NO. 42761-3-II

COURT OF APPEALS, DIVISION II

STATE OF WASHINGTON,

Respondent,

vs.

DANIAL R. HALVERSON,

Appellant.

APPEAL FROM THE SUPERIOR COURT
FOR MASON COURT
The Honorable Amber L. Finlay, Judge
Cause No. 10-1-00293-6

AMENDED BRIEF OF APPELLANT

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A. ASSIGNMENTS OF ERROR

01. The trial court erred in failing to produce any record of the closing arguments in the first trial, which violated Halverson's constitutional right to appeal and effective assistance of counsel on appeal concerning his two convictions for unlawful possession of a firearm in the second degree.

02. The trial court erred in allowing prosecutorial misconduct during closing argument to deprive Halverson of his constitutional due process right to a fair trial.

03. The trial court erred by violating Halverson's and the public's constitutional right to an open and public trial when it conducted an in-chambers questioning of a juror during deliberations without first engaging in a Bone-Club analysis.

04. The trial court erred in ordering that Halverson participate in mental health counseling or treatment as a condition of community custody.

05. The trial court erred in finding that Halverson has the current or future ability to pay legal financial obligations (LFOs).

B. ISSUES PERTAINING TO ASSIGNMENTS OF ERROR

01. Whether Halverson's constitutional right to appeal and effective assistance of counsel concerning his two convictions for unlawful possession of a firearm in the second degree following his first trial are violated because of the lack of any record of the closing arguments in the first trial? [Assignment of Error No. 1].

02. Whether Halverson was denied his constitutional due process right to a fair trial where the

prosecutor committed misconduct by misrepresenting the nature of reasonable doubt and thereby impermissibly shifting the burden of proof to Halverson? [Assignment of Error No. 2].

03. Whether the trial court violated Halverson's and the public's constitutional right to an open and public trial when it conducted an in-chambers questioning of a juror during deliberations without first engaging in a Bone-Club analysis? [Assignment of Error No. 3].

04. Whether the trial court erred in ordering that Halverson participate in mental health counseling or treatment as a condition of community custody? [Assignment of Error No. 4].

05. Whether the trial court, sans an inquiry into Halverson's individual financial circumstances, erred in finding that he has the current or future ability to pay legal financial obligations? [Assignment of Error No. 5].

C. STATEMENT OF THE CASE

01. Procedural Facts

Danial R. Halverson (Halverson) was charged by second amended information filed in Mason County Superior Court on June 13, 2011, with attempted murder in the first degree while armed with a firearm, count I, assault in the first degree while armed with a firearm, count II, and two counts of unlawful possession of a firearm in the second degree, counts III-IV, contrary to RCWs 9A.32.030(1)(a), 9A.28.020, 9A.36.011, 9.94A.533 and 9.41.040(2). [CP 190-92].

On July 29, a jury found Halverson guilty of the two possession of firearm charges but deadlocked on the counts of attempted murder and assault. [CP 109, 111-13]. Following an order of mistrial [CP 107], Halverson was charged by third amended information on August 2 with the latter two offenses [CP 95-96], for which he was found guilty by jury verdicts the following October 7. [CP 33-36].

No motions were argued regarding either a CrR 3.5 or CrR 3.6 hearing in either trial, the Honorable Amber L. Finlay presiding in each instance. [CP 202; RP 02/24/11 24-25; RP 08/15/11 1-4]. Nor were objections or exceptions taken to the jury instructions in either proceeding. [CP 22; RP 10/04/11 918].

The court merged the assault and attempted murder convictions, Halverson was sentenced within his standard range and timely notice of this appeal followed. [CP 5-20].

02. First Trial: Substantive Facts

On Tuesday, September 14, 2010, sometime between 6:30 and 7:00 in the morning, police responded to a reported shooting in Belfair, Washington. [RP 07/22/11 587-88, 618; RP 07/26/11 664-65]. The victim was Michael Okoniewski, who was suffering from life-threatening bullet wounds. [RP 07/20/11 189, 194, 196].

