SUPREME COURT NO. 90017-5
COURT OF APPEALS NO. 69328-0-I

IN THE SUPREME COURT OF THE STATE OF WASHINGTON

STATE OF WASHINGTON,

Respondent,

v.

CARL TOBIN,

Petitioner.

ON APPEAL FROM THE SUPERIOR COURT OF THE STATE OF WASHINGTON FOR KING COUNTY

The Honorable Barbara Linde, Judge,

PETITION FOR REVIEW

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RULES, STATUTES AND OTHER AUTHORITIES

A. IDENTITY OF PETITIONER

Petitioner Carl Tobin asks this Court to review the decision of the court of appeals referred to in section B.

B. COURT OF APPEALS DECISION

Petitioner seeks review of the court of appeals decision in State v. Tobin, COA No. 69328-0-I, filed January 13, 2014, attached as appendix A to this petition.[1]

C. ISSUES PRESENTED FOR REVIEW

1. During jury selection, the parties made peremptory challenges by passing a piece of paper back and forth, while the court gave its preliminary instructions to the jury. Because the trial court did not analyze the Bone-Club[2] factors before conducting this important portion of jury selection privately, did the court violate petitioner's constitutional right to a public trial?[3]

2. Whether the state failed to prove robbery where the evidence showed that the complainant was assaulted because of his sexual orientation and that his fur coat was taken as an afterthought, once the assault was complete and the complainant was unconscious?

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[1] The state has filed a motion to publish that part of the opinion addressing the public trial right issue, which is still pending in the court of appeals.
[2] State v. Bone-Club, 128 Wn.2d 254, 906 P.2d 629 (1995).

D. STATEMENT OF THE CASE

Following a jury trial, petitioner Carl Tobin was convicted of first degree robbery and malicious harassment, allegedly committed against Dan Lusko outside Inay's Restaurant on Beacon Hill on December 23, 2011. CP 1-7, 69-70; RP 145. The state alleged Tobin and Antonio Gomez[4] assaulted Lusko because of his sexual orientation, and that the assault constituted a robbery because Lusko's fur coat was taken at some point during the assault. CP 1-7; RP 474.

1. Peremptory Challenges

The court explained peremptory challenges would be made by passing a piece of paper back and forth:

> As far as peremptory challenges go, there's a sheet of paper that the parties will pass back and forth. Did you have a chance to see it? And if you pass, in other words, if you are happy, you'll need to – when you – if you pass your turn, right pass, and then you'll be limited only to jurors who are not in the box, anyone that comes in afterwards for your peremptory challenges.
>
> When you're all done and you accept the panel, sign it, and then it will be presented here. I will be instructing the jury on all of the ins and outs of trial, the typical script of instructions, while you're doing that. And my experience is the amount of time it takes to do all those instructions gives you ample time to do that. And it you're not done at the time I'm doing instructions, we just wait until you are.

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[3] A petition for review raising this same issue is currently pending before the Court in State v. Love, 176 Wn. App. 911, 309 P.3d 1209 (2013) (Supreme Ct. No. 89619-4).

[4] The record does not indicate how Gomez's case resolved, but he did not go to trial with Tobin.

> So, when you're doing it, I'll everyone have their number up here so you can see them. And you'll simply have to keep track of – you know, there's going to be 13 in here and how many are gone and where we are. Makes sense?
>
> MS. NAVE [prosecutor]: Thank you, Your Honor.
>
> MS. GRIFFIN [defense counsel]: Thank you.

RP 129.

In contrast, the court explained challenges for cause would occur in "open court:"

> Challenges for cause need to be done before we get to the peremptory challenge stage. So, if there's a challenge for cause that you develop while you're questioning the juror, simply, in open court at that time, indicate, address the Court that you would like to ask that that juror be excused for cause.

RP 129.

The transcript indicates that after questioning and for-cause challenges, the court began instructing the jurors as it previously indicated it would to allow the parties to exercise peremptory challenges as directed:

> (Voir dire.)
>
> (Recess.)
>
> THE COURT: Welcome back. Please be seated, ladies and gentlemen. We're ready to proceed, and as promised, I'm going to give you some additional instructions. And while I'm doing this, the attorneys are going to be making their selections on paper and then they're going to deliver them to me, and then I will announce them. And so this

applies to the trial. And so as if all of you were going to be on this trial, serving as this jury of 13, I just ask that you pay close attention.

. . .

Can I get your signatures on this, counsel? That is literally the best timing I have ever seen happen. The attorneys have concluded their selections just as I've completed my remarks.

All right. Ladies and gentlemen, I'm going to read a list of juror numbers, and these will be those individuals that will be the first group excused from this panel. And after that I will seat in order the remaining wave of jurors who will go take some positions in the jury box. And after that I'll excuse those that we don't use.

