NO. 44523-9-II

IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON
DIVISION TWO

STATE OF WASHINGTON,

Respondent,

v.

DERRICK THOMAS,

Appellant.

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

The Honorable Kathryn J. Nelson, Judge

BRIEF OF APPELLANT

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A. ASSIGNMENTS OF ERROR

1. The trial court violated appellant's constitutional right to a public trial by conducting peremptory challenges in private.

2. The court erred in failing to suppress appellant's statements to a Department of Corrections officer made without benefit of Miranda[1] warnings while appellant was handcuffed in the back of a patrol car.

3. The court erred in finding appellant, on a separate occasion, told an officer where he lived after being advised of his right to silence. CP 82 (Finding of Fact 5).

4. The trial court erred in finding appellant knowingly and voluntarily waived his Miranda rights. CP 82 (Conclusion of Law 2).

5. The prosecutor committed misconduct when, in closing argument, he repeatedly referred to what "we know," thereby expressing a personal opinion on guilt, placing the prestige of his office in play, and unfairly aligning himself with the jury against appellant.

6. The court erred in denying appellant's motion to dismiss the possession of cocaine charge under CrR 4.3.1's mandatory joinder provision.

7. Appellant's possession of cocaine conviction in the second trial violates double jeopardy because the prosecutor abandoned the charge in the first trial under circumstances indicating a lack of evidence.

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[1] Miranda v. Arizona, 384 U.S. 436, 86 S. Ct. 1602, 16 L. Ed. 2d 694 (1966).

8. The court erred in imposing a one-year suspended sentence on the misdemeanor charges when the statutory maximum is 364 days.

Issues Pertaining to Assignments of Error

1. Jury selection was not open to the public because peremptory challenges were exercised by silently passing a piece of paper back and forth. Because the trial court did not analyze the Bone-Club[2] factors before conducting this important portion of voir dire in private, did the trial court violate appellant's constitutional right to a public trial?

2. At the direction of a Department of Corrections officer, police stopped appellant for driving with a suspended license. The Corrections officer arrived on the scene and questioned appellant, who was handcuffed and sitting the back of a patrol car at the time. The officer did not advise appellant of his constitutional rights. Is reversal required where appellant's conviction rests in part on appellant's answers to the officer's questions?

3. An officer who arrested appellant on a prior occasion testified appellant indicated where he lived before he was detained and read his rights. The court's written findings state appellant made the statements after voluntarily waiving his Miranda rights. Should the findings be reversed for lack of evidence in the record?

[2] State v. Bone-Club, 128 Wn.2d 254, 906 P.2d 629 (1995).

4. In closing argument, the prosecutor repeatedly referred to what "we know" about the case. Did the prosecutor unfairly align himself with the jury, invite the jury to consider the prestige of his office, and offer a personal opinion on guilt, thereby committing misconduct and violating appellant's right to a fair trial?

5. The State originally charged appellant with unlawful possession of a firearm and two misdemeanors. Two months before the first trial, the State amended the information to add a charge of possession of cocaine found in the same search as the firearm. The State presented instructions only on the original charges. After the jury failed to reach a verdict on the firearms charge, the State again amended the information to charge possession of cocaine and appellant was convicted in the second trial. Must the possession of cocaine conviction be reversed and dismissed under CrR 3.4.1 because it was not presented to the jury in the first trial?

6. Under Downum v. United States,[3] when the state dismisses a charge before it is submitted to the jury out of lack of preparedness or a fear that the evidence will be insufficient, re-trial on that charge violates the double jeopardy right to a determination by a given tribunal. Was double jeopardy violated when the prosecutor did not submit the cocaine

[3] Downum v. United States 372 U.S. 734, 735, 83 S. Ct. 1033, 10 L. Ed. 2d 100 (1963).

possession charge to the jury in the first trial but waited until additional evidence came to light before the second trial?

7. Sentencing authority derives entirely from statute. The statutory maximum sentence for misdemeanors is 364 days. Did the court err in imposing a suspended sentence of one year?

B. STATEMENT OF THE CASE

1. Procedural Facts

The Pierce County prosecutor charged appellant Derrick Thomas with unlawful possession of a firearm, violation of a protection order, and driving with a suspended license in the third degree on July 16, 2012. CP 1-3. On October 15, 2012, the court denied Thomas' motion to suppress the evidence and dismiss the charges. RP 118. On October 16, 2012, the prosecutor filed, in open court, an amended information adding a charge of possession of cocaine, and Thomas was arraigned on the additional charge. RP 149. The proceedings were then recessed for nearly two months. RP 146. The amended information was not actually filed with the clerk's office or listed in the computer record until January 2013.[4] RP 1133.

When the trial resumed in December 2012, the parties referred to the clerk's office computer records and, not seeing an amended information,

[4] Several months after trial, the court convened a hearing at which the parties clarified what had happened with the first amended information and the changes the clerk's office had made to the record. RP 1133-35. The attorneys and the judge were present, but Thomas was not. RP 1135. His attorney had withdrawn when the notice of appeal was filed. RP 1140.

proceeded to trial only on the three original charges. RP 1137. Defense counsel, who recalled the arraignment, mentioned it to the prosecutor, who assured her the State had opted not to move forward with that charge. RP 1138-39.

The jury convicted Thomas of violating the protection order and driving with a suspended license, but could not agree on the unlawful possession of a firearm charge. CP 76-78; RP 657-66. At defense counsel's request, the court declared a mistrial as to that charge. RP 657-66.

The State immediately declared it would retry Thomas, and trial was set for January 8, 2013. RP 667. On January 17, 2013, defense counsel asked a colleague to cover what she believed to be a routine continuance because she had the flu. RP 685, 691-92. Instead, Thomas was arraigned on an amended information, adding a charge of possession of cocaine and alleging Thomas was subject to a firearm sentencing enhancement. CP 79-80; RP 685. This was actually the second amended information, and the clerk's office later re-titled it as such, although at the time, it appears neither the parties nor the court realized this. RP 1134.

