NO. 30850-2-III

IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON

DIVISION THREE

STATE OF WASHINGTON,

Respondent,

v.

ROBERT MIDDLEWORTH,

Appellant.

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

APPELLANT'S REPLY BRIEF

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A. SUMMARY OF REPLY

Mr. Middleworth's right to be present and the right to a public trial were violated when the court held an in-chambers conference regarding disputed factual issues and other pretrial matters. The jury instructions violated his right to be free from double jeopardy because they allowed the jury to convict him of multiple counts for the same act. The court's instructions and statements by the deputy prosecuting attorney equating the beyond reasonable doubt standard with a belief in the truth diluted the burden of proof. Also, a mistrial should have been granted for the State's failure to produce evidence that tended to negate Mr. Middleworth's guilt. These errors require reversal standing alone or, at least, in the cumulative as it cannot be said Mr. Middleworth had a constitutionally fair trial.

This brief addresses many of the State's unavailing arguments in response. Where Mr. Middleworth has elected not to reply, no concession of the State's arguments is intended. Mr. Middleworth also does not agree with the State's characterization of the facts. His recitation of the facts is set forth in full at pages 5 through 11 of the opening brief.

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B. ARGUMENT IN REPLY

1. The Court should reject the State's characterization of the in-chambers proceedings and hold the trial court violated Mr. Middleworth's constitutional right to be present by excluding him.

As set forth in the opening brief, Mr. Mortenson's constitutional right to be present was violated when the trial court excluded him from an in-chambers, evidentiary, pretrial hearing. The federal constitution guarantees Mr. Mortenson's right to be present at critical stages, including where disputed facts are addressed. U.S. Const. amends. VI, XIV; *In re Pers. Restraint of Lord*, 123 Wn.2d 296, 868 P.2d 835 (1994). A defendant's right to be present extends beyond critical stages under our state constitution because Article I, § 22 contains an explicit right to "appear and defend in person." Const. art. I, § 22; *State v. Irby*, 170 Wn.2d 874, 884-85, 246 P.3d 796 (2011). Because Mr. Mortenson's substantial rights may have been affected by the closed hearing, he had a state constitutional right to be present. *E.g.*, *id.*

The Court should reject the State's characterization of the in-chambers hearing as a "status conference." *E.g.*, Resp. Br. at 8. The trial court put the hearing on the record, an indication that the hearing would not proceed as one of its standard conferences to discuss readiness for trial. III RP 364-65. Although the court said it would not make any

"decisions or discussions . . . that will dictate how we proceed during the trial," the record demonstrates that such decisions were made. III RP 354-55, 365, 372-73. The substance of the hearing demonstrates Mr. Mortenson had a constitutional right to be present, regardless of what the State or court calls the hearing.

The State also mischaracterizes the court's treatment of its prior ruling on excluding evidence of B.'s foster care placement. *See* Resp. Br. at 11-12. Although the judge stated, "I am not going to change that ruling[,]" he proceeded to do precisely that. III RP 372-73.

The State argues that the court's alteration of its pretrial foster care evidence ruling did not implicate Mr. Mortenson's right to be present because "nothing would have prevented an objection to a ruling at a true hearing." Resp. Br. at 11. The State's argument misses the mark. First, the State cites no authority for the proposition that the availability of a subsequent opportunity to object dictates whether the defendant has a right to be present when a ruling is actually made. Second, such a rule would not make sense. The critical opportunity to persuade arises while the court considers the issue. Moreover, the parties can virtually always try to move to change a court's ruling or lodge a subsequent objection regardless when or where the initial ruling is made. The State's argument therefore provides no basis upon which to distinguish among the issues considered.

The State also incorrectly labels the factual discussion of evidence pertaining to the presence of the herpes simplex virus as "administrative." Resp. Br. at 12-13. The State reported what its expert's opinion was regarding the presence of the virus in Mr. Mortenson and the utility of certain tests. III RP 373-74. As defense counsel argued, the matter was critical because the defense expert disputed the ability of these tests to show whether the virus was active in Mr. Mortenson. III RP 374-76. Mr. Mortenson's right to be present was implicated because the matter was central to the case and involved factual matters in which Mr. Mortenson could exclusively provide input. It was not purely administrative; the evidence was contested and essential to the State's case. *E.g.*, 4/2/12 RP 94 (State focuses on herpes evidence in opening statement); VII RP 973-74 (State relies on herpes evidence in closing); CP 414, 416, 427, 430 (defense motions and pleadings).