So, I want to make sure and thank all of you. So if I'm going to excuse you and I don't get a chance to do it again, on behalf of the Court and the parties, thank you very much for your service. This process can't work without the participation and sacrifice of everyone, whether you ultimately sit in the jury box or not. So, thank you. And your instructions will be to return to the first floor jury assignment area. And hopefully continue on with a good and productive jury service.

(The jury was sworn and impaneled).[5]

RP 138-39; CP 95.

2. Trial Testimony

The night of the altercation was "drag night" at Inay's. RP 146-48, 260. Lusko claimed he went there to perform and was "dressed waist up

[5] Pursuant to a supplemental order or indigency, the peremptory challenge portion of voir dire was ordered and is attached as appendix B. It indicates the court excused jurors 3, 7, 11, 12, 13, 14, 15, 16, 17 and 25. Appendix B, at 3. The empty positions in the box were filled, with juror 27 taking the final spot in position 3. Appendix B, at 4. After the unused jurors were excused, the court swore in the panel. Appendix B, at 4-5.

in $2,000.00 worth of entertainment clothing[,]" including a "red-sequined Liberace shirt" and "an inside-out Fingerhut coat from 1970." RP 262. The coat belonged to Lusko's mother but was too big for her; it was gold and brown and looked like it was made of real fur. RP 262-63.

Inay's owner Ernesto Rios testified Lusko was not part of the entertainment (RP 192), but that Lusko: "was acting a little bit flamboyant, friendly. Kind of dancing around, you know. And since – like he's a little intoxicated, kind of." RP 150; see also RP 195. Rios testified he took Lusko aside to tell him to tone it down, as Lusko was being overly affectionate with other customers. RP 150-51, 195-96.

As the restaurant was closing, Lusko was outside saying goodbye to other patrons. RP 264, 268. Lusko's and Tobin's accounts differed slightly, but both testified they struck up a conversation and shared a hug. RP 269, 417-20. Ultimately, Lusko, Tobin and Tobin's friend Gomez ended up on some steps together behind the restaurant. RP 277. Gomez was reportedly drinking a beer and sharing a joint with Tobin. RP 272, 274-75.

While Lusko claimed he was brought to the steps unwillingly (RP 277), Rios – who lived nearby and happened to look out his window – saw a different scene. RP 177. When Rios first got home, he saw three men on the steps to an apartment building behind the restaurant. RP 174, 191.

He recognized Lusko, Tobin and Tobin's friend, whom Rios described as "laughing, giggling." RP 174-75. Rios had seen Tobin and the other man earlier that evening in front of the restaurant. RP 151-52. Tobin had an electric wheelchair and had tried to sell it to Rios a couple of days earlier. RP 151-52, 410. Rios thought the group was having fun and went to watch television for a while. RP 177.

About ten minutes later, Rios looked out his window again. RP 178. This time, he saw Lusko falling and being attacked. RP 178. Rios called 911 and left his house to help. RP 178. As he walked down the stairs, Rios reportedly saw Tobin's friend jumping on Lusko. RP 179. Rios testified Tobin was standing on the other side of Lusko, but Rios did not see him assault Lusko. RP 179. By the time Rios reached Lusko, the men had left. RP 180.

Lusko testified that suddenly, "there were three of them, and there was six fists at my head at once." RP 275. Lusko testified all three men were hitting him, but he kicked the tall, skinny one in the groin and he "ran behind a tree and cried." RP 276.

Meanwhile, Lusko testified the Hispanic man remained on one side of him, while the African American man stood on the other. RP 276. They reportedly made derogatory threats, such as: "Goddamn it. Let's kill this faggot so faggot corner is over with. Done." RP 277.

Lusko testified he tried to crawl away, but the Hispanic man smothered him, while the African American man pinned him down. RP 279. According to Lusko:

> They say, smother the faggot so he's dead. Faggot corner will be over. And cut out his finger for that ring. Then the Hispanic did this (indicating) before that take a deep breath. He did this. I totally relaxed. Then I was pushed to the ground so my face rubbed in this – whatever that was down there, the black tar, sidewalk.
>
> Then I immediately was out. I didn't even really, at all, felt scared [sic] of it. I didn't feel smothered. I didn't even know I was smothered at all. But I woke up later, nothing on waist up, with teeth in front of me on the street. And my mouth – I crawled back to Inay's, and had just caught them down the street wearing my clothing because they thought I was dead, they could get away with it. Dead. They decided they should go put on my clothes. What is going on with society today? And then the police drove down the street and they all came to me.

RP 280.

Meanwhile, Rios followed the men southbound on 15th Avenue South toward South Lander Street. RP 181, 185. Rios testified Tobin was wearing Lusko's fur coat. RP 185. At some point, the men were joined by another, taller man. RP 184-185. Rios flagged down one of the responding officers and pointed the men out. RP 181, 184.