Upon her recovery, defense counsel objected to the amended information under the mandatory joinder rule and asked the court to dismiss the new charge. RP 691-94. Although she agreed she was not entirely surprised, she argued Thomas was being penalized for his success at the first

trial. RP 712. The court found no prejudice and permitted the amendment. RP 712. At the second trial, the jury found Thomas guilty of unlawful possession of a firearm and possession of cocaine. CP 133-34. The jury rejected the firearm enhancement. CP 135.

On the misdemeanors from the first trial, the court imposed a one-year sentence suspended on conditions of time already served. CP 87-90. On the unlawful possession of a firearm charge, the court imposed a standard range sentence of 40 months, with an 18-month standard range sentence on the drug charge to run concurrently. CP 172. Notice of appeal was timely filed. CP 162.

2. Substantive Facts

On July 14, 2012, Thomas was released from jail after serving time for a community custody violation. RP 18, 49. The address registered with the Department of Corrections was his mother's home on South Hosmer. RP 43. But, having received a tip that Thomas might actually be living elsewhere, Officer Grabski from the Department of Corrections staked out the house at 4840 South I Street where Thomas' girlfriend and children lived. RP 18, 30, 66. That evening, he saw Thomas arrive by car and go in and out of the house without knocking. RP 824-28, 841. After Thomas left, Grabski called Tacoma Police and Pierce County Sheriffs and asked them to pull Thomas over for driving with a suspended license. RP 828. When

Grabski arrived and questioned him, Thomas denied living at 4840 South I. RP 829. He admitted he had just come from there, had a key, and kept some personal belongings there. RP 829.

Believing Thomas to be in violation of his community custody, Grabski, along with Tacoma Police and Pierce County Sheriffs, searched the house. RP 832, 951. They found a loaded shotgun and a small baggie of cocaine in the master bedroom. RP 834-36, 839, 954, 969. They also found court documents, Department of Corrections release documents dated that day, as well as a credit card and receipt, all in Thomas' name. RP 837-38, 954-68. The main issue at trial was whether Thomas lived there or had dominion and control over the premises sufficient to show constructive possession.

Officer Gutierrez testified that, on an earlier occasion, Thomas had pointed to the house at 4840 South I in answer to a question about where he lived. RP 815-17. An officer also relayed Thomas' girlfriend's contradictory statements about whether he lived in the house with her and the children. RP 951.

The jury also heard phone calls made on Thomas' jail booking number, in which a man tells a woman he does not want them to know where he lives, so he would give his mother's address and only come home later in the evening. Ex. 23 (call on 7/8/2012 at 9:43). The man also

inquires whether his pills have been dropped off and whether everything has been put away. Ex. 23 (call on 7/1/2012 at 10:09). The female voice assures him he has pills and everything has been put away and safely locked up. Id.; Ex. we (calls on 6/28/2012 at 4:48 and 6/25/2012 at 7:08). The jury also heard a call on Thomas' account in which he appears to tell a man they came "to my house," and then corrects himself referring to it as "my baby mama's house." Ex. 23 (call on 7/7/2012 at 7:59).

a. Search of Home

Grabski is a Corrections officer charged with seeking out probation violators. RP 10-11. On July 11, 2012, he heard from a colleague in the Pierce County Sheriff's Office that Thomas might be living not at his registered address, but at a house used by a local gang to stash firearms and illegal drugs. RP 15-16, 44-45. Grabski did not know where the deputy got this information. RP 38.

He learned from his partner that Thomas had given the 4840 South I address when he was arrested in June. RP 16, 57-58, 72. He also verified Thomas was on active supervision and his driver's license was suspended. RP 20, 43-45.

The evening of the day Thomas was released, Grabski parked outside the house at 4840 South I. RP 18-19. He saw a car pull up and saw Thomas get out. RP 19. He saw Thomas enter the house without knocking. RP 21.

A few minutes later, Thomas came back out, got in the car, and drove away. RP 21.

Later that evening, the same car returned. RP 23. Thomas, a woman, and two children got out got out and went in the house. RP 23-24. Then Thomas came out again and drove away again. RP 24-25. At this point, Grabski asked colleagues from Tacoma Police and the Pierce County Sheriffs to stop Thomas for driving with a suspended license. RP 25, 54.

When Grabski arrived at the traffic stop, Thomas was handcuffed and in the patrol car. RP 25, 61. Grabski did not advise Thomas of his constitutional rights to silence or an attorney. RP 28-29. Grabski asked him whether he lived at 4840 South I. RP 25-27. Thomas denied living at the house but said he kept some property there and had a key. RP 29-30, 63.

Grabski then accompanied Thomas and the other officers back to the house to search. RP 30. The woman who answered the door said Thomas was her boyfriend and they had children together. RP 66, 84. She told officers Thomas did not live there, but kept some of his things there. RP 66. Grabski testified they searched the entire house except the children's bedrooms. RP 31, 70. He did not check the mailbox because he was looking for guns and drugs. RP 68-69.

The court denied Thomas' motion to suppress, finding probable cause to believe Thomas lived at the house in violation of his community

custody conditions. CP 85. In its oral ruling, the court clarified that that even if Thomas did not live at the house, Grabski could search the personal property that Thomas said was there. RP 118.

b. June Statements

On June 24, 2012, approximately three weeks before Thomas was arrested in this case, Officer Gutierrez arrested Thomas in front of the 4840 house. RP 210. At the pre-trial hearing, Gutierrez testified he was investigating a call from a neighbor. RP 206-08. When he arrived, he approached Thomas and asked where he lived. RP 214. In answer, he testified, Thomas pointed to the house. RP 214.

It was only after this exchange, Gutierrez testified, that he asked Thomas for identification. RP 209-10. Thomas replied that he did not have any. RP 209-10. Gutierrez then asked Thomas for his name and date of birth. RP 209-10. Not believing Thomas' answer, Gutierrez arrested him and read him his rights. RP 210-13. Thomas testified Gutierrez never asked where he lived and he did not tell them or otherwise indicate where he lived. RP 249-50.