At trial, Okoniewski testified that Halverson, whom he had known for 10-15 years, came to his house just after 6:00 that morning with an offer to buy his motorcycle. [RP 07/20/11 218, 221, 223]. "I told him that I wanted to think about it and we would get back together and I would make a decision." [RP 07/20/11 222]. Halverson then asked if he could get "another electrical box … of a kind that I had given him before to work on his home." [RP 07/20/11 222]. As Okoniewski "stepped down off (his) porch [RP 07/20/11 224]" and started walking toward his tool shed to get the box, he realized he'd been shot and turned to see Halverson with "a gun in his hand." [RP 07/20/11 226]. "I got up and went around the back corner of my tool shed to try to get out into the woods and put some distance between us." [RP 07/20/11 226-27]. He ran to his neighbor's house, which was "maybe a hundred yards" away, and related what had happened. [RP 07/20/11 228, 395, 438-39, 477].

Within a couple of hours, Halverson was arrested in the driveway at his nearby residence. [RP 07/22/11 556-57]. He admitted to driving to Okoniewski's that morning to make an offer to purchase his motorcycle but denied any involvement in the shooting. [State's Exhibit 155 4, 6]. He also mentioned that he had passed Okoniewski's neighbor, Bobbie Paquette, on the road. [State's Exhibit 155 5]. Two .357 Magnum shell

casings [RP 07/22/11 623-25] and "two brass casings" were found during a search of Halverson's property. [RP 07/26/11 707].

Four days later, a bullet hole and fragments were located on the side of Okoniewski's woodshed [RP 07/26/11 592, 608, 627-28], and the State presented testimony that the hole was made by "(a) .355 diameter .38 caliber bullet." [RP 07/22/11 574].

On September 25, Ricky Ting, who owns property adjoining Halverson's, contacted the police. [RP 07/22/11 377]. In the bushes next to his driveway, Ting had found a bag with a shoulder holster plopped next to it. [RP 07/21/11 346-48, 351, 367-68, 381; RP 07/22/11 632]. The bag contained a canister and a loaded .357 Ruger revolver. [RP 07/22/11 638]. The items were discovered near a machete, which Ting said Halverson had thrown into the bushes the previous Labor Day weekend (September 4-6). [RP 07/21/11 353-55]. The parties stipulated that no latent impressions of value for identification purposes were developed following an analysis of the canister, the Ruger revolver or the .357 caliber cartridges. [CP 171; RP 07/22/11 615]. The parties also stipulated that on September 17, 1999, Halverson's wife had purchased the .357 Ruger revolver [CP 170; RP 07/22/11 614-15; RP 07/26/11 706], which was found operational and capable of firing either a .357 or .38 caliber bullet. [RP 07/22/11 574]. There was no evidence that the shell

casings found at Halverson's had been recently fired or were ever fired from the Ruger revolver. [RP 07/26/11 669-70].

Two days prior to the shooting, Halverson had told Paquette, "don't ever ask him (Okoniewski) for anything; he's a piece of crap." [RP 07/21/11 444]. Paquette considered this "normal" bickering between the two. [RP 07/20/11 448]. She, like Halverson, remembered passing one another on the road around 6:30 the morning of the shooting. [RP 07/21/11 432-35, 447-48].

The previous August 31, Halverson had given John Allen Sr. an operational 12-gauge shotgun [RP 07/22/11 495-96, 504-05, 509, 640; RP 07/26/11 761], and the parties stipulated that Halverson had been convicted of a felony prior to this. [CP 169; RP 07/26/11 781].

At trial, Halverson reiterated what he had earlier told the police, proclaiming that he did not shoot Okoniewski, that he passed Paquette on the road, and that he returned home around 6:45 to make breakfast for his wife. [RP 07/26/11 783, 785, 790, 809]. He further explained that several months before the shooting incident, he had given his wife's .357 Ruger revolver to Ting to keep because of his concern for his wife's mental health issues. [RP 07/26/11 767-69, 781, 819]. Regarding the machete, he claimed:

> I stopped – some guys were stealing a tractor – pieces off a tractor down below, and I had stopped them. And they had left this (machete) here, and I took it up and asked him (Ting) if he wanted it, and he said no, so I just stuck it in the, in the brush by his fence.

[RP 07/26/11 772].

Marty Hayes, Halverson's ballistics expert [RP 07/26/11 833], while admitting he "didn't reconstruct a shooting incident here [RP 07/27/11 905](,)" concluded that

> the ballistics evidence, both what was seen at the scene at (sic) then also the wounding patterns on Mr. Okoniewski's body are not consistent with the story he told me when I visited the scene.