Aaron Johnson was the officer Rios flagged down. RP 323. At first, Johnson saw only two men walking, one of whom was a taller, black man and the other Caucasian or possibly Hispanic. RP 322. By the time

Johnson came to a stop on South Lander, a third man in a wheelchair had joined them. RP 325-27. The three were identified as Carl Tobin, who was in the wheelchair, Antonio Gomez and John Austin. RP 332. Tobin was wearing a brown fur coat. RP 327. Johnson took the coat as evidence; it was in two pieces. RP 344, 358.

Rios arrived and identified Tobin and Gomez as the two he had seen beating Lusko. RP 186, 325, 340. Rios indicated he had not actually seen Austin involved, so Johnson let him go. RP 340.

Meanwhile officer Azrielle Johnson responded to the restaurant, where medics were treating Lusko. RP 216-17. According to Azrielle Johnson, Lusko was lying on the ground "and all of his items from his pockets, like his cell phone and some stuff, were laying around him on the ground." RP 216.

Azrielle Johnson testified Lusko was: "Very upset. Very – just shocked. "He was talking about his coat and how the suspects had ripped it from him and taken it." RP 220.

Lusko remembered the conversation differently:

> Q [prosecutor]. Let me ask you, though, when you told them what had been stolen at that time –
>
> A. I didn't tell them anything was stolen.
>
> Q. Well, what about your coat?

A. I said waist up everything was gone. I didn't tell them anything. Apparently these people were wearing something that they couldn't imagine winning on the Price is Right. I mean, truly.

Q. And – but you told them that you had been wearing this fur coat. You told the police that?

A. Oh, yeah, when they asked me. Well, yes, yes.

RP 284.

Tobin denied participating in the assault or taking Lusko's coat. RP 439. Tobin had been charging his electric wheelchair at the Mexican restaurant next to Inay's and went to check on it and get some food. RP 426-27. When he returned to the apartment steps where they had been hanging out, he saw Gomez and a tall, dark man assaulting Lusko. RP 427. Tobin believed the tall dark man to be John Austin. RP 427.

When Tobin asked, "What the hell are you guys doing," Austin ran around the corner. RP 429. Tobin pulled Gomez off Lusko and ushered him up toward the front of the restaurant, where Tobin retrieved his wheelchair. RP 429-30. Around this same time, Tobin saw Rios approaching, and therefore, believed aid would be coming for Lusko. RP 429.

Tobin and Gomez were heading south on 15th when Austin "came out from nowhere" and joined them. RP 434. Tobin testified Austin had Lusko's coat. RP 434. After going through it, Austin discarded it. RP

434. Tobin – who had been sick and was cold – picked it up. "And at that point the police rolled up." RP 434.

3. Court of Appeals Decision

On Appeal, Tobin argued the evidence was insufficient to convict him of robbery, because the state failed to present evidence sufficient for jurors to reasonably conclude force was used *to obtain or retain possession* of Lusko's coat. Rather, the evidence indicated the coat was taken as an afterthought following the assault, after Lusko was unconscious. Brief of Appellant (BOA) at 19-23.

Division One disagreed there was insufficient evidence from which a jury could infer Tobin used force for the purpose of taking property from Lusko, pointing to the statements made about cutting off Lusko's finger for his ring, the fact the coat was torn in two when confiscated by police, and on grounds "Tobin's statements in the police car indicate that he was aware he had committed robbery." Appendix A at 4.

Alternatively, Tobin argued his convictions should be reversed because the manner in which peremptory challenges were exercised – by passing a sheet of paper back and forth – violated his right to a public trial to the same extent any in-chambers conference or courtroom closure would have. BOA at 23-27.

Again, Division One disagreed, reasoning the courtroom was not closed:

> Tobin was present for the exercise of peremptory challenges, during which time the courtroom was open to the public. Once the parties had written their challenges on the form provided by the trial court, the trial court excused the prospective jurors on the record. The form utilized by the parties listed the prospective jurors who were removed by the peremptory challenge, as well as the order in which each challenge was made and the party who made it. The form was then filed in the court record. Though Tobin takes issue with the fact that the challenges were exercised in writing rather than orally, calling the procedure "similar to a sidebar," the public was entitled to be present during the proceedings and to view the record of what transpired.

Appendix A at 5-6.

E. REASONS WHY REVIEW SHOULD BE ACCEPTED AND ARGUMENT

1. THIS COURT SHOULD ACCEPT REVIEW OF THE PUBLIC TRIAL RIGHT ISSUE, BECAUSE DIVISION I'S DECISION CONFLICTS WITH DIVISION III'S DECISION IN STATE V. LOVE, THIS COURT'S DECISION IN STATE V. WISE, AND INVOLVES A SIGNIFICANT QUESTION OF LAW UNDER THE STATE AND FEDERAL CONSTITUTIONS THAT SHOULD BE RESOLVED BY THIS COURT AS A MATTER OF SUBSTANTIAL PUBLIC INTEREST.