In its oral ruling, the court found this was a social contact and there was no need for Miranda warnings when the officer initially approached Thomas. RP 278.

The written findings of fact and conclusions of law state that Thomas was arrested, was read his Miranda rights, and agreed to talk to the officer. CP 82. The findings also state Thomas told the officer he lived at 4840 South I. CP 82. The conclusions of law state that Thomas knowingly and voluntarily waived his Miranda rights. CP 82.

c. July Statements

No separate hearing was held to determine the voluntariness of Thomas' statements to Grabski the night he was arrested in this case. However, when Grabski testified at the suppression hearing about Thomas's statements, counsel objected "regarding 3.5 issues." RP 27. The court overruled the objection based on the relaxed evidentiary standards at a suppression hearing. RP 28. Grabski testified he did not read Thomas his Miranda rights before questioning him because it was not a new criminal matter, but instead merely questions about his probation. RP 28-29.

Subsequently, the prosecutor appeared to indicate he would not be eliciting Thomas' statements to Grabski in July:

> I'm not going to be offering any of those statements. I'm going to be eliciting the observation because the question as to what address he provided, Defendant can get up and tell that story. The fact that he said he didn't live there, the defendant can get up and tell that story. The fact that he said he had personal property there, the defendant can tell that story because I'm going to be going into the search. . . . They did a search on the residence because they believed the lived

there. I think that's a res gestae, and I don't think I need to elicit any of his statements.

RP 131.

Before the first trial, the court granted defense a continuing objection to the fruits of the search of the house and all of Thomas' statements. RP 181-82. Thomas argued his statements should be suppressed "because he was seized and detained and questioned." RP 182. Defense counsel clarified her objection was to, "Any statements that were elicited from Mr. Thomas that evening." RP 182. The court summarized, "And I think you've made that clear in your briefing and your previous motion, and you have a standing objection so that, by letting those issues pass in trial, you won't be prevented from renewing them on appeal." RP 182-83.

Before the second trial, defense counsel reminded the court, "As the Court may recall, I objected most heartily to the court's decision...that Grabski did not need to give him any constitutional rights even though he was in custody." RP 720.[5] In both the first and the second trials, the State elicited, in its case in chief, Grabski's testimony that Thomas said he had a key to the house, had just come from there, and kept personal belongings there. RP 327-28, 829.

[5] The record contains no formal ruling on this issue.

3. Peremptory Challenges

At both trials, peremptory challenges were exercised by passing a piece of paper back and forth. In the first trial, the court stated:

> At this time, ladies and gentlemen of the jury, the attorneys will be passing back and forth this sheet of paper that Ms. Pierson is picking up and delivering to Mr. Curtis. And they're going to be writing down their peremptory challenges. During this process, the only rule is you have to stay in your seat, although you could stand up and stretch. But we don't want you to move around because, if you start playing musical chairs, we would have more difficulty remembering who answered what to the questions. So if you'd like to speak softly to your neighbor, if you'd like to pull out knitting or a book, please make yourself comfortable. This usually takes about ten minutes.

RP 185-86. The record then reads, "(Peremptory challenges exercised.)" followed by an unreported sidebar. Id. The court then announced, "Ladies and gentlemen of the jury, the lawyers have exercised their peremptory challenges," and called out the numbers of the jurors to be seated for the case. RP 186-87.

The minutes provide little additional information, stating only, "9:44 AM Attorneys work on peremptory challenges 10:03 AM Court reviews peremptory challenges. 10:06 AM Side bar. 10:07 AM Jury is seated and sworn." CP 188. The sheet of paper listing the challenges was filed in the court file. CP 184.

The second trial followed an identical procedure, with the court announcing the peremptory challenges would be exercised on paper, and permitting the jury to stretch or talk softly amongst themselves. RP 776-77. The record then indicates, "(Peremptory challenges exercised.)" followed by a sidebar that was not reported. RP 777. Then the court announced the jurors who would be seated. RP 778. The minutes are also virtually identical to the first trial: "11:34 AM Attorneys work on peremptory challenges. 11:49 AM Court review peremptory challenges. 11:51 AM Sidebar. 11:52 AM Jury is seated." CP 203-04 As in the first trial, the Peremptory Challenges document was then filed. CP 200.

C. ARGUMENT

1. THE TRIAL COURT VIOLATED THOMAS' RIGHT TO A PUBLIC TRIAL BY HEARING PEREMPTORY CHALLENGES IN PRIVATE.

The public trial right is 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); U.S. Const. amend. VI;[6] Const. art. I, § 10; Const. Art. I, § 22. This is not to say that court proceedings may never be closed to public view, but a careful procedure must be followed. Bone-Club, 128 Wn.2d at 258-59.

[6] Washington's Constitution provides at least as much protection of a defendant's fair trial rights as the Sixth Amendment. State v. Wise, 176 Wn.2d 1, 9, 288 P.3d 1113, 1117 (2012) (quoting Bone–Club, 128 Wn.2d at 260).

Absent consideration, on the record, of the Bone-Club factors, trial closure is structural error requiring reversal. State v. Wise, 176 Wn.2d 1, 13-15, 288 P.3d 1113, 1118 (2012).

Jury selection is a critical part of the trial that must be open to the public. Wise, 176 Wn.2d at 11 (citing Presley v. Georgia, 558 U.S. 209, 130 S. Ct. 721, 724, 175 L. Ed. 2d 675 (2010)). The benefits of public scrutiny that underlie the public trial right are particularly applicable to the exercise of peremptory challenges. State v. Saintcalle, __Wn.2d__, __P.3d__, 2013 WL 3946038 at *21 (slip op. filed Aug. 1, 2013) (Gonzalez, J., concurring). Courts may not exempt this proceeding from public view by closing the courtroom. Nor may they achieve the same effect by conducting the challenges silently on paper. Thomas' convictions must be reversed because the private exercise of peremptory challenges violated his constitutional right to a public trial.

a. Peremptory Challenges Are Part of Voir Dire and Must Be Open to Public Scrutiny.