[RP 07/26/11 835-36].

Following the conclusion of the testimony, the "(r)emainder of the proceedings were not recorded due to a malfunction with the recording system." [RP 07/27/11 933]. Thereafter, the parties entered into an AGREED REPORT OF PROCEEDINGS [RP 10/24/11 1047-49], wherein it was determined that the missing portions of the record included the admission of defense exhibits, jury instructions, closing arguments, jury deliberations and verdicts. [CP 21]. In this regard, the parties further agreed to the following:

> The parties agree that the Court properly admitted defense exhibits before the defense rested its case; the proposed jury instructions are properly filed in the court file and the instructions given by the Court are also properly filed

> within the Court file, there were no exceptions to the Court's instructions; closing argument can not be re-created, the defense cannot stipulate that there was no error by either defense attorney or prosecutor; jury deliberations were proper for the first trial, any questions sent to the Court by the jury are properly filed in the Court file; and the verdicts were properly recorded with (sic) Court after appropriate inquiry as to the possibility of reaching a verdict in accordance with the WPIC or instruction on being unable to reach a verdict. The clerks (sic) minutes accurately reflect the missing proceedings.

[CP 22].

03. Second Trial: Substantive Facts

Unsurprisingly, the second trial mirrored much of the first trial. Okoniewski again testified that Halverson came to his house somewhere between 6:00-6:30 the morning of September 14, 2010, with an offer to buy his motorcycle. [RP 09/27/11 95-96, 127]. When he went to his tool shed to retrieve the electrical box Halverson requested, he realized he'd been shot in the shoulder and started to scramble around the corner of his carport before eventually running to his neighbor's house, where he related what had happened. [RP 09/27/11 98-104, 106-07,126, 208-09, 263]. As a result of the shooting, he suffered life-threatening bullet wounds and spent a week in the hospital. [RP 09/27/11 108, 162-67].

Following Halverson's arrest, he readily told the police he had driven to Okoniewski's that morning to make an offer to purchase his

motorcycle but denied any involvement in the shooting. [RP 09/28/11 292, 347-48; State's Exhibit 144 4, 6]. He again acknowledged passing Okoniewski's neighbor, Paquette, on the road. [State's Exhibit 144 5]. A search of Halverson's property that morning produced "two shell casings - - empty, spent shell casings for a .38 caliber handgun, and two shell casings - - brass shell casings for a .357." [RP 09/28/11 294]. The brass shell casings were found at a burn pit on the property. [RP 09/28/11 295; RP 09/28/11 334-35]. It could not be determined how old the casings were. [RP 09/28/11 414-15].

The following Saturday, September 18, a bullet hole and a bullet fragment were found on a trim board on Okoniewski's tool shed, in addition to a dowel found on the ground that appeared to have a bullet hole through it. [RP 09/28/11 301-02, 311, 413; RP 09/29/11 537].

The next Saturday, September 25, the police were contacted by Halverson's neighbor, Ricky Ting, who turned over the shoulder holster and bag containing a canister, a gun cleaning kit and a loaded .357 Ruger revolver, which Ting had discovered near a machete, which he said Halverson had thrown into the bushes the previous Labor Day weekend (September 4-6). [RP 09/28/11 315-25, 337-38; RP 09/28/11 432-33, 445]. None of the bullets in the cylinder of the fully loaded Ruger were spent. [RP 09/29/11 577]. As in the first trial, the parties stipulated that

on September 17, 1999, Halverson's wife had purchased the .357 Ruger revolver. [CP 170; RP 09/28/11 326]. No latent impressions of value for identification purposes were developed following an analysis of the canister, the Ruger revolver or the .357 caliber cartridges. [RP 09/28/11 401-03]. Unlike the first trial, evidence was presented that the shell casings at Halverson's were fired from the Ruger revolver. [RP 09/28/11 412].

Paquette related Halverson's bickering comments regarding Okoniewski being a piece of crap, which were made the Sunday before the shooting on Tuesday [RP 09/27/11 266], in addition to explaining she had passed Halverson around 6:30 on the road that morning: "The car was just sitting there. I don't know if it was moving, I don't know if he was coming down the road." [RP 09/27/11 279].