The court took peremptory challenges based on a piece of paper passed back and forth between the parties. CP 95. Contrary to the court of appeals decision, this procedure amounts to a courtroom closure to the same extent as any in-chambers conference. See e.g. State v. Love, 176

Wn. App. 911, 915-16, 309 P.3d 1209 (2013) (rejecting state's "bright line rule" that for-cause challenges conducted at sidebar in open court did not constitute a courtroom closure); see also Commonwealth v. Cohen, 456 Mass. 94, 921 N.E.2d 906 (2010) (citing cases addressing limited closures).

Moreover, the fact that the court announced the excused jurors in court afterward and filed the peremptory challenges sheet does not obviate the public trial right violation, as the public – absent a photographic memory – would be hard pressed to associate numbers with faces, as the court dismissed the challenged jurors all at once and the challenges sheet only lists the numbers of those jurors challenged. Appendix B at 3-4; CP 95.

Thus, looking at the peremptory challenges sheet in the cold court record would be of no assistance to a member of the public wondering if it was the state or defense that dismissed the only African American juror, for example, in a prosecution against another African American. Not surprisingly, this Court has found a defendant's public trial right violated by individual questioning of jurors in chambers, even though the questioning was recorded and transcribed. State v. Wise, 176 Wn.2d 1, 7-8, 288 P.3d 1113 (2012).

The Sixth Amendment to the United States Constitution and article I, section 22 of the Washington Constitution guarantee the accused a public trial by an impartial jury.[6] Presley v. Georgia, 558 U.S. 209, 130 S. Ct. 721, 724, 175 L. Ed. 2d 675 (2010); State v. Bone-Club, 128 Wn.2d at 261-62. Additionally, article I, section 10 of the Washington Constitution provides that "[j]ustice in all cases shall be administered openly, and without unnecessary delay." This latter provision gives the public and the press a right to open and accessible court proceedings. Seattle Times Co. v. Ishikawa, 97 Wn.2d 30, 36, 640 P.2d 716 (1982).

While the right to a public trial is not absolute, a trial court may restrict the right only "under the most unusual circumstances." Bone-Club, 128 Wn.2d at 259. Before a trial judge can close any part of a trial, it must first apply on the record the five factors set forth in Bone-Club. In re Personal Restraint of Orange, 152 Wn.2d 795, 806-09, 100 P.3d 291 (2004).

The public trial right applies to "'the process of juror selection,' which 'is itself a matter of importance, not simply to the adversaries but to the criminal justice system.'" Orange, 152 Wn.2d at 804 (quoting Press-

[6] The Sixth Amendment provides in pertinent part that "[i]n all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury . . . ." Article I, section 22 provides that "[i]n criminal prosecutions the accused shall have the right . . . to have a speedy public trial by an impartial jury . . . ."

Enter. Co. v. Superior Court, 464 U.S. 501, 505, 104 S. Ct. 819, 78 L. Ed. 2d 629 (1984)). The right to a public trial includes "circumstances in which the public's mere presence passively contributes to the fairness of the proceedings, such as deterring deviations from established procedures, reminding the officers of the court of the importance of their functions, and subjecting judges to the check of public scrutiny." State v. Slert, 169 Wn. App. 766, 772, 282 P.3d 101 (2012), review granted, 176 Wn.2d 1031 (2013) (S. Ct. No. 87844-7).[7]

The peremptory challenge process, an integral part of jury selection,[8] is one such proceeding: While peremptory challenges may be exercised based on subjective feelings and opinions, there are important constitutional limits on both parties' exercise of such challenges. Georgia v. McCollum, 505 U.S. 42, 49, 112 S. Ct. 2348, 120 L. Ed. 2d 33 (1992); Batson v. Kentucky, 476 U.S. 79, 106 S. Ct. 1712, 90 L. Ed. 2d 69 (1986). Based on these crucial constitutional limitations, public scrutiny of the exercise of peremptory challenges is more than a procedural nicety; it is required by the constitution. See Slert, 169 Wn. App. at 772 (explaining need for public scrutiny of proceedings).

[7] In Slert, the court of appeals reversed Slert's conviction, holding that an in-chambers conference at which various jurors were dismissed based on their answers to a questionnaire violated his right to a public trial. 169 Wn. App. at 778-79.

[8] People v. Harris, 10 Cal.App.4th 672, 684, 12 Cal.Rptr.2d 758 (1992).

