IN THE SUPREME COURT OF THE STATE OF WASHINGTON

STATE OF WASHINGTON, Respondent, v. TERRANCE JON IRBY, Petitioner.	)	No. 82665-0 En Banc Filed January 27, 2011

ALEXANDER, J.—We granted the State's petition for review of a decision of the Court of Appeals to reverse Terrance Irby's convictions of first degree murder with aggravating circumstances, first degree felony murder, and first degree burglary. The Court of Appeals held that the trial court violated Irby's right to be present at trial by conducting a portion of the jury selection process by e-mail in Irby's absence. The State contends that Irby did not have a right to be present at this proceeding and that, even if he did have the right, any violation of the right was harmless. We hold that the trial court violated Irby's rights under the constitutions of the United States and the State of Washington to be present during the entire jury selection process and that the violation was not harmless. Accordingly, we affirm the Court of Appeals.

I. Facts and Procedural History

The Skagit County Prosecuting Attorney's Office charged Irby in Skagit County Superior Court with first degree burglary and first degree murder with aggravating circumstances or, alternatively, first degree felony murder. The charges arose out of the bludgeoning death of James Rock. Shortly before trial, the State and Irby agreed to the trial court's suggestion that neither party needed to attend the first day of jury selection, Tuesday, January 2, 2007. At that time, according to the trial judge, prospective jurors (hereinafter "jurors") would simply be given a juror questionnaire to complete and would take the necessary oath. Both parties were, however, expected to appear and begin the questioning of jurors on the following day. At the time the parties agreed to the schedule proposed by the trial court, there was no suggestion that any jurors might be removed from the panel before questioning took place in open court beginning on January 3.

On January 2, according to the agreed schedule, jurors were sworn and given a questionnaire. After all the jurors submitted filled-out questionnaires, the trial judge sent an e-mail to the prosecuting attorney and Irby's counsel that suggested that certain jurors be removed from the panel. The e-mail, which was sent at 1:02 p.m., read as follows:

> I note that 3,23,42 and 59 were excused after one week by the Court Administrator.
> 17 home schools, and 3 weeks is a long time.
> 77 has a business hardship.

36, 48, 49 and 53 had a parent murdered.
Any thoughts? If we're going to let any go, I'd like to do it today.

Clerk's Papers (CP) at 1279-80.[1] At 1:53 p.m., Irby's trial counsel agreed to the release of all 10 jurors referenced in the trial judge's message. The prosecutor's precise response is not part of the record, but at some point prior to 1:59 p.m., the prosecutor informed the trial court that the State agreed to the release of seven of the jurors identified in the e-mail. The prosecutor did, however, object to the release of three of the four jurors (36, 48, and 49) who indicated on their questionnaires that they had a parent who had been murdered. The trial judge responded with another e-mail to the prosecuting attorney and Irby's counsel indicating that the seven jurors whom the attorneys had jointly agreed to release would be notified that they did not need to appear the following day. The clerk's minutes read: "In chambers not on the record. Counsel stipulate to excusing the following jurors for cause: # 7, 17, 23, 42, 53, 59 & 77." *Id*. at 1239. The minutes also indicate that Irby was in custody at the time, and there is no indication there or elsewhere in the record before us that Irby was consulted about the dismissal of any of the jurors who had taken the juror's oath.

On the following day, jury selection continued, this time in open court and in Irby's presence. The State and Irby agreed at that time to release juror 36 for cause.[2] Jury selection, which proceeded numerically, ultimately reached juror 37. Thus, of the

[1]Juror 3 was actually juror 7, the judge correcting himself at 2:01 p.m. as follows: "Oops. 7 goes, not 3. OK?" *Id*.

[2]The transcript says juror 46, but the clerk's minutes read juror 36 at multiple locations.

jurors identified in the judge's initial e-mail, only jurors 7, 17, 23, and 36 had a chance to sit on Irby's jury.

At the conclusion of the trial, the jury found Irby guilty of first degree murder with aggravating circumstances, first degree felony murder, and first degree burglary. Given the first degree murder and first degree burglary convictions, the trial court determined that Irby was a persistent offender and, consequently, sentenced him to life in prison without the possibility of parole. Irby appealed the convictions and sentence to Division One of the Court of Appeals. The State cross-appealed, arguing that the trial court erred by failing to impose a life sentence based on Irby's aggravated first degree murder conviction.[3]