"The public trial right applies to jury selection." Wise, 176 Wn.2d at 11 (citing Presley, 558 U.S. 209). To determine whether a specific portion of jury selection implicates the public trial right, this Court has applied the "experience and logic" test, adopted in State v. Sublett. State

v. Wilson, 174 Wn. App. 328, 337, 298 P.3d 148 (2013) (citing State v. Sublett, 176 Wn.2d 58, 73, 292 P.3d 715, 722 (2012)).

Under that test, the court first inquires, "'whether the place and process have 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, 8–10, 106 S. Ct. 2735, 92 L. Ed. 2d 1 (1986)). If so, the court inquires, "'whether public access plays a significant positive role in the functioning of the particular process in question.'" Id. The public trial right applies whenever the answer to both questions is "yes." Sublett, 176 Wn.2d at 73. In two recent cases, this Court has deemed the exercise of peremptory challenges to be an integral part of jury selection that must be public under the experience and logic test set forth in Sublett.

In Wilson, this Court held the public trial right was not implicated when the bailiff excused two jurors due to illness before voir dire began. Wilson, 174 Wn. App. at 347. The Court drew a distinction between administrative removal of potential jurors before voir dire and more integral portions of jury selection, including peremptory challenges. Id. at 342-43.

The Court explained, "[B]oth the Legislature and our Supreme Court have acknowledged that a trial court has discretion to excuse jurors outside the public courtroom for statutorily-defined reasons, provided such

juror excusals do not amount to for-cause excusals or peremptory challenges traditionally exercised during voir dire in the courtroom." Id. at 344 (emphasis added). Similarly, a trial court may delegate hardship and administrative excusals to other staff, "provided that the excusals are not the equivalent of peremptory or for cause juror challenges." Id. Wilson's public trial argument failed because he could not show "the public trial right attaches to any component of jury selection that does not involve 'voir dire' or a similar jury selection proceeding involving the exercise of 'peremptory' challenges and 'for cause' juror excusals." Id. at 342.

In State v. Jones, 175 Wn. App. 87, 91, 303 P.3d 1084 (2013), this Court held the public trial right was violated when, during a court recess off the record, the clerk drew names to determine which jurors would serve as alternates. The court recognized, "both the historic and current practices in Washington reveal that the procedure for selecting alternate jurors, like the selection of regular jurors, generally occurs as part of voir dire in open court." Id. at 101. As in Wilson, the Jones court referred to the exercise of peremptory challenges as a part of jury selection that must be public. Id. The court held the selection of alternate jurors must be public because it is akin to exercising peremptory challenges. Id. at 98 ("Washington's first enactment regarding alternate jurors not only

specified a particular procedure for the alternate juror selection, but it specifically instructed that alternate jurors be called in the same manner as deliberating jurors and subject to for-cause and peremptory challenges in open court.").

As Wilson and Jones suggest, the "experience" component of the Sublett test is satisfied in this case. "[S]ince the development of trial by jury, the process of selection of jurors has presumptively been a public process with exceptions only for good cause shown." Press-Enterprise Co. v. Super. Court, 464 U.S. 501, 505, 104 S. Ct. 819, 78 L. Ed. 2d 629 (1984). The criminal rules of procedure show our courts have historically treated peremptory challenges as part of voir dire on par with for-cause challenges. Wilson, 174 Wn. App. at 342. CrR 6.4(b) contemplates voir dire as involving peremptory and for-cause challenges. Id. CrR 6.4(b) describes "voir dire" as a process where the trial court and counsel question prospective jurors to assess their ability to serve on the particular case and to enable counsel to exercise intelligent "for cause" and "peremptory" juror challenges. Id. at 343.

This stands in sharp contrast with CrR 6.3, which contemplates administrative excusal of potential jurors before voir dire begins in the public courtroom. Id. at 342-43. In further contrast, a trial court has discretion to excuse jurors outside the public courtroom under RCW

2.36.100(1), but only so long as "such juror excusals do not amount to for-cause excusals or peremptory challenges traditionally exercised during voir dire in the courtroom." Id. at 344 (emphasis added).

The "logic" component of the Sublett test is satisfied as well. "Our system of voir dire and juror challenges, including causal challenges and peremptory challenges, is intended to secure impartial jurors who will perform their duties fully and fairly." Saintcalle, __Wn.2d at __, 2013 WL 3946038 at *21 (Gonzalez, J., concurring). "The peremptory challenge is an important 'state-created means to the constitutional end of an impartial jury and a fair trial.'" Id. at *14 (Madsen, C.J. concurring) (quoting Georgia v. McCollum, 505 U.S. 42, 59, 112 S. Ct. 2348, 120 L. Ed. 2d 33 (1992)).

While peremptory challenges may be exercised based on subjective feelings and opinions, there are important constitutional limits on both parties' exercise of such challenges. McCollum, 505 U.S. at 48-50. A prosecutor may not challenge a juror based on race, ethnicity, or gender. Batson v. Kentucky, 476 U.S. 79, 86, 106 S. Ct. 1712, 90 L. Ed. 2d 69 (1986); Rivera v. Illinois, 556 U.S. 148, 153, 129 S. Ct. 1446, 173 L. Ed. 2d 320 (2009); State v. Burch, 65 Wn. App. 828, 836, 830 P.2d 357 (1992).

Peremptory challenges matter. Discrimination in jury selection casts doubt on the integrity of the judicial process and the fairness of criminal proceedings. Powers v. Ohio, 499 U.S. 400, 411, 111 S. Ct. 1364, 113 L. Ed. 2d 411 (1991); Saintcalle, ____ Wn.2d at____; slip op. at 4. The exercise of peremptory challenges directly impacts the fairness of a trial, and it is inappropriate to shield that process from public scrutiny.

