



chase. The chief deputy sheriff testified that about a year after the chase, he heard defendant comment that “if I’m not caught behind the wheel—if you’re not stopping me behind the wheel, that you can’t prove it’s me.” The jury found defendant guilty on all counts and he was sentenced to two-and-a-half to three-and-a-half years to serve. This appeal followed.

Defendant first argues the court violated his right to be present during trial by discussing the charges and various logistical issues with the prosecutor and defense counsel before defendant arrived on the morning of trial and before the jury entered the courtroom. The transcript shows that the court and the attorneys first discussed which charges the State planned to present to the jury. The prosecutor then stated that he planned to play the cruiser video during the trooper’s testimony, and the attorneys discussed where they would stand and where the screen would be positioned. The prosecutor said, “[t]here’s no audio the first thirty seconds and then with about twenty seconds left, the officer pulls over and there’s some talking between himself and another officer. So I think we had discussed my just shutting off the audio at that point.” Defense counsel did not object to this procedure and stipulated to the admission into evidence of the disc containing the video. The court and the attorneys then discussed how long the trial would take, the prosecutor’s plan to use certified copies of the docket entries in defendant’s prior criminal cases, and whether excessive speed was a lesser-included offense of grossly negligent operation. At that point, defense counsel noted that defendant had not yet arrived, and the court went into recess so that defense counsel could attempt to contact defendant. Approximately fifteen minutes later, the jury entered and trial began; defendant evidently had arrived by that point.\*

Defendant argues that the discussion in his absence violated his constitutional right to be present at all phases of trial. He contends that he was prejudiced by the violation because if he had been present, he would have strongly objected when the prosecutor indicated that he planned to mute the cruiser video recording after the trooper discontinued the chase, pulled over, and started speaking to the chief deputy sheriff. Defendant argues that the audio recording showed that the trooper was enjoying his first high-speed chase and that this undermined the credibility of his identification of defendant.

“One of the most basic of the rights guaranteed by the Confrontation Clause is the accused’s right to be present in the courtroom at every stage of his trial.” Illinois v. Allen, 397 U.S. 337, 338 (1970); see also State v. Nguyen, 173 Vt. 598, 599 (2002) (mem.) (recognizing that Article 10 of Vermont Constitution guarantees same right to defendants). “[A] defendant is guaranteed the right to be present at any stage of the criminal proceeding that is critical to its outcome if his presence would contribute to the fairness of the procedure.” Kentucky v. Stincer, 482 U.S. 730, 745 (1987); see also State v. Tobin, 2018 VT 108, ¶ 20, 208 Vt. 518 (in determining whether defendant had right to be present at particular stage, question is whether defendant’s absence affected fairness of proceeding).

This right is not absolute, however. It may be waived, see Nguyen, 173 Vt. at 599, and it does not apply “when presence would be useless, or the benefit but a shadow.” Snyder v. Massachusetts, 291 U.S. 97, 106-07 (1934). For example, the U.S. Supreme Court has held that a defendant did not have the right to be present at a hearing to determine whether two child witnesses were competent to testify because there was no indication that his presence “would have been useful in ensuring a more reliable determination” on that issue. Stincer, 482 U.S. at

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\* The court’s record shows that defendant was present at trial, and defendant does not claim that he missed any other portion of the trial after the jury entered.

747. Similarly, Vermont Rule of Criminal Procedure 43(c)(1) provides that “[t]he defendant’s presence is not required at a conference or argument upon a question of law.” V.R.Cr.P. 43(c)(3); see Tobin, 2018 VT 108, ¶ 22 (holding defendant had no right to be present at hearing when trial court corrected initial sentence because he was present at initial sentencing, court imposed same minimum sentence, and court lacked discretion in correcting maximum sentence).