At the Court of Appeals, one of Irby's primary contentions was that the trial court's dismissal of seven potential jurors via the aforementioned e-mail exchange violated his right to be present at all critical stages of trial. *See* Br. of Appellant at 13-17. He also asserted that this procedure violated his right to a public trial under the Sixth Amendment to the United States Constitution and article I, section 22 of the Washington Constitution and that the trial court had improperly sentenced him as a persistent offender. Relying on *State v. Wilson*, 141 Wn. App. 597, 171 P.3d 501 (2007), the Court of Appeals reversed Irby's convictions, holding that the trial court "violated Irby's right to be present and contribute to jury selection." *State v. Irby*, noted at 147 Wn. App. 1004, slip op. at 5 (2008). The Court of Appeals did not address the

[3]Irby conceded this issue at the Court of Appeals. *See* Reply Br. of Appellant at 14.

question of whether the error was harmless, and it did not reach the other issues raised by Irby and the State, including Irby's claim that his right to a public trial was violated. The State then filed a petition for review, which we granted. *State v. Irby*, 166 Wn.2d 1014, 210 P.3d 1019 (2009).

II. Standard of Review

Whether a defendant's constitutional right to be present has been violated is a question of law, subject to de novo review. *Cf. State v. Strode*, 167 Wn.2d 222, 225, 217 P.3d 310 (2009) ("Whether a defendant's constitutional right to a public trial has been violated is a question of law, subject to a de novo review on direct appeal.").

III. Analysis

Irby claims that the trial court violated his rights under the due process clause of the Fourteenth Amendment to the United States Constitution and article I, section 22 of the Washington Constitution by conducting a portion of jury selection outside his presence. This court has routinely analyzed alleged violations of the right of a defendant to be present by applying federal due process jurisprudence. *See In re Pers. Restraint of Benn*, 134 Wn.2d 868, 920, 952 P.2d 116 (1998); *In re Pers. Restraint of Lord*, 123 Wn.2d 296, 306, 868 P.2d 835 (1994); *State v. Rice*, 110 Wn.2d 577, 616, 757 P.2d 889 (1988) (adding "*see also* Const. art. 1, §§ 3, 22"). Accordingly, we begin our analysis with a discussion of the due process clause of the Fourteenth Amendment.

A. Due Process Clause of the Fourteenth Amendment

A criminal defendant has a fundamental right to be present at all critical stages of a trial. *Rushen v. Spain*, 464 U.S. 114, 117, 104 S. Ct. 453, 78 L. Ed. 2d 267 (1983). Although the right to be present is rooted to a large extent in the confrontation clause of the Sixth Amendment to the United States Constitution,[4] the United States Supreme Court has recognized that this right is also "protected by the Due Process Clause in some situations where the defendant is not actually confronting witnesses or evidence against him." *United States v. Gagnon*, 470 U.S. 522, 526, 105 S. Ct. 1482, 84 L. Ed. 2d 486 (1985). In that vein, the Court has said that a defendant has a right to be present at a proceeding "whenever his presence has a relation, reasonably substantial, to the fulness of his opportunity to defend against the charge." *Snyder v. Massachusetts*, 291 U.S. 97, 105-06, 54 S. Ct. 330, 78 L. Ed. 674 (1934), *overruled in part on other grounds sub nom. Malloy v. Hogan*, 378 U.S. 1, 84 S. Ct. 1489, 12 L. Ed. 2d 653 (1964). The Court went on to indicate, however, that because the relationship between the defendant's presence and his "opportunity 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." *Id*. at 106-07. Thus, it is fair to say that the 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*. at 107-08.

The State asserts here that the "e-mail exchange between the [trial] court and

[4]"In all criminal prosecutions, the accused shall enjoy the right . . . to be confronted with the witnesses against him." U.S. Const. amend. VI.

counsel [for the State and Irby] regarding excusing potential jurors" was not a "critical stage[]" of the trial because it was not substantially related to Irby's "opportunity to defend against the charge." Suppl. Br. of Pet'r at 1, 7, 14. In prior cases, this court has discussed the right of a defendant to be present at various stages of a trial. For instance, in *Rice*, we held that "[u]nder the *Snyder* standard," a defendant has a "due process right to be present at the return of his verdict." *Rice*, 110 Wn.2d at 617. In another case, *Lord*, our court determined that a defendant did not have a right to be present at "in-chambers or bench conferences between the court and counsel on legal matters." *Lord*, 123 Wn.2d at 306; *see also In re Pers. Restraint of Pirtle*, 136 Wn.2d 467, 484, 965 P.2d 593 (1998) (no right to be present at "in-chambers conferences between court and counsel" involving "legal matters, such as the wording of jury instructions, or ministerial matters, such as jury sequestration"). Similarly, in *Benn*, we held that a defendant did not have a right to be present at a hearing on a motion for a continuance. *Benn*, 134 Wn.2d at 920.