Contrary to the court of appeals decision in this case, the procedure by which peremptory challenges were taken violated the defendant's right to a public trial. The procedure was similar to a sidebar, which occurs outside of the public's scrutiny, and thus violates the appellant's right to a fair and public trial. See e.g. Slert, 169 Wn. App. at 774 n. 11 (rejecting argument that no violation occurred if jurors were actually dismissed not in chambers but at a sidebar and stating "if a side-bar conference was used to dismiss jurors, the discussion would have involved dismissal of jurors for case-specific reasons and, thus, was a portion of jury selection held wrongfully outside Slert's and the public's purview"); see also Harris, 10 Cal.App.4th at 684, (exercise of peremptory challenges in chambers violates defendant's right to a public trial).[9]

Because Division I's decision conflicts with Division III's decision recognizing the concept of "limited closure" for purposes of the public trial right and this Court's decision in Wise recognizing the availability of a record does not obviate a violation of the public trial right, this Court should accept review. RAP 13.4(b)(1), (2). Whether the public trial right extends to the peremptory challenge portion of voir dire is also an issue of

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[9] Cf. People v. Williams, 26 Cal.App.4th Supp. 1, 7-8, 31 Cal.Rptr.2d 769 (1994) (peremptory challenges could be held at sidebar to permit party opponent to make motion based on state version of Batson, 476 U.S. 79, if challenges and party making them were then announced in open court).

substantial public interest as this Court's recent acceptance of other cases with similar issues indicates. See e.g. Slert, 169 Wn. App. 766, supra; State v. Njonge, 161 Wn. App. 568, 255 P.3d 753 (2011), review granted, 176 Wn.2d 1031 (2013) (S. Ct. No. 86072-6) (Whether in this criminal prosecution the trial court violated the defendant's constitutional right to a public trial when it closed the courtroom to spectators while considering and ruling on the dismissal of some prospective jurors for hardship). RAP 13.4(b)(4).

2. THIS COURT SHOULD ACCEPT REVIEW BECAUSE DIVISION I'S DECISION CONFLICTS WITH THIS COURT'S DECISION IN LARSON AND INVOLVES A SIGNIFICANT QUESTION UNDER THE STATE AND FEDERAL CONSTITUTIONS.

In every criminal prosecution, due process requires that the State prove every fact necessary to constitute the charged crime beyond a reasonable doubt. In re Winship, 397 U.S. 358, 364, 25 L. Ed. 2d 368, 90 S. Ct. 1068 (1970). Where a defendant challenges the sufficiency of the evidence, the proper inquiry is, when viewing the evidence in the light most favorable to the prosecution, whether there was sufficient evidence for a rational trier of fact to find guilt beyond a reasonable doubt. Jackson v. Virginia, 443 U.S. 307, 319, 61 L. Ed. 2d 560, 99 S. Ct. 2781 (1979).

A person commits robbery when "he or she unlawfully takes personal property from the person of another or in his or her presence against his or her will by the use or threatened use of immediate force, violence, or fear of injury to that person . . . ." RCW 9A.56.190. "Such force or fear must be used to obtain or retain possession of the property, or to prevent or overcome resistance to the taking . . . ." Id. Moreover, the crime requires an intent to steal. State v. Kjorsvik, 117 Wn.2d 93, 98, 812 P.2d 86 (1991).

The most recent and thorough discussion of the robbery statute's requirements is found in State v. Allen, 159 Wn.2d 1, 147 P.3d 581 (2006). Allen was a 5-4 decision in which the majority found the evidence sufficient to convict the defendant of aggravated first-degree murder with robbery as the aggravating factor. Allen, 159 Wn.2d at 11. Although the Court was split on whether the evidence in that particular case was sufficient to demonstrate a robbery, there was no split on the robbery statute's requirements, discussed at length in the dissenting opinion authored by Justice Alexander. See Allen, 159 Wn.2d at 11-16 (Alexander, J., dissenting).

As pointed out by Justice Alexander, Washington long ago departed from the broader view that the use of any force prior to a theft necessarily demonstrates robbery. Id. at 12 (citing State v. Handburgh,

119 Wn.2d 284, 293, 830 P.2d 641 (1992)). Rather, "the force must relate to the taking or retention of property, either as force used directly in the taking or retention or as force used to prevent or overcome resistance 'to the taking.'" Id. at 13 (quoting State v. Johnson, 155 Wn.2d 609, 611, 121 P.3d 91 (2005)).

Thus, consistent with this relatively narrow definition of robbery, "'the mere taking goods from an unconscious person, without force, or the intent to use force, is not robbery, unless such unconsciousness was produced expressly for the purpose of taking the property in charge of such person.'" State v. Larson, 60 Wn.2d 833, 835, 376 P.2d 537 (1962) (quoting 2 Francis Wharton, Wharton's Criminal Law § 1092, at 1390 (12th ed. 1932)).

Here, the State failed to present evidence sufficient for jurors to reasonably conclude force was used *to obtain or retain* possession of Lusko's coat. Rather, the evidence indicates the coat was taken as an afterthought following the assault, after Lusko was unconscious.