The public trial right encompasses "'circumstances in which the public's mere presence passively contributes to the fairness of the proceedings by, for example 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) (quoting State v. Bennett, 168 Wn. App. 197, 204, 275 P.3d 1224 (2012)). An open peremptory process safeguards against discrimination by discouraging both discriminatory challenges and the subsequent discriminatory removal of jurors that have been improperly challenged.

Public trials are a check on the judicial system that provides for accountability and transparency. Wise, 176 Wn.2d at 6. "'Essentially, the public-trial guarantee embodies a view of human nature, true as a general rule, that judges [and] lawyers . . . will perform their respective functions more responsibly in an open court than in secret proceedings.'" Id. at 17

(quoting Waller v. Georgia, 467 U.S. 39, 46 n.4, 104 S. Ct. 2210, 81 L. Ed. 2d 31 (1984)). Both experience and logic indicate that the exercise of peremptory challenges is a crucial part of a criminal trial that must be open to the public.

b. The Procedure Used in this Case Was Private.

The public trial right helps assure that trials are fair, deters misconduct by participants, and tempers biases and undue partiality. Wise, 176 Wn.2d at 5. These purposes are only served if the proceedings are actually observable by the public. Thus, it is unsurprising that courts have found this right was violated when proceedings were held in a location that is not accessible to the public, regardless of whether the courtroom itself was per se closed. See, e.g., State v. Strode, 167 Wn.2d 222, 224, 217 P.3d 310 (2009) (proceedings in chambers were closed); State v. Leyerle, 158 Wn. App. 474, 477, 483-484, 242 P.3d 921 (2010) (questioning juror in hallway outside courtroom was a closure).

This Court should reject any assertion that the procedure in this case was public. The procedure was essentially a sidebar, which occurs outside of the public's scrutiny, and thus violates the appellant's right to a fair and public trial. 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"), review granted, 176 Wn.2d 1031 (2013); see also People v. Harris, 10 Cal. App. 4th 672, 684, 12 Cal. Rptr. 2d 758 (Cal. Ct. App. 1992) (exercise of peremptory challenges in chambers violates defendant's right to a public trial).

The purpose of the process was clearly to ensure that jurors did not know which side had excused which juror. Yet jurors were allowed to remain in the courtroom, which demonstrates peremptory challenges were exercised in such a way that those in the courtroom would not be able to overhear. The public could not hear which potential jurors were peremptorily struck, who struck them, and in what order they were struck. See People v. Williams, 52 A.D.3d 94, 98, 858 N.Y.S.2d 147 (N.Y. App. Div. 2008) (sidebar conferences, by their very nature, are intended to be held in hushed tones).

This procedure was closed to the public just as if it had taken place in chambers. Members of the public are no more able to approach the bench and listen to an intentionally private process than they are able to enter a locked courtroom, access the judge's chambers, or participate in a private hearing in a hallway. The practical impact is the same — the public was denied the opportunity to scrutinize events.

The selection process was closed to the public because which party exercised which peremptory challenge and the order in which the peremptory challenges were made were not subject to public scrutiny. The sequence of events through which the eventual constituency of the jury "unfolded" was kept private. Harris, 10 Cal. App. 4th at 683 n.6.

c. The Convictions Must Be Reversed Because the Court Did Not Justify the Closure Under The Bone-Club Factors.

Conducting peremptory challenges in private and excluding the public from observing that process violated Thomas' right to a public trial. *Before* a trial judge closes the jury selection process off from the public, it must consider the five factors identified in Bone-Club on the record. Wise, 176 Wn.2d at 12. Under the Bone-Club test, (1) the proponent of closure must show a compelling interest for closure and, when closure is based on a right other than an accused's right to a fair trial, a serious and imminent threat to that compelling interest; (2) anyone present when the closure motion is made must be given an opportunity to object to the closure; (3) the proposed method for 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 proponent of closure and the public; (5) the order must be no broader in its application or

duration than necessary to serve its purpose. Bone-Club, 128 Wn.2d at 258-60; Wise, 176 Wn.2d at 10.[7]

There is no indication the court considered the Bone-Club factors before conducting the private jury selection in this case. Appellate courts do not comb through the record or attempt to deduce whether the trial court applied the Bone-Club factors when it is not apparent in the record. Wise, 176 Wn.2d at 12-13.

Because peremptory challenges were not exercised openly and in public, Thomas' constitutional right to a public trial under the state and federal constitutions was violated. The violation of the public trial right is structural error requiring automatic reversal because it affects the framework within which the trial proceeds. Id. at 6, 13-14. "Violation of the public trial right, even when not preserved by objection, is presumed prejudicial to the defendant on direct appeal." Id. at 16. Thomas' convictions must be reversed. Id. at 19.

This Court should reject any suggestion that this issue may have been waived. A defendant does not waive his right to challenge an improper closure by failing to object. Id. at 15. The issue may be raised for the first time on appeal. Id. at 9. Indeed, a defendant must have

[7] The Bone-Club requirements are similar to those set forth by the United States Supreme Court. In re Pers. Restraint of Orange, 152 Wn.2d 795, 805-06, 100 P.3d 291 (2004) (discussing Waller, 467 U.S. at 45–47).

knowledge of the public trial right before it can be waived. In re Pers. Restraint of Morris, 176 Wn.2d 157, 167, 288 P.3d 1140 (2012). Here, there was no discussion of Thomas' public trial right before the peremptory challenges were exercised in secret. There is no waiver, and Thomas' convictions must be reversed.

2. THE COURT ERRED IN FAILING TO SUPPRESS STATEMENTS TAKEN IN VIOLATION OF MIRANDA.

The Fifth Amendment to the United States Constitution provides, "No person . . . shall be compelled in any criminal case to be a witness against himself." U.S. Const. amend V. Self-incriminating statements made in police custody are presumed coerced and are inadmissible as substantive evidence. State v. Sargent, 111 Wn.2d 641, 646-48, 762 P.2d 1127 (1988). The presumption can be overcome if the State shows a knowing and voluntary waiver of the Fifth Amendment rights. Id. A knowing waiver requires that the person be informed of the nature of the rights, by a process commonly known as the Miranda warnings. Id.