The State likens the "e-mail exchange" between the trial judge and counsel for the parties to a sidebar or chambers conference, proceedings that our court and other courts have said that a defendant has no due process right to attend. We disagree with the State's analogy to those sorts of proceedings. In our judgment, 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.

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. *See*, *e.g.*, *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 general qualification process is not a critical stage of the proceedings requiring the defendant's presence); *Commonwealth v. Barnoski*, 418 Mass. 523, 530, 531, 638 N.E.2d 9 (1994) (distinguishing "preliminary hardship colloqu[y]" from "individual, substantive voir dire"). Indeed, the questionnaire that was given to the jurors after the juror's oath was administered indicated that filling out the questionnaire was "part of the jury selection process," and "designed to elicit information with respect to your qualifications to sit as a juror *in this case*." CP at 1234 (emphasis added). The subsequent exchange of e-mails resulted in decisions being made, at least in part, on the basis of the questionnaire about the ability of particular jurors to try this specific case. This decision making was clearly a part of the jury selection process, a part that Irby did not agree to miss.

The State points out that the courtroom was "empty" at the time and that there were "no proceedings on the record." Suppl. Br. of Pet. at 12, 10. What was not happening in the courtroom is beside the point: What ought to have happened there was instead happening in cyberspace. Contrary to the State's claim that no court proceedings took place at the time, the e-mails in question substituted for jury

selection. *See id*. at 6, 10, 14-15.

The question, then, becomes: did Irby have a right to be present at this portion of the jury selection process? The Court of Appeals recognized in *Wilson* that the due process right to be present "extends to jury voir dire." *Wilson*, 141 Wn. App. at 604. We are in full accord with that principle. Indeed, the United States Supreme Court said in *Snyder* that a defendant's presence at jury selection "bears, or 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." *Snyder*, 291 U.S. at 106 (citing *Lewis v. United States*, 146 U.S. 370, 13 S. Ct. 136, 36 L. Ed. 1011 (1892)). The United States Court of Appeals of the District of Columbia Circuit came to the same conclusion in *United States v. Gordon*, 829 F.2d 119 (1987), where the defendant, at his attorney's request, was absent from the whole of voir dire and never told of his right to attend. The District of Columbia Circuit said, "That Gordon's presence at voir dire was substantially related to his defense is indicated by the fact that he had no opportunity 'to give advise [sic] or suggestion[s] . . . to . . . his lawyers.'" *Id.* at 124 (most alterations in original) (quoting *Snyder*, 291 U.S. at 106); *see also Commonwealth v. Owens*, 414 Mass. 595, 602, 609 N.E.2d 1208 (1993) (defendant "has a right to be present when jurors are being examined in order to aid his counsel in the selection of jurors and in the exercise of his peremptory challenges" (citing *Lewis*, 146 U.S. at 373)).

In *Gomez v. United States*, 490 U.S. 858, 873, 109 S. Ct. 2237, 104 L. Ed. 2d

923 (1989), the United States Supreme Court affirmed that jury selection is "a critical stage of the criminal proceeding, during which the defendant has a constitutional right to be present." The court pointed out that it 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." *Id.* (citations omitted). This right attaches "'"at least from the time when the work of empanelling the jury begins."'" *Id.* at 873 (quoting *Lewis*, 146 U.S. at 374 (internal quotation marks omitted) (quoting *Hopt v. Utah*, 110 U.S. 574, 578, 4 S. Ct. 202, 28 L. Ed. 262 (1884))).

In Irby's case, "the work of empaneling the jury" began on January 2, when jurors were sworn and completed their questionnaires. The work was ongoing when the trial judge e-mailed Irby's attorneys and the prosecutor about potentially dismissing 10 jurors, not only for hardship, but because 4 jurors had parents who had been murdered. As noted above, Irby was not present during this discussion because he was in his jail cell. Furthermore, because the trial judge sent his initial e-mail at 1:02 p.m., and Irby's attorneys replied at 1:53 p.m., it is unlikely that the attorneys spoke to Irby about the e-mail in the interim. Even if "[d]efense counsel had time to . . . consult him regarding excusing some of the jurors if they chose to do so," as the State suggests, Suppl. Br. of Pet'r at 16, "where . . . personal presence is necessary in point of law, the record must show the fact." *Lewis*, 146 U.S. at 372. Significantly, the record here does not evidence the fact that defense counsel spoke to Irby before responding to the trial judge's e-mail. In sum, conducting jury selection in Irby's absence was a violation of

his right under the due process clause of the Fourteenth Amendment to the United States Constitution to be present at this critical stage of trial.