At the second trial, Halverson again repeated what he had earlier told the police following his arrest and again proclaimed that he did not shoot Okoniewski, that he was at Okoniewski's for only a couple of minutes, that he drove past Paquette on his way home after briefly checking on an unrelated matter and that he returned home to make breakfast for his wife. [RP 09/29/11 594-95, 604, 609, 649]. When the police asked about his wife's Ruger revolver, he told them he'd given it to Ting along with the canister and cleaning kit around the first of July

because of his concern about his wife harming herself following her third nervous breakdown. [RP 09/29/11 608, 615, 620]. Ting declined his offer of the machete.

> He said no, and so I stuck it in - - I said well I don't need one either. I've got two of them. He had a couple. So I just stuck it in the bushes there by fence post three.

[RP 09/29/11 617].

Sandra Halverson, the defendant's wife, confirmed her chronic illness and ownership of the items her husband told her he had given to Ting the July before the incident. [RP 09/29/11 666-67, 670; RP 09/30/11 689-92, 733].

Marty Hayes offered the same expert opinion he had in the initial trial:

> The opinion I basically came up with is that the story that Mr. Okoniewski had told Detective Morini to begin with, and then told me later at the scene, doesn't … is quite inconsistent with the evidence that I saw as a - - as a ballistics expert.

[RP 09/30/11 773].

Ostensibly, based on where Okoniewski placed himself and Halverson during the relevant events and in consideration of the corresponding angles derived from these various configurations, Hayes opined that the incident could not have occurred as depicted by Okoniewski. [RP 09/30/11 789-793, 801-03, 826].

> ... (T)hese wounds are inconsistent with the story that he told about shot from the back and having the different - - you know, having the different angle of wound. I don't know how these occurred.

[RP 09/30/11 803].

Hayes went on to say he didn't "believe that the wounds that Mr. Okoniewski suffered were made by a .357 Magnum semi-jacketed projectile [RP 09/30/11 805](,)" as was found in Mrs. Halverson's Ruger revolver, because the wounds suffered by Okoniewski were insufficiently dramatic. [RP 09/30/11 806-08].

D. ARGUMENT

01. HALVERSON'S CONSTITUTIONAL RIGHT TO APPEAL AND EFFECTIVE ASSISTANCE OF COUNSEL ON APPEAL CONCERNING HIS TWO CONVICTIONS FOR UNLAWFUL POSSESSION OF A FIREARM IN THE SECOND DEGREE FOLLOWING HIS FIRST TRIAL ARE VIOLATED BECAUSE OF THE LACK OF ANY RECORD OF THE CLOSING ARGUMENTS IN THE FIRST TRIAL.

As previously noted, following the conclusion of testimony in the first trial, it was discovered that the remaining portions of the trial were not recorded due to a defect in the recording equipment. [RP 07/27/11 933]. In response, almost three months later, the parties entered into an AGREED REPORT OF PROCEEDINGS, wherein, in part, it was agreed that the record of the closing argument "can not be re-

created" and "the defense cannot stipulate that there was no error by either defense attorney or prosecutor…." [CP 22].

A criminal defendant is constitutionally entitled to a "'record of sufficient completeness'" to permit effective appellate review of his or her claims. State v. Thomas, 70 Wn. App. 296, 298, 852 P.2d 1130 (1993) (quoting Coppedge v. United States, 369 U.S. 438, 446, 82 S. Ct. 917, 8 L. Ed 2d (1962). Sufficient completeness, however, does not necessarily equate with a complete verbatim transcript. State v. Tilton, 149 Wn.2d 775, 781, 72 P.3d 735 (2003). The normal remedy in such a situation is to supplement the record with appropriate affidavits and have the judge who heard the case resolve any discrepancies. Id. at 783. However, if affidavits are unable to produce a record that satisfactorily recounts the events material to the issues on appeal, a new trial must be ordered. Id.

In State v. Larson, 62 Wn.2d 64, 381 P.2d 120 (1963), the Washington Supreme Court held that the lack of a sufficient reconstructed record constituted a denial of due process and reversed the defendant's convictions and ordered a new trial. The defense attorney in Larson, who had not been the attorney at trial, was unable to test the "sufficiency of completeness" of the trial court's narrative of facts and thus unable to satisfactorily determine what errors to assign for review. Id. at 67. See also State v. Tilton, 149 Wn. 2d at 783 (reversal and remand for new trial

required where complete record of missing portion essential to establishing claim of ineffective assistance, in the face of significant evidence that defenses were viable but had not been presented).