Miranda generally applies to statements made in response to custodial interrogation by a state actor. State v. D.R., 84 Wn. App. 832, 835, 930 P.2d 350, 352 (1997). Thomas was stopped by police, handcuffed, and placed in the back of a patrol car. RP 61. A Corrections officer then asked questions designed to incriminate him in unlawful

possession of firearms and narcotics. RP 25-27, 31. At no time was Thomas advised of his Miranda rights. Thomas' statements should have been suppressed.

a. Thomas Was in Custody When Grabski Questioned Him in Handcuffs in the Back of a Patrol Car.

Custodial interrogation occurs when questioning is "initiated by law enforcement officers after a person has been taken into custody or otherwise deprived of his freedom of action in any significant way." Miranda, 384 U.S. at 444. Custodial interrogation occurs "during 'incommunicado interrogation of individuals in a police-dominated atmosphere.'" Illinois v. Perkins, 496 U.S. 292, 296, 110 S. Ct. 2394, 110 L. Ed. 2d 243 (1990).

The Miranda safeguards apply as soon as a person's freedom of movement is curtailed to the degree associated with a formal arrest. D.R., 84 Wn. App. at 836 (quoting Berkemer v. McCarty, 468 U.S. 420, 440, 104 S. Ct. 3138, 3150, 82 L. Ed. 2d 317 (1984)). The relevant perspective is that of a reasonable person in the detained person's circumstances. D.R., 84 Wn. App. at 836. A traffic stop is generally more akin to an investigative detention than a formal arrest. Berkemer, 468 U.S. at 439-40. But a typical traffic stop does not involve handcuffing the person and placing him in the back of a patrol car. See id. at 434 ("There can be no

question that respondent was 'in custody' at least as of the moment he was formally placed under arrest and instructed to get into the police car."). Berkemer refers to the "comparatively non-threatening character" of investigative detention because the person will be released shortly unless the officer develops probable cause for an arrest. 468 U.S. at 440.

What occurred in this case was far more than a Terry[8] stop. Grabski had already determined Thomas was in violation of his community custody conditions and he had authority to take him into custody regardless of what any questioning or searching revealed. RP 21. There was no evidence Thomas was merely going to be briefly questioned and then released if no new evidence developed. He was handcuffed and placed in a patrol car. RP 61. The show of force by law enforcement was far beyond a typical traffic stop; at least five officers were involved from both the Tacoma Police Department and the Pierce County Sheriff's Office. RP 54. Thomas was in custody because his freedom of movement was restricted to the same extent as a formal arrest. D.R., 84 Wn. App. at 836.

b. Grabski's Questioning Was Interrogation by a State Actor.

Interrogation under Miranda refers to any words or actions reasonably likely to elicit an incriminating response. Rhode Island v.

[8] Terry v. Ohio, 392 U.S. 1, 88 S. Ct. 1868, 20 L. Ed. 2d 889 (1968).

Innis, 446 U.S. 291, 300-01, 100 S. Ct. 1682, 64 L. Ed. 2d 297 (1980); Sargent, 111 Wn.2d at 650. "The standard is an objective one, focusing on what the officer knows or ought to know will be the result of his words and acts." Sargent, 111 Wn.2d at 651; State v. Willis, 64 Wn. App. 634, 637, 825 P.2d 357 (1992). Here, Grabski knew he was attempting to elicit incriminating information from Thomas. Grabski was looking for evidence linking Thomas to weapons and drugs. RP 31, 68-69. He did not just ask Thomas for his address. RP 25-27. He questioned Thomas about his connection to a specific address that, Grabski suspected, held a stash of illegal weapons and narcotics. RP 25-27, 31, 68-69.

Custodial interrogation by a probation officer is not exempt from the protections of the Fifth Amendment and Miranda. See Sargent, 111 Wn.2d at 651-53; Willis, 64 Wn. App. at 637. In Sargent, a probation officer conducted a pre-sentencing interview without giving Miranda warnings. Sargent, 111 Wn.2d at 642. In the interview, the officer asked if Sargent was guilty and suggested Sargent would have to confess in order to benefit from mental health counseling. Id. at 643. The probation officer gave Sargent his card and told him to call if there was anything else Sargent regarded as significant. Id. Several days later, Sargent called the probation officer, who visited Sargent in his cell (again without

administering Miranda warnings), handed him a legal pad and pencil, and sat with Sargent as he wrote a confession. Id.

Sargent's original conviction was reversed on appeal. On remand, the State sought to introduce Sargent's confession at the new trial. Id. at 644. The trial court suppressed it, concluding the interview was custodial interrogation requiring Miranda warnings. Id. The Washington Supreme Court agreed. Id. at 651-53.

In Willis, a probation officer asked Willis, who was in custody on unrelated charges, specific questions about how he supported his drug habit. 64 Wn. App. at 636. In response, Willis admitted to stealing a particular truck. Id. The State later charged Willis with taking a motor vehicle without permission and relied on his statement. Id. at 635-36.

The Court of Appeals noted that even if the probation officer had no specific knowledge Willis was a suspect in other crimes, the defendant's perception of an interrogation, not the questioner's intent, was determinative. Viewed in this context, "it is apparent the responses sought would in all likelihood be incriminating. Thus, the session fits the Innis definition of an 'interrogation.'" Id. at 637-38.

Citing Sargent, the Court of Appeals held Willis should have been advised of his Miranda rights before questioning. Willis, 64 Wn. App. at 640. The Court noted the inherent compulsion present in custodial police

questioning was "equally applicable" to a correction officer's questioning of a jailed defendant. Willis, 64 Wn. App. at 639-40.