Because defendant did not object to the alleged confrontation violation below, we review his claim for plain error, “which requires the showing of a glaring error so grave and serious that it strikes at the very heart of the defendant’s constitutional rights.” State v. Grace, 2016 VT 113, ¶ 11, 204 Vt. 68 (quotation omitted). We conclude that no error occurred here. The discussion between the attorneys and the judge about the presentation of the video recording concerned trial procedure, and courts have generally held that defendants do not have the right to be present during sidebar or chambers conferences concerning trial procedure or the progress of the trial. United States v. Taylor, 489 F. App’x 34, 44 (6th Cir. 2012); see also United States v. Barth, 424 F.3d 752, 762-63 (8th Cir. 2005) (holding that “defendant’s presence is not required at a conference regarding trial procedure”); United States v. Romero, 282 F.3d 683, 689-90 (9th Cir. 2002) (holding that defendant does not have constitutional or statutory right to attend conference between court and counsel to discuss jury instructions). Furthermore, defendant was present during the trial itself when the State played the video for the jury. If he had an objection to muting the audio, he could have raised it at that point; he did not. We are therefore unpersuaded that defendant’s absence from the pretrial conference affected the fairness of the proceeding.

Defendant also contends that his absence during the court’s discussion with the attorneys about which counts were to be tried violated his due process right to be informed of the charges against him. See Smith v. O’Grady, 312 U.S. 329, 334 (1941) (describing notice to defendant “of the true nature of the charge against him” as “the first and most universally recognized requirement of due process”). This argument lacks merit. The information filed by the State clearly set forth the charges against defendant. The record shows that defendant was provided with the information and affidavit and waived the reading of the charges at his arraignment. See Tobin, 2018 VT 108, ¶ 7 (holding defendant received proper notice where record showed he received information and had opportunity at arraignment to have charges read). Defendant was present when the court read the charges that were to be tried to the jury. He could have raised an objection at that time if he had one; he did not. Defendant does not argue that the charges of which he was convicted were different than what was read by the court. Nor does he identify any prejudice that resulted due to his absence from the pretrial discussion of the charges. We therefore see no violation.

Defendant next argues that the verdict must be reversed because the court gave a coercive instruction to the jury. At the close of evidence, the court instructed the jury on the seven counts. The jurors deliberated for over three hours and then sent a note to the judge asking, “What happens—we cannot agree on a verdict.” After some discussion with the attorneys, the court proposed the following response: “If you cannot reach a unanimous verdict, then you become a hung jury and your foreperson notifies the Court that you cannot reach a unanimous verdict. Would additional time to deliberate either today or another day help you determine whether or not you can reach a unanimous verdict?” Defense counsel and the prosecutor agreed to the court’s proposed response. After deliberating for an additional fifteen minutes, the jury reached a verdict of guilty on all counts.

The trial court has discretion to give “a supplemental jury instruction to encourage a jury to continue deliberations when they cannot agree on a verdict.” State v. Rolls, 2020 VT 18, ¶ 17,

211 Vt. 568. “However, the court may not issue a supplemental instruction to continue deliberations that coerces the jury into arriving at a verdict.” *Id.* The court’s response to the jury’s question in this case was not coercive because it did not instruct or encourage the jury to continue deliberations. The court indicated that it was willing to accept a hung jury, and merely asked if additional time would help them to determine if they could reach a unanimous verdict. The court did not impose an artificial time limit or otherwise exert pressure on the jury to reach a verdict.

Defendant argues that the court’s response was coercive because it did not advise the jurors that they should not surrender any strongly held beliefs. However, defendant failed to ask for such an instruction below. Rather, defense counsel suggested that the court simply answer the jury’s question about what would happen if they could not agree and ask if more time would help them reach a unanimous verdict. This was the response ultimately given by the court, which defense counsel expressly agreed to. Having advocated for a specific instruction below, defendant cannot now claim error in that instruction on appeal. See *State v. Morse*, 2019 VT 58, ¶ 9, 211 Vt. 130 (“Defendant may not inject error into the proceedings by advocating for one type of jury instruction and then attempt to profit from the legal consequences of the error by challenging the same instruction on appeal.” (quotation omitted)). Defendant invited error if there was any and has, therefore, waived any claim of error in the instruction.

Affirmed.

BY THE COURT:

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Paul L. Reiber, Chief Justice

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Harold E. Eaton, Jr., Associate Justice

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William D. Cohen, Associate Justice