Because Mr. Mortenson's federal and state constitutional rights to be present were violated, his convictions should be reversed.

2. The in-chambers hearing also violated the right to a public trial.

The State improperly argues the in-chambers, pretrial proceedings did not violate the constitutional right to a public trial. Regardless of how the court characterized the proceedings, the record demonstrates the

conference was held in the judge's chambers, the door was shut, the defendant was not allowed to attend, and no other attorneys, parties, witnesses or members of the public were permitted inside the closed door. III RP 364-65. The presence of a sealed record does not render the proceedings open. III RP 364-65; *Press-Enterprise Co. v. Superior Court*, 478 U.S. 1, 12, 106 S. Ct. 2735, 92 L. Ed. 2d 1 (1986) (*Press II*); *In re Detention of D.F.F.*, 172 Wn.2d 37, 46-47, 48-49, 256 P.3d 357 (2011).

The State's unsupported contention that the only likely attendees at a hearing, if it had been open to the public, would be attorneys is not relevant to the experience and logic test or to the principles underlying the public trial right. *See* Resp. Br. at 15-16. The public trial right ensures the fairness of proceedings and reminds the prosecutor and judge of their responsibility to the accused and the importance of their functions. *State v. Brightman*, 155 Wn.2d 506, 514, 122 P.3d 150 (2005). It does not turn on the actual interest of the public in the particular subject matter of the proceeding. In ensuring fairness, the process of the trial is just as important as the testimony of witnesses.

Moreover, the State's argument presumes that the in-chambers hearing merely addressed "ministerial" matters. Resp. Br. at 15-16. As discussed, however, in-chambers the court discussed pretrial rulings, the nature of expert testimony critical to the State's case and Mr.

Middleworth's defense, Mr. Middleworth's motion for new counsel, and a defense expert report. This was not ministerial, and it was not a mere status conference.

The contrast is readily apparent from the State's own argument. The State argues that a status conference is limited to "a single question: is everyone ready to go?" Resp. Br. at 16. The State contends that a status conference has "no motions, no arguments, no rulings, no continuances requested or granted." Resp. Br. at 16. But here the record is clear the court did not simply ask "is everyone ready to go?" Instead, the court questioned counsel on Mr. Middleworth's motion for new counsel, heard arguments from the parties regarding the herpes testing and expert opinions, ruled on a previously heard motion, amended its ruling on a pretrial motion in limine, and discussed another expert report. III RP 364-78. The in-chambers hearing here was not the simple status conference of the State's imagination.

Mr. Middleworth's right to a public trial and the public's right to open access to the court system serve "complementary and interdependent functions in assuring the fairness of our judicial system." *State v. Bone-Club*, 128 Wn.2d 254, 259, 906 P.2d 325 (1995); Const. art. I, § 10; Const. art I, § 5; Const. art I, § 22; U.S. Const. amends. I, VI. The guarantee of a public trial benefits the accused by ensuring "that the public may see he is

fairly dealt with and not unjustly condemned, and that the presence of interested spectators may keep his triers keenly alive to a sense of their responsibility and to the importance of their functions." *Bone-Club*, 128 Wn.2d at 259 (quoting *In re Oliver*, 333 U.S. 257, 270 n.25, 68 S. Ct. 499, 92 L. Ed. 682 (1948)). "Openness thus enhances both the basic fairness of the criminal trial and the appearance of fairness so essential to public confidence in the system." *Press-Enterprise v. Superior Court*, 464 U.S. 501, 508, 104 S. Ct. 819, 78 L. Ed. 2d 629 (1984). The right to a public trial includes the right to public access to pretrial proceedings. *E.g.*, *State v. Lormor*, 172 Wn.2d 85, 93, 257 P.3d 624 (2011); *Bone-Club*, 128 Wn.2d at 257.

Mr. Middleworth's constitutional right to a public trial was violated by the in-chambers pretrial hearing. The matter must be remanded for a new trial.

3. Mr. Middleworth's conviction for child molestation should be dismissed because it violates his constitutional right to be free from double jeopardy.

As set forth in Mr. Middleworth's opening brief, the trial court should have provided the requested separate and distinct act jury instruction. The trial involved two counts occurring over the same charging period—one count of child molestation and one count of rape of a child. Mr. Middleworth proposed the separate and distinct act

instruction to ensure the jury did not convict him of both crimes for a single act. But the trial court erroneously denied the proposed instruction.