Similar to Larson and Tilton, Halverson's trial counsel is not representing him on appeal, and, in any event, the parties agreed that the closing argument "can not be re-created.... [CP 22](,)" thus leaving no avenue to cure the defect in the record. Unlike both cases, the missing closing argument in this case is beyond recreation of any sort. There is nothing. Like Larson, Halverson is clearly prejudiced by this, for it concerns the entire presentation of closing argument by defense and the State, including rebuttal. As argued herein (see following argument, infra at 15-19), prosecutorial misconduct occurred during closing argument in the second trial in a manner or template that could be relevant to the two convictions in the first trial, particularly given that defense counsel at the first trial could not stipulate that there was no error by either himself or the prosecutor during closing argument. [CP 22]. And while the record for the second trial does suggest this possibility, it is simply impossible to identify what errors to assign on appeal relative to closing argument in the first trial because it cannot be reproduced in any form, with the result that a new trial must be ordered for Halverson's two convictions for unlawful possession of a firearm in the second degree.

02. THE PROSECUTOR COMMITTED MISCONDUCT BY MISREPRESENTING THE NATURE OF REASONABLE DOUBT AND THEREBY IMPERMISSIBLY SHIFTING THE BURDEN OF PROOF TO HALVERSON.

A criminal defendant's right to a fair trial is denied where there is an unsuccessful objection to the prosecutor's improper comments and there is a substantial likelihood the comments affected the jury's verdict. State v. Reed, 102 Wn.2d 140, 145, 684 P.2d 699 (1984). The defense bears the burden of establishing both the impropriety and the prejudicial effect. State v. Hoffman, 116 Wn.2d 51, 93, 804 P.2d 577 (1991). Where a defendant fails to object to improper comments at trial, or fails to request a curative instruction, or to move for a mistrial, reversal is not always required unless the prosecutorial misconduct was so flagrant and ill intentioned that a curative instruction could not have obviated the resultant prejudice. State v. Ziegler, 114 Wn.2d 533, 540, 789 P.2d 79 (1990). "The State's burden to prove harmless error is heavier the more egregious the conduct is." State v. Rivers, 96 Wn. App. 672, 676, 981 P.2d 16 (1999).

A prosecutor's obligation is to see that a defendant receives a fair trial and, in the interest of justice, must act impartially, seeking a verdict free of prejudice and based on reason. State v. Belgarde, 110 Wn.2d 504, 516, 755 P.2d 174 (1988). The hallmark of due process analysis is the fairness of the trial, i.e., did the misconduct prejudice the jury and thus deny the defendant a fair trial guaranteed by the due process clause? Smith v. Phillips, 455 U.S. 209, 210, 102 S. Ct. 940, 71 L. Ed. 2d 78

(1982). In this context, the definitive inquiry is not whether the error was harmless or not harmless but rather did the irregularity violate the defendant's due process rights to a fair trial. State v. Davenport, 100 Wn.2d 757, 762, 675 P.2d 1213 (1984). If this court is unable to say from its reading of the record whether the defendant would or would not have been convicted but for the impropriety, then it may not deem it harmless. State v. Charlton, 90 Wn.2d 657, 664, 585 P.2d 142 (1978).

Although a prosecutor has wide latitude in closing argument to draw reasonable inferences from the evidence and to express such inferences to the jury, State v. Hoffman, 116 Wn.2d at 94-95, it is flagrant misconduct to shift the burden of proof to the defendant, which occurred in this case. State v. Stenson, 132 Wn.2d 668, 727, 940 P.2d 1239 (1997).

In rebuttal argument, the prosecutor told the jury:

> But the bottom line is this. Do you have a reasonable doubt that someone other than Danial Halverson shot Mr. Okoniewski.

[RP 10/04/11 1016]. When defense counsel objected—"Objection, your Honor, that is not - -"—the court overruled with a curt "Continue." [RP 10/04/11 1016]. Without objection, the prosecutor quickly returned to this theme:

> … So to acquit Danial Halverson then, you have to have a reasonable doubt that Mr. Halverson was the person who shot Okoniewski. And I challenge you - - I challenge you to find a reason for that doubt…. [emphasis added].