While the appellate court makes note of statements concerning cutting off Lusko's finger, the property allegedly stolen was Lusko's coat, not his ring. Moreover, the fact the coat was in two pieces sheds little light on anything, as it was just as likely ripped during the assault.

Finally, Tobin's speculation as to what crime or crimes he could be charged with is no substitute for evidence. See appendix A at 4.

Lay people frequently mischaracterize the nature of crime. For instance, television is replete with shows in which a homeowner comes home to find his house has been burglarized, but the homeowner tells police he has been robbed. The appellate court's decision therefore conflicts with this Court's decision in Larson and involves a significant question of law under the state and federal constitutions. RAP 13.4(b)(1), (3).

F. CONCLUSION

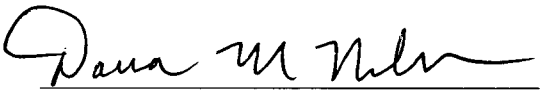
This Court should accept review of the sufficiency of the evidence issue, as it conflicts with this Court's decision in Larson, and involves a significant question of law under the state and federal constitutions. RAP 13.4(b)(1), (3).

This Court should also accept review of the public trial right issue because Division I's decision conflicts with this Court's decision in Wise and Division III's decision in Love and involves a significant question of the law under the state and federal constitution for which there is a substantial public interest. RAP 13.4(b)(1), (2), (3), (4).

Dated this 12th day of February, 2014.

Respectfully submitted,

NIELSEN, BROMAN & KOCH



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APPENDIX A

IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON

STATE OF WASHINGTON, Respondent, v. CARL STEVEN TOBIN, Appellant.	)	No. 69328-0-I DIVISION ONE UNPUBLISHED OPINION FILED: January 13, 2014

SPEARMAN, A.C.J. – Carl Tobin appeals the judgment and sentence imposed following his convictions for first degree robbery and malicious harassment. Tobin claims that the State's evidence was insufficient to convict on the robbery charge and that his right to an open and public trial was violated when peremptory challenges were exercised in writing instead of orally. We affirm.

FACTS

On December 23, 2011, Daniel Lusko went to a restaurant in the Beacon Hill neighborhood of Seattle with some friends. Lusko was wearing a fur coat and had a gold ring on one of his fingers. Lusko stayed at the restaurant until it closed around 9:30 p.m. Soon after he left, Lusko realized he had left some of his possessions inside the restaurant, but the restaurant's front door was locked. Tobin, who was sitting outside the restaurant, suggested that Lusko go into the alley next to the restaurant and knock on the restaurant's side door.

Lusko testified that Tobin and two other men followed him into the alley and began kicking him and stomping on him. During the assault, Tobin said, "smother the

faggot so he's dead" and "cut out his finger for that ring." Report of Proceedings (RP) (8/15/12) at 280. One of the three men ran away when Lusko managed to kick him. Tobin and the remaining man, Antonio Gomez, then shoved Lusko's face into the ground and Lusko lost consciousness. When Lusko woke up, the men were gone and he was no longer wearing his coat. A witness saw Tobin walking away from the assault wearing Lusko's coat.

Law enforcement officers called to the scene located Tobin and the two other men. Tobin was wearing Lusko's coat. The coat had been ripped in half. Tobin and Gomez were arrested and placed in the back of a police car together. The arresting officer activated the police car's audio system and informed Tobin that anything he said inside the car would be recorded. Despite this, Tobin made several incriminating statements, including: "'[I]t's robbery...that's twenty to life. You gotta be fucked up. I didn't do shit to nobody. Nothing...and neither did you. That's my story.'" Exhibit 23, at 3.

Prior to jury selection, the trial court explained to the parties its process for challenging jurors. For peremptory challenges, the parties were instructed to take turns writing their challenges on a form that they would pass back and forth. The parties conducted peremptory challenges in this fashion as the trial court made some opening remarks to the jury pool. The trial court then excused the challenged prospective jurors and impaneled the jury. The form upon which the State and defense counsel wrote their peremptory challenges was filed in the record that same

day. The clerk's minutes indicate that Tobin was present in the courtroom throughout these proceedings, and there was no evidence that the courtroom was closed to the public during this time.

The jury found Tobin guilty as charged. Tobin appeals.

DISCUSSION

Sufficiency of the Evidence

Evidence is sufficient to support a conviction if, viewed in the light most favorable to the State, it permits any rational trier of fact to find the essential elements of the crime beyond a reasonable doubt. State v. Salinas, 119 Wn.2d 192, 201, 829 P.2d 1068 (1992). All reasonable inferences from the evidence must be drawn in favor of the State and against the defendant. Salinas, 119 Wn.2d at 201. Circumstantial evidence and direct evidence are equally reliable. State v. Thomas, 150 Wn.2d 821, 874, 83 P.3d 970 (2004).