As in Sargent and Willis, Grabski's questions the night of Thomas' arrest were reasonably likely to result in incriminating statements. That Thomas was only handcuffed and in a patrol car rather than in jail at the time of interrogations makes no difference. See Sargent, 111 Wn.2d at 649-50 (recognizing freedom of movement is the "determining factor" in deciding whether an interview is custodial). Grabski was under the same psychological pressure to answer as he would have been during a police interrogation. Willis, 64 Wn. App. at 639-40. Grabski's questions constituted custodial interrogation by a state actor. Id. Because no Miranda warnings were given, Thomas's statements that he had just come from 4840 South I, that he kept some personal items there, and that he had a key should have been suppressed.

c. The State Cannot Show This Constitutional Error to Be Harmless Beyond a Reasonable Doubt.

Admission of a statement obtained in violation of Miranda is an error of constitutional magnitude. State v. Spotted Elk, 109 Wn. App. 253, 261, 34 P.3d 906 (2001). Constitutional error is presumed prejudicial, and the State bears the burden of proving the error was harmless beyond a reasonable doubt. State v. Miller, 131 Wn.2d 78, 90,

929 P.2d 372 (1997); Spotted Elk, 109 Wn. App. at 261. Such error is harmless only if it is "trivial, or formal, or merely academic, and was not prejudicial to the substantial rights of the party assigning it, and in no way affected the final outcome of the case." Miller, 131 Wn.2d 78 at 90.

The State can make no such showing in this case. The main issue at trial was whether there was sufficient circumstantial evidence demonstrating whether Thomas had dominion and control over the premises at 4840 South I such that he could be found beyond a reasonable doubt to possess the gun and the cocaine found inside. The State relied on statements by Thomas, observations by Grabski and other officers, and statements by Thomas' girlfriend. RP 1052, 1053, 1055-56, 1061, 1062-63. Yet some jurors remained unpersuaded after the first trial. RP 657-66. The State cannot demonstrate that the verdict would, beyond a reasonable doubt, have been the same if Thomas' statements to Grabski had been properly suppressed. This constitutional issue requires reversal of Thomas' convictions.

3. THE COURT ERRED IN FINDING THOMAS WAIVED HIS FIFTH AMENDMENT RIGHTS BEFORE MAKING THE JUNE STATEMENTS TO GUTIERREZ.

A finding of fact under CrR 3.5 is erroneous when not supported by substantial evidence sufficient to persuade a fair-minded, rational person. State v. Levy, 156 Wn.2d 709, 733, 132 P.3d 1076 (2006)

(quoting State v. Mendez, 137 Wn.2d 208, 214, 970 P.2d 722 (1999)); State v. Broadaway, 133 Wn.2d 118, 131, 942 P.2d 363 (1997). Conclusions of law are reviewed de novo. State v. Lorenz, 152 Wn.2d 22, 30, 93 P.3d 133 (2004).

The court's written findings strongly imply, without expressly stating, that Thomas said he lived at 4840 South I Street after he was arrested, was read his Miranda rights, and agreed to talk to Gutierrez. CP 81-82. The conclusions of law declare Thomas' statements admissible because he knowingly and voluntarily waived his Miranda rights. CP 82. These findings and conclusions are not supported by the evidence.

Gutierrez testified Thomas indicated where he lived *before* Gutierrez detained him and advised him of his rights. RP 214-15. The court's oral ruling was that this was a social encounter that did not implicate Miranda. RP 278. No evidence supports the conclusion that Thomas was advised of or waived his Miranda rights before indicating where he lived. The erroneous findings and conclusions should be vacated.

4. PROSECUTORIAL MISCONDUCT VIOLATED THOMAS' RIGHT TO A FAIR TRIAL.

Prosecutors are officers of the court and have a duty to ensure accused persons receive a fair trial. Berger v. United States, 295 U.S. 78,

88, 55 S. Ct. 629, 79 L. Ed. 1314 (1935); State v. Charlton, 90 Wn.2d 657, 664-65, 585 P.2d 142 (1978). When a prosecutor commits misconduct and there is a substantial likelihood the misconduct affected the jury's verdict, the right to a fair trial and the right to be tried by an impartial jury are violated. Charlton, 90 Wn.2d at 664-65; State v. Reed, 102 Wn.2d 140, 145, 684 P.2d 699 (1984); U.S. Const. amend. XIV; Const. art. 1, §§ 3, 22.

The prosecutor's closing argument in this case was misconduct because repeated use of "we know" statements had the effect of improperly aligning the jury with the prosecution, placing the prestige of the prosecutor's office in the balance, and expressing the prosecutor's personal opinion on Thomas' guilt. Reversal is required because the misconduct was incurable by instruction and substantially likely to affect the verdict.

a. A Prosecutor's Repeated Use of "We" Statements Can Amount to Improper Vouching.

Prosecutors are prohibited from using the power and prestige of their office to sway the jury. In re Pers. Restraint of Glasmann, 175 Wn.2d 696, 706, 286 P.3d 673 (2012). A fair trial "certainly implies a trial in which the attorney representing the state does not throw the prestige of his public office . . . and the expression of his own belief of guilt into the scales against the accused." State v. Monday, 171 Wn.2d

667, 677, 257 P.3d 551 (2011) (quoting State v. Case, 49 Wn.2d 66, 71, 298 P.2d 500 (1956)).

It is also misconduct for the prosecutor to make comments "calculated to align the jury with the prosecutor and against the [accused]." Reed, 102 Wn.2d at 147. Such alignment blurs the proper roles of neutral factfinder and zealous advocate in the adversary process. This alignment may occur in an obvious manner. See id. at 147 (prosecutor argued defendant's counsel and expert witnesses were outsiders driving expensive cars). Or it may occur by subtler but no less effective means.

