No. 42761-3

COURT OF APPEALS, DIVISION II
STATE OF WASHINGTON

STATE OF WASHINGTON, RESPONDENT

V.

DANIAL HALVERSON, APPELLANT

Appeal from the Superior Court of Mason County
The Honorable Amber L. Finlay, Judge

No. 10-1-00293-6

SUPPLEMENTAL BRIEF OF RESPONDENT

MICHAEL DORCY
Mason County Prosecuting Attorney

By
TIM HIGGS
Deputy Prosecuting Attorney
WSBA #25919

521 N. Fourth Street
PO Box 639
Shelton, WA 98584
PH: (360) 427-9670 ext. 417

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Court Rules

A. Introduction

This court ordered this supplemental briefing to address: 1) the application of the "experience and logic" test, outlined in *State v. Sublett*, 176 Wn.2d 58, 292 P.3d 715 (2012), to Halverson's claim that he was denied an open and public trial when during the trial the trial court examined one of the jurors in chambers in regard to a report of juror misconduct; and, 2) the application of *State v. Blazina*, ___ P.3d ___, 2013 WL 2217206 (Div. 2, 2013) (No. 42728-1-II, filed May 21, 2013), to Halverson's claims that the trial court erred when it found that he had the present or future ability to pay legal financial obligations.

B. State's Counterstatement of Issues Relevant to Supplemental Briefing

1) The public trial right does not attach to the in-camera questioning of a single juror regarding an allegation of juror misconduct because in-camera questioning under these circumstances is historically accepted.

2) Because Halverson failed to preserve the issue with an objection in the trial court, the issue of costs is not properly preserved and Halverson should not be permitted to raise the issue for the first time on appeal.

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C. Argument

1) The public trial right does not attach to the in-camera questioning of a single juror regarding an allegation of juror misconduct because in-camera questioning under these circumstances is historically accepted.

Whether the public trial right attaches to a particular proceeding is determined by application of the "experience and logic" test. *State v. Sublett*, 176 Wash. 2d 58, 72-73, 292 P.3d 715 (2012). The experience and logic test consists of two prongs: 1) the experience prong; and, 2) the logic prong. *Id.* at 73. "The experience prong, asks 'whether the place and process have historically been open to the press and general public.'" *Id.* at 73, quoting *Press–Enterprise Co. v. Superior Court,* 478 U.S. 1, 8, 106 S.Ct. 2735, 92 L.Ed.2d 1 (1986). The logic prong asks "'whether public access plays a significant positive role in the functioning of the particular process in question.'" *Sublett* at 73, quoting *Press–Enterprise,* 478 U.S. at 8. Unless the answer to both prongs is yes, the public trial right does not attach to the particular proceeding. *Sublett* at 73.

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PO Box 639
Shelton, WA 98584
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a) Experience Prong

In the instant case, after closing arguments and while the jury was deliberating, which was, of course, well after the jury was selected and sworn and the trial was underway, the trial court interviewed a single juror at an in-camera hearing after receiving a report of juror misconduct from the bailiff who was in charge of the jury. RP-II 1019-1036. The State avers that, historically, hearings involving matters of juror misconduct haven't necessarily been conducted in an open courtroom.

Many Washington cases exist that involve in-chambers voir dire of prospective jurors. See, e.g., *State v. Wise*, 176 Wn.2d 1, 288 P.3d 1113 (2012); *State v. Paumier*, 176 Wn.2d 29, 288 P.3d 1126 (2012). These cases, of course, found open courts violations due to such circumstances and ordered new trial. *Id.*

But only one Washington case, *State v. Wilson*, 141 Wn. App. 597, 171 P.3d 501 (2007), was located where the facts included, as in the instant case, that the judge interviewed a juror in-camera after the jury had been impaneled. Although the legal issues under examination in *Wilson* were not the same as the instant case, the facts of *Wilson* support the State's current contention that historical experience supports a practice, in appropriate circumstances, such as where juror misconduct or questions of

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PO Box 639
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partiality are concerned, of interviewing a single juror in chambers. The *Wilson* court wrote as follows:

> On facts similar to those here, the United States Supreme Court has held that due process does not require a defendant's presence at in-chambers discussions between a judge and an impaneled juror. *See* [*US v.*] *Gagnon,* 470 U.S. [522] at 526, 105 S.Ct. 1482 (holding "[w]e think it clear that respondents' rights under the Fifth Amendment Due Process Clause were not violated by the *in camera* discussion with the juror"); *accord United States v. Olano,* 62 F.3d 1180, 1190–91 (9th Cir.1995) (rejecting due process challenge where judge had questioned juror about her impartiality outside the presence of defendant and counsel), *cert. denied sub nom. Gray v. United States,* 519 U.S. 931, 117 S.Ct. 303, 136 L.Ed.2d 221 (1996).