A person commits robbery by unlawfully taking property from another person against that person's will by the use or threatened use of force, violence or fear of injury. RCW 9A.56.190. "Such force or fear must be used to obtain or retain possession of the property, or to prevent or overcome resistance to the taking . . . . Such taking constitutes robbery whenever it appears that, although the taking was fully completed without the knowledge of the person from whom taken, such knowledge was prevented by the use of force or fear." RCW 9A.56.190.

The intent to steal is an essential, nonstatutory element of the crime of robbery. State v. Kjorsvik, 117 Wn.2d 93, 98, 812 P.2d 86 (1991). "[T]he force must

relate to the taking or retention of the property, either as force used directly in the taking or retention or as force used to prevent or overcome resistance 'to the taking.'" State v. Johnson, 155 Wn.2d 609, 611, 121 P.3d 91 (2005). The mere taking of goods from an unconscious person, without force or the intent to use force, is not robbery unless such unconsciousness was produced "'expressly for the purpose of taking the property in charge of such person.'" State v. Larson, 60 Wn.2d 833, 835, 376 P.2d 537 (1962).

Tobin argues that the State's evidence was insufficient to show that force was used for the purpose of obtaining or retaining possession of Lusko's coat. Tobin argues that he merely beat Lusko into unconsciousness and then stripped him of the coat as an afterthought. But there was both direct and circumstantial evidence sufficient to show that Tobin used force for the purpose of taking property from Lusko. During the crime, Tobin told Gomez to cut Lusko's finger off so they could get his ring. When Tobin was apprehended wearing the coat, it was ripped in half, indicating that it was taken from Lusko with a great deal of force. Finally, Tobin's statements in the police car indicate that he was aware he had committed robbery. This evidence was sufficient to permit a reasonable jury to infer that acquiring the coat was one of Tobin's purposes for assaulting Lusko.

Public Trial

Tobin contends that the exercise of peremptory challenges in writing instead of orally amounted to a courtroom closure that violated his right to a public trial. We disagree.

The right of a criminal defendant to a public trial is guaranteed by both the Sixth Amendment to the U.S. Constitution and article I, section 22 of the Washington Constitution. State v. Bone-Club, 128 Wn.2d 254, 261-62, 906 P.2d 325 (1995). Additionally, article I, section 10 of the Washington Constitution guarantees the public's open access to judicial proceedings. Seattle Times Co. v. Ishikawa, 97 Wn.2d 30, 36, 640 P.2d 716 (1982). The court may close a portion of a trial to the public only if the court openly engages in the five-part balancing test outlined in Bone-Club.[1] A closure "occurs when the courtroom is completely and purposefully closed to spectators so that no one may enter and no one may leave." State v. Lormor, 172 Wn.2d 85, 93, 257 P.3d 624 (2011).

The record does not support Tobin's claim that the courtroom was closed. Tobin was present for the exercise of peremptory challenges, during which time the courtroom was open to the public. Once the parties had written their challenges on the form provided by the trial court, the trial court excused the prospective jurors on the record. The form utilized by the parties listed the prospective jurors who were removed by

[1] The five factors are: (1) the proponent of closure must make a showing of compelling need; (2) any person present when the motion is made must be given an opportunity to object; (3) the means of curtailing open access must be the least restrictive means available for protecting the threatened interests; (4) the court must weigh the competing interests of the public and of the closure; and (5) the order must be no broader in application or duration than necessary. Bone-Club, 128 Wn.2d at 258-59.

peremptory challenge, as well as the order in which each challenge was made and the party who made it. The form was then filed in the court record. Though Tobin takes issue with the fact that the challenges were exercised in writing rather than orally, calling the procedure "similar to a sidebar," the public was entitled to be present during the proceedings and to view the record of what transpired. The procedure by which peremptory challenges were exercised satisfied both Tobin's right to a public trial and the public's right to the open administration of justice.

Affirmed.

Spearman, A.C.J.

WE CONCUR:

Schindler, J.

Cox, J.

APPENDIX B

IN THE SUPERIOR COURT OF THE STATE OF WASHINGTON

IN AND FOR THE COUNTY OF KING

STATE OF WASHINGTON,	)	
	)	
Respondent,	)	
	)	
vs.	)	No. 11-1-08546-1 SEA
	)	
CARL TOBIN,	)	Appeal No. 69328-0-I
	)	
Appellant.	)	
	)	

SUPPLEMENTAL EXCERPT OF TRIAL PROCEEDINGS

AUGUST 14, 2012

APPEARANCES:

For the State:	MARGARET NAVE Deputy Prosecuting Attorney
For the Defendant:	THERESA GRIFFIN Attorney at Law
BEFORE:	THE HONORABLE BARBARA LINDE
PREPARED BY:	R.V. WILSON Wilson Transcription Services (425) 391-4218

I N D E X

WITNESSES:	DIRECT	CROSS	REDIRECT	RECROSS

(None Offered)

* * *

EXHIBITS FOR IDENTIFICATION	MARKED	RECEIVED

(None Offered)

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P R O C E E D I N G S

AUGUST 14, 2012

* * * * * * * *

(11:10:53 to 11:14:39

THE COURT: So thanks go out to the following jurors: Juror 3, 7, 11, 12 and 13 in the jury box. You can leave your badges and placards behind on that podium right there. You can set them or Trish can take them from you, but you're excused at this time. That's 3, 7, 11, 12 and 13.

