise inadmissible evidence"); State v. Mee Hui Kim, 134 Wn. App. 27, 41, 139 P.3d 354 (2006) (defendant has right to present a defense "'consisting of relevant evidence that is not otherwise inadmissible'" (quoting State v. Rehak, 67 Wn. App. 157, 162, 834 P.2d 651 (1992))).

[13] State v. Irby, 170 Wn.2d 874, 880-85, 246 P.3d 796 (2011) (addressing federal and state rights).

[14] RAP 2.5(a).

[15] RAP 2.5(a)(3).

Such errors are "manifest" if the defendant can plausibly show that the error had practical and identifiable consequences at trial.[16] Assuming without deciding that Rainey had a right to be present during the court's handling of the jury inquiries,[17] he fails to demonstrate that his absence had any practical and identifiable consequences.[18] His conclusory allegation that "[t]he court prevented [him] from offering a different response to the jury's question" is insufficient to establish manifest error.[19]

In addition, any error in answering the jury inquiries in Rainey's absence was harmless. Such errors are harmless if the State demonstrates their harmlessness beyond a reasonable doubt.[20] When, as in this case, a court's answers to jury questions are negative in nature and convey no affirmative information, any violation of the right to be present is harmless beyond a reasonable doubt.[21]

Rainey next contends the court's handling of the jury inquiries without public

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[16] State v. Lynn, 67 Wn. App. 339, 345, 835 P.2d 251 (1992).

[17] In State v. Jasper, 158 Wn. App. 518, 539-40, 245 P.3d 228 (2010), aff'd, __ Wn.2d __, 271 P.3d 876 (2012), we held that "[b]ecause the jury's questions did not raise any issues involving disputed facts, the court's consideration of and response to the jury's inquiries did not constitute a critical stage of the proceedings. Therefore, Jasper's presence when the court resolved the jury's inquiries was not constitutionally required." In so holding, we noted that the State constitutional right to be present is no broader than its federal counterpart. Id. at 539 n.12. In Irby, however, the Supreme Court suggested the state constitutional right may in fact be broader. Irby, 170 Wn.2d at 885 n.6.

[18] Prejudice in this setting is not presumed. Irby, 170 Wn.2d at 886.

[19] Br. of Appellant at 24-25.

[20] Irby, 170 Wn.2d at 886.

[21] State v. Allen, 50 Wn. App. 412, 419, 749 P.2d 702 (1988); State v. Besabe, 166 Wn. App. 872, 882-883, 271 P.3d 387 (2012).

proceedings violated his right to a public trial. Jury inquiries, however, "are part of jury deliberations and, as such, are not historically a public part of the trial."[22] The right also does not apply where a trial court resolves "'legal issues that do not require the resolution of disputed facts.'"[23] Because the jury inquiries in this case raised questions of law that did not require the resolution of disputed facts, the handling of the inquiries via telephonic conference and e-mail did not violate Rainey's right to a public trial.

Rainey contends two of the court's responses to the jury inquiries were substantively inadequate or incorrect. He asserts that telling the jury they could not look inside the duffel bag exhibit "may be contrary to what the parties intended" and to the relevant law.[24] But both counsel and the court agreed that the jury's request to look inside the bag should be denied. Any error was thus invited.[25] Furthermore, the alleged error is raised for the first time on appeal and Rainey fails to show how it is "manifest" within the meaning of RAP 2.5(a)(3).

Finally, Rainey questions the court's response to the jury's question, "Can we take the defendant's behavior in the courtroom into account (as evidence) in our deliberation?" As noted above, the court responded, "No. Please refer to the

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[22] State v. Sublett, 156 Wn. App. 160, 182, 231 P.3d 231, review granted, 170 Wn.2d 1016, 245 P.3d 775 (2010).

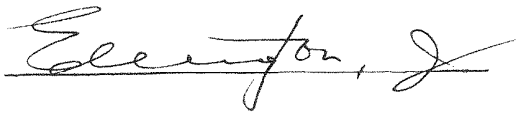
[23] In re Det. of Ticeson, 159 Wn. App. 374, 384, 246 P.3d 550 (2011) (quoting State v. Koss, 158 Wn. App. 8, 17, 241 P.3d 415 (2010)).

[24] Br. of Appellant at 22.

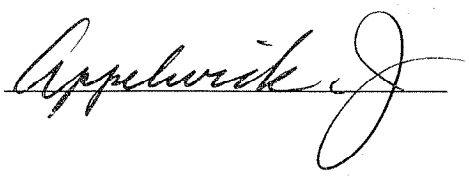
[25] State v. Barnett, 104 Wn. App. 191, 200, 16 P.3d 74 (2001) (defendant could not object on appeal to trial judge's answer to jury question when defense counsel agreed to answer).

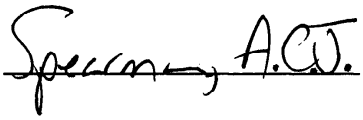
instructions as to what is evidence."[26] The instructions expressly limited the evidence the jury could consider in its deliberations to the testimony and the exhibits. Rainey does not challenge the relevant instruction or cite any authority allowing a jury to consider a nontestifying defendant's behavior as evidence. He thus fails to demonstrate error.[27]

Affirmed.



WE CONCUR:





[26] Clerk's Papers at 55.

[27] We note that, in general, when a defendant chooses not to testify, "the fact of his presence and his non-testimonial behavior in the courtroom [may] not be taken as evidence of his guilt." United States v. Carroll, 678 F.2d 1208, 1209 (4th Cir.1982); accord United States v. Schuler, 813 F.2d 978, 980 (9th Cir. 1987) (defendant's laughter during witness testimony could not be considered as evidence in guilt determination); United States v. Pearson, 746 F.2d 787, 796 (11th Cir. 1984) (defendant's behavior off of the witness stand, i.e., nervous shaking of his leg, was not evidence to be considered by jury); United States v. Wright, 489 F.2d 1181, 1186 (D.C. Cir. 1973) (defendant's demeanor and emotional response to testimony was not evidence to be used in determining guilt or innocence); cf. State v. Klok, 99 Wn. App. 81, 992 P.2d 1039 (2000) (a prosecutor may not comment on a nontestifying defendant's demeanor during trial).