Contrary to the State's contention, the prosecutor did not describe separate and distinct acts of rape and molestation. *See* Resp. Br. at 21, 22. In closing, the prosecutor discussed B.'s testimony that Mr. Middleworth touched her on different occasions. VII RP 976. However, she did not distinguish between sexual contact and sexual intercourse. *Id.* In the section of argument relied on by the State, the prosecutor argued,

> [B.] was able to tell you that she was watching at one point, Sponge Bob, and that he come over and turned the television off and her words to Rachel Marsh were that he laid me down. She describe [sic] for you various occasions where he would pull her into his lap on his napping chair and touched her underneath her clothes. She described another event on the tape where he got in bed with her and hurt her back.

Id. Thus the prosecutor discussed multiple allegations of contact, without separately and distinctly identifying sexual intercourse. In short, her argument did not ensure the jury would not convict Mr. Middleworth of rape and molestation based on the same instance of sexual contact.

As set forth above and in Mr. Middleworth's opening brief, the failure to provide the separate and distinct acts instruction violated Mr. Middleworth's constitutional right against double jeopardy. Because the

State cannot prove the error was harmless beyond a reasonable doubt, the conviction for child molestation should be dismissed.

4. The unlawful and unsupported award of restitution should be vacated.

A court's authority to order restitution is limited by statute. RCW 9.94A.753(3); *State v. Gray*, 174 Wn.2d 920, 280 P.3d 1110 (2012). The State argues the $2,597.22 "appears likely" to be a witness fee. Resp. Br. at 34. However, without support Mr. Middleworth was order to pay that amount as restitution to the Walla Walla Prosecutor. An order of restitution is distinct from a witness fee. Moreover, as set forth in Mr. Middleworth's opening brief, the State reported no costs incurred or fees paid for the State's two expert witnesses. CP 1143. It cannot now claim it in fact incurred such costs. Because the State presented no evidence or argument supporting the $2,597.22 restitution award, it should be stricken. *See* CP 1129-42; VII RP 1007, 1013.

With regard to the award to Molina Healthcare, the State argues the court's general authority to continue a restitution hearing supports the speculative award. Resp. Br. at 35. However, the State presented no evidence at trial—and relies on none now—to demonstrate Molina Healthcare qualifies as a "victim" who sustained a loss or is a third-party

that covered costs incurred on behalf of B. Without any record, this part of the restitution award is also speculative and unsupported.

The court was not authorized to award restitution to cover the expert witness fees incurred by the prosecuting attorney's office and no documentation supports the amount of restitution awarded to either entity. Consequently, the restitution order should be vacated.

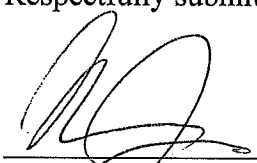
Through a statement of additional authorities, the State apparently argues Mr. Middleworth's challenge to the court's authority to enter the restitution order cannot be raised for the first time on appeal. However, a challenge to the court's statutory authority to order restitution may be raised for the first time on appeal. *State v. T.A.D.*, 122 Wn. App. 290, 293 n.7, 95 P.3d 775 (2004); *see State v. Moen*, 129 Wn.2d 535, 547-48, 919 P.2d 69 (1996) (challenge to timeliness of restitution order may be raised for first time on appeal). Moreover, a restitution challenge does not run the risk of necessitating a new trial, one of the primary bases for encouraging the efficient use of judicial resources by requiring issues be raised first during trial. *State v. Armstrong*, 91 Wn. App. 635, 637-38, 959 P.2d 1128 (1998); *see* RAP 2.5(a); *State v. Scott*, 110 Wn.2d 682, 685, 757 P.2d 492 (1988). The error should be reviewed.

C. CONCLUSION

Because Mr. Middleworth was denied a fair trial, his convictions should be reversed. In the alternative, this Court should vacate the restitution award.

DATED this 1st day of May, 2013.

Respectfully submitted,



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DECLARATION OF DOCUMENT FILING AND SERVICE

I, MARIA ARRANZA RILEY, STATE THAT ON THE 1ST DAY OF MAY, 2013, I CAUSED THE ORIGINAL **REPLY BRIEF OF APPELLANT** TO BE FILED IN THE **COURT OF APPEALS – DIVISION ONE** AND A TRUE COPY OF THE SAME TO BE SERVED ON THE FOLLOWING IN THE MANNER INDICATED BELOW:

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