Also, Jurors 14, 15, 16, 17, 19 and 25 may all be excused at this time. Again, our thanks very much. Your badge can be given to the bailiff or left on the podium and your bigger number on the bench. Thank you.

And now what I'm going to do is ask you to put your cards back up so I can read them and I'm going to have Juror No. 18 -- would you please come forward -- actually, 18, 20 and 21, you can all move out of the bench because you're all going to be coming forward. 18, I'm going to have you fill in in Position 3 in the front row. Juror 20, you will take Position 7 in the front row. And, Juror 21, in Position 8 in the back row. So you can come around front. It's probably a

little easier. Right up here will get you there as well. And, Juror 23, you'll be in Position No. 11. Please come forward. 24 in Position 12. And 27 in Position 13.

So if I have my numbers correct -- and the attorneys aren't telling me I've made some mistake and misinterpreted their comments -- we will now thank and excuse Jurors 28 through 48 or -9, and thank you so much for your service. Hope you have a great rest of your day, and I really hope that the next time you get a jury summons in the mail you'll do just what you did this time and respond. Thank you.

So, ladies and gentlemen of the jury, I'm going to ask that you stand now to take the oath of juror.

CLERK: Please raise your right hand.

Do you solemnly swear or affirm that you will well and truly try the matter before the State of Washington and this defendant and return a true verdict according to the evidence and the instructions of the court? If so, please say "I do."

(PROSPECTIVE JURORS RESPOND "I DO.")

THE COURT: Thank you. Please be seated.

Ladies and gentlemen, as I indicated, the trial begins with open statement. We do need to get you your notebooks and pens, however, the evidence portion

doesn't begin until the witnesses actually testify. And so I think we'll get these handed out to you before we begin opening statement, but I would ask that if you do take notes on opening statement, following opening statement you draw a big line so you can tell the difference between an attorney's opening statement and a witness' testimony.

As we take every recess, including the noon recess, which will be coming up before too long, I will instruct you to close your notebooks and leave them on your chair, and at the end of the day they'll be secured overnight and every time you leave that box you're going to leave it on your chair in a closed condition until such time as you're deliberating, that's when you take it with you. Okay?

So, Counsel, whenever you're ready. Ladies and gentlemen, I'd like you to give your attention to counsel who will make opening statement initially on behalf of the State.

MS. NAVE: Thank you, your Honor.

(STATE'S OPENING STATEMENT.)

(DEFENSE OPENING STATEMENT.)

* * * * * * * *

C E R T I F I C A T E

STATE OF WASHINGTON)
)
COUNTY OF KING)

I hereby declare under penalty of perjury that the foregoing transcript of proceedings was prepared by me from electronic recordings of the proceedings, monitored by me and reduced to typewriting to the best of my ability;

That the transcript is, to the best of my ability, a full, true and correct record of the proceedings, including the testimony of witnesses, questions and answers, and all objections, motions and exceptions of counsel made and taken at the time of the proceedings;.

That I am neither attorney for, nor a relative or employee of any of the parties to the actions; further, that I am not a relative or employee of any attorney or counsel employed by the parties hereto, nor financially interested in its outcome.

(Date) R.V. WILSON

IN THE SUPREME COURT OF THE STATE OF WASHINGTON

STATE OF WASHINGTON Respondent, v. CARL TOBIN, Petitioner.	)	SUPREME COURT NO. _____ COA NO. 69328-0-II

DECLARATION OF SERVICE

I, PATRICK MAYOVSKY, DECLARE UNDER PENALTY OF PERJURY UNDER THE LAWS OF THE STATE OF WASHINGTON THAT THE FOLLOWING IS TRUE AND CORRECT:

THAT ON THE 12TH DAY OF FEBRUARY, 2013, I CAUSED A TRUE AND CORRECT COPY OF THE **PETITION FOR REVIEW** TO BE SERVED ON THE PARTY / PARTIES DESIGNATED BELOW BY EMAIL AND/OR DEPOSITING SAID DOCUMENT IN THE UNITED STATES MAIL.

[X] CARL TOBIN
DOC NO. 909668
STAFFORD CREEK CORRECTIONS CENTER
191 CONSTANTINE WAY
ABERDEEN, WA 98520

SIGNED IN SEATTLE WASHINGTON, THIS 12TH DAY OF FEBRUARY, 2013.

X Patrick Mayovsky