[RP 10/04/11 1017].

This is akin to an improper "fill-in-the-blank" argument and represents a clear misstatement of the law because it improperly suggested that Halverson had to provide a reason for the jury to find him not guilty. State v. Johnson, 158 Wn. App. 677, 684-85, 243 P.3d 936, review denied, 171 Wn.2d 1013 (2011); State v. Venegas, 155 Wn. App. 507, 523, 228 P.3d 813, review denied, 170 Wn.2d 1003 (2010). In analyzing similar remarks, this court has noted:

> The jury need not engage in any such thought process. By implying that the jury had to find a reason in order to find [the defendant] not guilty, the prosecutor made it seem as though the jury had to find [the defendant] guilty unless it could come up with a reason not to. Because we begin with a presumption of innocence, this implication that the jury had an initial affirmative duty to convict was improper. Furthermore, this argument implied that [the defendant] was responsible for supplying such a reason to the jury in order to avoid conviction. [emphasis in the original].

State v. Anderson, 153 Wn. App. 417, 431, 220 P.3d 1273 (2009), review denied, 170 Wn.2d 10902 (2010).

The State's evidence of Halverson's guilt was neither clear-cut nor overwhelming. The forensic evidence, certainly diminutive in quantity and quality, was of little consequence, and it cannot be believed that the combination of the direct and circumstantial evidence was prodigious, as evidenced by the hung jury in the first trial, which was based on almost

identical evidence. Moreover, the effect of the trial court overruling defense counsel's initial objection to the improper argument, provided an emphatic aura of legitimacy to the impermissible comments. See State v. Davenport, 100 Wn.2d at 764. Because the State's case against Halverson "was controverted, the prejudicial impact of the misconduct is magnified." State v. Perez-Mejia, 134 Wn. App. 907, 919, 143 P.3d 838 (2006).

Based on this record, there is a substantial likelihood that the prosecutor's comments affected the jury's verdict and were nothing short of a flagrant attempt to encourage the jury to decide the case on improper grounds, for they were "'so flagrant and ill-intentioned that it evinces an enduring and resulting prejudice' incurable by a jury instruction." See State v. Fisher, 165 Wn.2d 727, 747, 202 P.3d 937 (2009) (quoting State v. Gregory, 158 Wn.2d 759, 841, 147 P.3d 1201 (2006). As it cannot be concluded that Halverson would have been convicted minus the prosecutor's improper and flagrant statements that misrepresented the nature of reasonable doubt and impermissibly shifted the burden of proof, Halverson was denied a fair trial and his convictions must be reversed and the case remanded for a new trial.

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03. THE TRIAL COURT VIOLATED HALVERSON'S AND THE PUBLIC'S CONSTITUTIONAL RIGHT TO AN OPEN AND PUBLIC TRIAL WHEN IT CONDUCTED AN IN-CHAMBERS QUESTIONING OF A JUROR DURING DELIBERATIONS WITHOUT FIRST ENGAGING IN A BONE-CLUB ANALYSIS ON THE RECORD.

During jury deliberations following Halverson's second trial, the trial court addressed the parties about the previous questioning of a juror in chambers:

> About - - late in the afternoon - - I want to say it was close to 4:00 - - the jury asked to go home. And the Court allowed them to do so. They wanted to go home, think about it, come back in the morning.
> And as they were walking out, the bailiff informed me that the lead juror informed him that one of the jurors had looked up a - - three words in the dictionary, and then came back to the jury room. And so, what we did is we had that particular juror remain. That juror was brought into chambers and Mr. Scott from the prosecutor's office, and Mr. Sergi from - - representing Mr. Halverson, and myself.
>
> The juror was asked whether or not he discussed that to the other jurors. His response was no. He was asked whether or not - - as a yes or no question - - whether or not it influenced his deliberations. His response was no.
> ....

[RP 10/07/11 1021-22].

Thereafter, in an attempted do over, the juror was questioned in open court about his activities, excused, and an alternate brought in as a replacement. [RP 10/07/11 1026-27, 1034-35].