Wilson, 141 Wn. App. at 604-05. While this language from *Wilson* does not validate the practice of in-camera interviewing of impaneled jurors and does not comment on the constitutionality in regard to an open courts violation, the discussion does *demonstrate* that this practice has been historically accepted.

A search of cases across jurisdictions in the United States shows that (in those jurisdictions) not only is it historically accepted to hold in-camera interviews of jurors where juror misconduct is a concern, but it is actually the preferred practice. The following list of cases do not address the question of law at issue in the instant case, but these cases demonstrate the point that in-camera examination of impaneled jurors to inquire of suspected juror misconduct is historically accepted:

1) *United States v. Simone*, 14 F.3d 833, 845 (3d Cir. 1994) (recognizing trial court has great discretion when addressing a possibly tainted juror and that that in-camera examination may be the preferred practice).

2) *United States v. Edwards*, 823 F.2d 111, 116-17 (5th Cir. 1987) (applying the experience and logic test, trial judge did not err by failing to hold a pre-closure hearing prior to examining impaneled juror in camera).

3) *Gov't of Virgin Islands v. Dowling*, 814 F.2d 134, 137 (3d Cir. 1987) ("Where there is a significant possibility that a juror or potential juror has been exposed to prejudicial extra-record information, we have expressed our preference, in general, for individual, *in camera* questioning of the possibly-tainted juror").

4) *United States v. Posner*, 644 F. Supp. 885, 887-88 (S.D. Fla. 1986) *aff'd sub nom. United States v. Scharrer*, 828 F.2d 773 (11th Cir. 1987).

> Courts routinely employ the use of in camera juror interviews as a means of determining whether extraneous information, not presented in open court, came to the attention of the jury and affected the final verdict. *See United States v. O'Keefe,* 586 F.Supp. 998 (E.D.La.1983)

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> (investigating juror misconduct through the use of in camera questioning of all jurors with counsel present, and sealing the transcript of the hearing so as to make it a part of the record.

Posner at 887-88.

5) *Nevels v. Parratt*, 596 F.2d 344, 346 (8th Cir. 1979) (Not error to exclude defendant from in-camera interview of juror regarding juror misconduct).

6) *United States v. Kimberlin*, 527 F. Supp. 1010 (S.D. Ind. 1981) aff'd, 805 F.2d 210 (7th Cir. 1986) (defendant sought in-camera hearing regarding alleged juror misconduct).

7) *Bolton v. Tesoro Petroleum Corp.*, 871 F.2d 1266, 1275 (5th Cir. 1989) (within court's discretion to interview jurors in-camera regarding allegations of juror misconduct).

8) *United States v. Anello*, 765 F.2d 253, 258 (1st Cir. 1985) (trial court interviewed juror in-camera regarding report of juror misconduct).

9) *United States v. Barrett*, 496 F.3d 1079, 1102 (10th Cir. 2007) (trial court held in-camera hearing to inquire of juror taint).

10) *State v. Mann*, 131 N.M. 459, 470, 39 P.3d 124, 135 (trial court's in-camera interviews were within its discretion).

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11) *State v. Nelson*, 318 N.J. Super. 242, 256, 723 A.2d 627, 634 (App. Div. 1999). Where a question of juror misconduct was under consideration, the court wrote that:

> The judge's procedural approach to this instance of juror misconduct was correct. *State v. McLaughlin,* 310 *N.J.Super.* 242, 257, 708 *A.*2d 716 (App.Div.), *certif. denied,* 156 *N.J.* 381, 718 *A.*2d 1210 (1998). When a problem of this nature arises the trial court [must] first determine whether the alleged improper conduct has the capacity to prejudice the defendant. If it does, the court should conduct voir dire, preferably individually and in camera, to determine the extent of juror exposure to the impropriety and whether the affected jurors are capable of deciding the case impartially.

Id.