B. Article I, Section 22

Unlike the United States Constitution, article I, section 22 of the Washington Constitution provides an explicit guaranty of the right to be present: "In criminal prosecutions the accused shall have the right to appear and defend in person, or by counsel." Wash. Const. art. I, § 22. Although Irby claims that the trial court violated article I, section 22 in addition to the due process clause of the Fourteenth Amendment, he has not asked this court to interpret article I, section 22 independently. *See* Suppl. Br. of Resp't at 4. We are nonetheless obliged to examine Irby's state constitutional claim separately because this court has previously interpreted the right to "appear and defend" independently of federal due process jurisprudence.

As early as 1914, this court announced that "[i]t is a constitutional right of the accused in a criminal prosecution to appear and defend in person and by counsel . . . *at every stage of the trial when his substantial rights may be affected*." *State v. Shutzler*, 82 Wash. 365, 367, 144 P. 284 (1914) (emphasis added).[5] Jury selection is unquestionably a "stage of the trial" at which a defendant's "substantial rights may be affected," and for that reason we do not hesitate in holding that Irby's absence from a portion of jury selection violated his right to "appear and defend in person" under article

[5]Article I, section 22 originally provided that "the accused shall have the right to appear and defend in person, and by counsel." It was amended in 1921. Laws of 1921, ch. 13, § 1.

I, section 22 as well as the due process clause of the Fourteenth Amendment.[6]

[6]The right under the state constitution to "appear and defend" is, arguably, broader than the federal due process right to be present. Unlike *Snyder*, our decision in *Shutzler* does not condition the right to "appear and defend" at a particular "stage of trial" on what a defendant might do or gain by attending, *see Snyder*, 291 U.S. at 108 ("There is nothing he could do if he were there, and almost nothing he could gain."), or the extent to which the defendant's presence may have aided his defense, *see id*. at 113 ("No one can . . . have even a passing thought that the presence of Snyder would have been an aid to his defense."), but rather on the chance that a defendant's "substantial rights may be affected" at that stage of trial.

C. Harmless Error

A violation of the due process right to be present is subject to harmless error analysis. *Rushen*, 464 U.S. at 117-18; *Benn*, 134 Wn.2d at 921; *Lord*, 123 Wn.2d at 306-07. The same can be said of the right to "appear and defend" under article I, section 22. Although this court said in *Shutzler* that "any denial of the right [to "appear and defend in person"] without the fault of the accused is conclusively presumed to be prejudicial," *Shutzler*, 82 Wash. at 367 (citing *State v. Wroth*, 15 Wash. 621, 47 P. 106 (1896)), it is clear that in this respect *Shutzler* is no longer good law. In *State v. Caliguri*, 99 Wn.2d 501, 664 P.2d 466 (1983), this court overruled *Wroth* and its progeny, including *Shutzler*, after noting that "[t]hese older cases," which "recognized a conclusive presumption of prejudice," have been criticized as "not in accord with the modern view." *Id*. at 508. We chose to follow instead "the harmless error standard adopted by most jurisdictions." *Id*. at 509. As a result, "the burden of proving harmlessness is on the State and it must do so beyond a reasonable doubt." *Id*.

The State has not met its burden here. We say that because the State has not and cannot show that three of the jurors who were excused in Irby's absence, namely, jurors 7, 17, and 23, 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. Indeed, they were not questioned at all. While the trial judge said that the court administrator had indicated that jurors 7

and 23 would fulfill their obligation in one week, the record does not establish that they were unable to serve for a longer period if selected. Nor is it self-evident that juror 17 was unable to serve in Irby's case. All that we know from the e-mail exchange is that juror 17 home-schooled his or her child or children and that the trial court considered three weeks' service to be a burden on the juror. Had jurors 7, 17, and 23 appeared on January 3, as they should have, and been subjected to questioning in Irby's presence as planned, 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. It is no answer to say that the 12 jurors who ultimately comprised Irby's jury were unobjectionable. Reasonable and dispassionate minds may look at the same evidence and reach a different result. Therefore, the State cannot show beyond a reasonable doubt that the removal of several potential jurors in Irby's absence had no effect on the verdict.

IV. Conclusion

We hold that the trial court violated Irby's rights under the due process clause of the Fourteenth Amendment and article I, section 22 by conducting a portion of jury selection in Irby's absence, and we conclude that the violation of these rights was not harmless beyond a reasonable doubt. In light of our decision, it is unnecessary to decide whether the trial court violated Irby's right to a public trial or erred by concluding that he was a persistent offender.

AUTHOR:

Justice Gerry L. Alexander

WE CONCUR:

	Justice Debra L. Stephens
Justice Tom Chambers	Richard B. Sanders, Justice Pro Tem
Justice Susan Owens	