Both the Sixth Amendment to the United States Constitution and

article I, section 22 of the Washington Constitution guarantee criminal defendants the right to a public trial. State v. Russell, 141 Wn. App. 733, 737-38, 172 P.3d 361 (2007), reviewed denied, 164 Wn.2d 1020 (2008); Presley v. Georgia, ___ U.S. ___, 130 S. Ct. 721, 723, 175 L. Ed. 2d 675 (2010) As well, article I, section 10 of the Washington Constitution states, "Justice in all cases shall be administered openly," thereby giving the public, in addition to the defendant, a right to open proceedings. Seattle Times Co. v. Ishikawa, Wn.2d 30, 36, 640 P.2d 716 (1982).

A defendant's right to a public trial "serves to ensure a fair trial, to remind the officers of the court of the importance of their functions, to encourage witnesses to come forward, and to discourage perjury." State v. Brightman, 155 Wn.2d 506, 514, 122 P.3d 150 (2005). Comparably, the public's right to an open trial, especially in the context of a criminal proceeding, safeguards that the accused "is fairly dealt with and not unjustly condemned...." State v. Momah, 167 Wn.2d 140, 148, 217 P.3d 321 (2009), cert. denied, 131 S. Ct. 160 (2010). A defendant's right and the public's right "serve complementary and independent functions in assuring the fairness of our judicial system. In particular, the public trial right operates as an essential cog in the constitutional design of fair trial safeguards." State v. Bone-Club, 128 Wn.2d 254, 259, 906 P.2d 325 (1995). And a defendant has standing to voice the public's interest in

public trials. State v. Erickson, 146 Wn. App. 146 Wn. App. 200, 205 n.2, 189 P.3d 245 (2008); State v. Duckett, 141 Wn. App. 797, 804-05, 173 P.3d 948 (2007).

To protect these rights, a trial court may properly close a portion of a trial only after (1) properly conducting a balancing process of five factors and (2) entering specific findings on the record to justify so ruling. State v. Bone-Club, 128 Wn.2d 254, 258-59, 906 P.2d 325 (1995). A trial court's failure to conduct the required Bone-Club inquiry "results in a violation of the defendant's public trial rights." State v. Brightman, 155 Wn.2d at 515-16. In such a case, the defendant need show no prejudice; it is presumed. Bone-Club, 128 Wn.2d at 261-62. Additionally, a defendant's failure to "lodge a contemporaneous objection" at the time of the exclusion does not amount to a waiver of his or her right to a public trial. Brightman, 155 Wn.2d at 514-15, 517. The remedy for such a violation is to reverse and remand for a new trial. In re Pers. Restraint of Orange, 152 Wn.2d 795, 814, 100 P.3d 291 (2004). This court reviews de novo the question of law of whether a defendant's right to a public trial has been violated. Brightman, 155 Wn.2d at 514.

In agreeing with our Supreme Court, this court recently held that there is no rule in itself "that the issues raised during in-chamber

conferences are not subject to public scrutiny and the defendant's right to be present." State v. Bennett, ___ P.3d ___, 2012, WL 1605735, at *3.

The issue presented is whether the in-chambers questioning of the juror violated Halverson's and the public's right to an open and public trial under the state and federal constitutions. In Bennett, this court declined to resolve this issue, reasoning that "a complete absence of a record relating to the challenged action cannot compel appellate review." Id. at *4 n.9.

> We need not resolve whether Bennett or the public had a right to observe a purely legal discussion relevant to Bennett's trial because our record fails to reveal that any issues, factual or legal, arose or were discussed." Id. at *3.

In contrast the record here reflects that the in-chambers conference did involve a discussion of factual issues. The conference was initiated by the court to question the juror as set forth above. Thus it cannot be said that the record fails to reveal that any issues, factual or legal, did not arise or were not discussed during the in-chambers conference.

Given that the in-chambers conference went beyond mere administrative or ministerial functions, and given that the trial court failed to engage in a meaningful and required five-part Bone-Club analysis or set forth on the record specific findings to justify so ruling, and given that Halverson's failure to object to the process does not constitute a waiver, and given that prejudice is presumed, this court must reverse Halverson's

convictions and remand for a new trial. State v. Brightman, 155 Wn.2d 514-15.

04. THE TRIAL COURT ERRED IN ORDERING THAT HALVERSON PARTICIPATE IN MENTAL HEALTH COUNSELING OR TREATMENT AS A CONDITION OF COMMUNITY CUSTODY.