12) *People v. Mejias*, 21 N.Y.3d 73 (2013) (where juror misconduct was alleged, questioning the juror in-camera was mandatory).

13) *Lebron v. State*, 724 So. 2d 1208, 1209 (Fla. Dist. Ct. App. 1998) (trial court conducted in-camera examination of juror).

14) *Hall v. Eastland Mall*, 769 N.E.2d 198, 204 (Ind. Ct. App. 2002) (trial court judge conducted in-camera interview of juror regarding juror's alleged misconduct).

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15) *State v. Cubano*, 203 Conn. 81, 92, 523 A.2d 495, 501 (1987) (trial judge interviewed juror in-camera regarding juror misconduct).

16) *State v. Carmack*, 388 S.C. 190, 196, 694 S.E.2d 224, 227 (Ct. App. 2010) (trial court judge interviewed jurors in chambers regarding suspected juror misconduct).

17) *Grillot v. State*, 353 Ark. 294, 316, 107 S.W.3d 136, 149 (2003) (trial court held in-camera interview to inquire of suspected juror misconduct).

18) *People v. Siripongs*, 45 Cal. 3d 548, 754 P.2d 1306 (1988) (court held in-camera interview to inquire of juror misconduct).

The preceding list of cases is meant to demonstrate that the questioning of jurors in regard to an allegation of suspected juror misconduct has not necessarily "'historically been open to the press and general public.'" *Sublett*, 176 Wn.2d at 73, quoting *Press–Enterprise Co. v. Superior Court,* 478 U.S. 1, 8, 106 S.Ct. 2735, 92 L.Ed.2d 1 (1986). Thus, because the first prong of the experience and logic test is lacking on

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the facts of the instant case, the public trial right did not attach. *Sublett* at 73.

b) The Logic Prong

The logic prong asks "'whether public access plays a significant positive role in the functioning of the particular process in question.'" *Sublett,* 176 Wn.2d at 73, quoting *Press–Enterprise,* 478 U.S. at 8.

The State concedes that the public's ability to know and observe the progress of the trial will always enable the public to measure its confidence in the fairness of the process. But the test is not whether the public is confident, but instead the test is "'whether public access plays a significant positive role in the functioning of the particular process in question.'" *Sublett,* 176 Wn.2d at 73, quoting *Press–Enterprise,* 478 U.S. at 8.

Where allegations of juror misconduct are concerned, particularly on the facts of the instant case -- where a juror is alleged to have looked up a word in a dictionary -- the public plays no role in the functioning of the process.

"[T]he right to a public trial serves to ensure a fair trial, to remind the prosecutor and judge of their responsibility to the accused and the

Mason County Prosecutor
PO Box 639
Shelton, WA 98584
360-427-9670 ext. 417

importance of their functions, to encourage witnesses to come forward, and to discourage perjury." *Sublett* at 72. The questioning of a single, impaneled juror in-camera, while the jury is deliberating, about an allegation of juror misconduct does not offend any of these principles. Instead, the in-camera questioning under the facts of the instant case protected the sanctity of the deliberation process while ensuring a fair trial to Halverson.

2) Because Halverson failed to preserve the issue with an objection in the trial court, the issue of costs is not properly preserved and Halverson should not be permitted to raise the issue for the first time on appeal.

No citation to the record was located where Halverson objected to the court's imposition of legal financial obligations. Nothing in the record of the instant case indicates that Halverson suffers from any disability or other impediment to his future ability to pay these costs. Thus, Halverson should not be permitted to raise his objection to the imposition of legal financial obligations for the first time on appeal. RAP 2.5(a); *State v. Blazina*, ___ P.3d ___, 2013 WL 2217206 (Div. 2, 2013) (No. 42728-1-II, filed May 21, 2013).

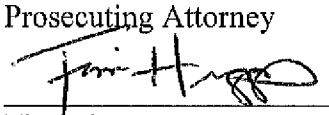
Mason County Prosecutor
PO Box 639
Shelton, WA 98584
360-427-9670 ext. 417

D. Conclusion

For the reasons described above, the State asks that the court find that the public trial right did not attach on the facts at issue in this case. The State further asks that the court sustain Halverson's convictions and sustain the imposition of costs.

DATED: June 17, 2013.

MICHAEL DORCY
Mason County
Prosecuting Attorney



Tim Higgs
Deputy Prosecuting Attorney
WSBA #25919

MASON COUNTY PROSECUTOR

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