As a condition of community custody, the court ordered that Halverson:

> .... shall participate in mental health counseling or treatment at the direction of the CCO.

[CP 18].

"'In the context of sentencing, established case law holds that illegal or erroneous sentences may be challenged for the first time on appeal.'" State v. Bahl, 164 Wn.2d 739, 744, 193 P.3d 678 (2008) (quoting State v. Ford, 37 Wn.2d 472, 477, 973 P.2d 452 (1999)). This court reviews whether a trial court had statutory authority to impose community custody conditions de novo. State v. Armendariz, 160 Wn.2d 106, 110, 156 P.3d 201 (2007).

The court erred in ordering the mental health counseling or treatment because it did not have a presentence report before it and did not make findings that Halverson's mental illness contributed to his crimes.

See RCW 9.94B.080;[1] State v. Jones, 118 Wn. App. 199, 202, 76 P.3d 258 (2003) (court may order mental health evaluation and recommend treatment condition only if it "finds, based on a presentence report and any applicable mental status evaluations, that the offender suffers from a mental illness which influenced the crime.").

This court should remand and order the sentencing court to strike the condition relating to counseling and treatment.

05. THE TRIAL COURT ERRED IN FINDING THAT HALVERSON HAD THE CURRENT OR FUTURE ABILITY TO PAY LEGAL FINANCIAL OBLIGATIONS.

At sentencing, the trial court imposed $46,424.83 in legal financial obligations (LFOs). [CP 11-12]. Although there was no discussion of Halverson's financial resources, the judgment and sentence included the following written finding on the preprinted form:

> The court has considered the total amount owing, the defendant's past, present and future ability to pay legal financial obligations, including the defendant's financial resources and the likelihood that the defendant's status will change. (RCW 10.01.160). The court makes the following specific findings:
> [X] The defendant has the ability or likely future ability to pay the legal financial obligations imposed herein. RCW 9.94A.753.

[CP 9].

[1] Although the heading to RCW 9.94B.080 indicates it applies to crimes committed prior to July 1, 2000, the statute is applicable to crimes committed after that date. See Laws of 2008, ch. 231, § 55.

When entering a finding regarding a defendant's ability to pay LFOs, a sentencing court must first consider the defendant's financial circumstances and the burden of imposing the obligations. State v. Bertrand, 165 Wn. App. 393, 403-04, 267 P.3d 511 (2011) (citing State v. Baldwin, 63 Wn. App. 303, 312, 818 P.2d 1116, 837 P.2d 646 (1991)).

A trial court's decision vis-à-vis a defendant's ability to pay LFOs is reviewed under the "clearly erroneous" standard. Bertrand, 165 Wn. App. at 403-04 (citing Baldwin, 63 Wn. App. at 312). At minimum, the record must establish the sentencing court at least considered the defendant's financial circumstances and the burden imposed by ordering payment. Bertrand, 165 Wn. App. at 404 (citing Baldwin, 63 Wn. App. at 311-12). A trial court's failure to exercise discretion in sentencing is reversible error. State v. Grayson, 154 Wn.2d 333, 342, 111 P.3d 1183 (2005).

Such error may be raised for the first time on appeal. See Bertrand, 165 Wn. App. at 395, 405 (explicitly noting issue was not raised at sentencing hearing, but nonetheless striking sentencing court's unsupported finding); See also State v. Ford, 137 Wn.2d at 477 (unlawful sentence may be raised for first time on appeal).

As in Bertrand, this record reveals no evidence or analysis supporting the sentencing court's finding that Halverson has the current or future ability to pay his LFOs. And given Halverson's length of sentence (305 months) and indigent stratus, the record suggests the opposite is true. [CP 46].

The sentencing court's finding that Halverson has the current or future ability to pay his LFOs was clearly erroneous and must be stricken. Moreover, before the State can collect LFOs from Halverson, "there must be a determination that (he) has the ability to pay these LFOs, taking into account (his) resources and the nature of the financial burden on (him)." Bertrand, 165 Wn. App. at 405 n.16.

E. CONCLUSION

Based on the above, Halverson respectfully requests this court to reverse his convictions and/or remand for resentencing consistent with the arguments presented herein.

DATED this 12th day of June 2012.

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CERTIFICATE

I certify that I served a copy of the above brief on this date as follows:

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DATED this 12th day of June 2012.

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