For example, it is improper for a prosecutor to align herself with jurors by making continuous references to "we" and "us" as though jurors and the prosecutor were one and the same or on the same side. State v. Mayhorn, 720 N.W.2d 776, 790 (Minn. 2006); State v. Spencer, 81 Conn. App. 320, 329, 329 n.6, 840 A.2d 7 (Conn. Ct. App. 2004), reversed in part on other grounds, 275 Conn. 171, 881 A.2d 209 (Conn. 2005); People v. Johnson, 149 Ill. App. 3d 465, 468, 102 Ill. Dec. 835, 500 N.E.2d 728 (1986) (prosecutor unfairly aligned himself with jury by referring to "our job" to find the facts).

b. Repeated References to What "We Know" During Closing Argument Were Prosecutorial Misconduct.

The presence of misconduct and its prejudicial effect are determined in the context of the record and the circumstances of the trial as a whole. Glasmann, 286 P.3d at 678. During closing argument, the prosecutor committed misconduct by using the phrase "we know" in discussing certain facts he deemed more reliable than others. This amounted to vouching for certain witnesses and facts:

- "We know that on June 24th, 2012, the defendant was arrested. RP 1052.
- "We know that Guttierez, he said that he arrested the defendant, and the defendant was at the – in the Pierce County Jail starting on June 24th, 2012." RP 1053.
- "So we know he's in custody on the 24th, and we know that on the 25th, at 12 midnight, he makes – I mean – he makes a phone call the next day to a phone number and that phone number is 253-353-4407." RP 1055.
- "So we know that's Tessa Akes. We're pretty sure that that's Tessa Akes, and we're also very sure based on the contents of the conversation." RP 1055.

- "Well, we know that there was cocaine in the dresser drawer." RP 1055.
- "Well, we know that DOC Officer Grabski began an investigation." RP 1060.
- "Some of the other officers you didn't hear from, but we know they were there." RP 1060-61.
- "Why was he concerned that someone would go in his room? 'Don't let anyone in the room.' We know why. We know why." RP 1062.
- "And then we know that Officer Patterson told you that she was interviewed by TPD after she spoke to Grabski, and what did she – she changed her story." RP 1062.
- "We know it was loaded because Officer Patterson told you it was loaded and these are the 12 gauge ammunition." RP 1064.
- "Well, we know this document was signed June 29, 2012. Where was he? We know he did not get out until when? July 14th. And we know – so we know he was in Pierce County at that time when this was signed." RP 1064.
- "What about the cocaine that was located? We know he was concerned about something." RP 1067.

- "Because we know they were both afraid and wanted to avoid a DOC search." RP 1068.
- "And we know that there was cocaine residue in his dresser drawer." RP 1068.
- "We know he was talking to Tessa Akes. We know where Tessa Akes lived." RP 1072.
- "Well, we know he just came home that day." RP 1072.
- "We know his children lived there." RP 1072.
- "We know it was 4840 South I." RP 1074.
- "What do we know based on the testimony? We know that she was interviewed after she tried to deny it to Grabski." RP 1102.
- "She changed her story. We know that." RP 1102.
- "We know the defendant got out of custody, right?" RP 1103.
- "We don't know exactly when, but we know Tessa Akes is at work." RP 1103.

The repeated use of the phrase "we know," suggests the jury need not even weigh the evidence because "we know" what happened.

Prosecutors should not use "we know" statements in closing argument because such statements blur the line between legitimate summary and improper vouching. United States v. Younger, 398 F.3d 1179, 1191 (9th

Cir. 2005). "The question for the jury is not what a prosecutor believes to be true or what 'we know,' rather, the jury must decide what may be inferred from the evidence." Id. The prosecutor may summarize evidence admitted at trial and draw reasonable inferences from that evidence. But the use of "we know" is improper "when it . . . carries an implied guarantee of truthfulness, or expresses a personal opinion about credibility." United States v. Bentley, 561 F.3d 803, 812 (8th Cir. 2009).

A prosecutor functions as the representative of the people in a quasi-judicial capacity in a search for justice. Monday, 171 Wn.2d at 676. "Defendants are among the people the prosecutor represents." Id. By repeated use of the pronoun "we," the prosecutor made clear he was part of a group that included his office, the witnesses, and the jury, but not the defendant. The repeated use of "we know" was misconduct because it conveyed the prosecutor's opinion and guarantee and aligned the jury against Thomas.

c. Reversal Is Required Because the Closing Argument Aligned the Jury with the Prosecutor Against Thomas in a Way that Could Not Be Cured by Instruction.

What the prosecutor says, and how it is said, is likely to have significant persuasive force with the jury. Glasmann, 286 P.3d at 679. The average jury has confidence the prosecutor will fulfill her duty to

refrain from methods calculated to produce a wrongful result. Berger, 295 U.S. at 88. "Consequently, improper suggestions, insinuations, and, especially, assertions of personal knowledge are apt to carry much weight against the accused when they should properly carry none." Id.

In many instances the prosecutor's choice of language, taken in isolation, does not amount to much. But considered as a whole, the repeated use of such language creates a consistent theme with inflammatory effect. It creates an environment in which the prosecutor not only injects his personal beliefs and the prestige of his office into the trial, but also sets up the jurors against Thomas by aligning them with the prosecutor's perspectives and opinions before deliberations even begin.

Defense counsel did not object to any of the argument cited above. In the absence of objection, appellate review of prosecutorial misconduct appropriate when the misconduct is so flagrant and ill intentioned that no curative instruction could have erased the prejudice. State v. Fisher, 165 Wn.2d 727, 747, 202 P.3d 937 (2009). The focus is "less on whether the prosecutor's misconduct was flagrant or ill intentioned and more on whether the resulting prejudice could have been cured." State v. Emery, 174 Wn.2d 741, 762, 278 P.3d 653 (2012). The touchstone of due process analysis is the fairness of the trial: regardless of whether the prosecutor deliberately committed misconduct, did the misconduct prejudice the jury

thereby denying the defendant a fair trial guaranteed by the due process clause? State v. Davenport, 100 Wn.2d 757, 762, 675 P.2d 1213 (1984) (citing Smith v. Phillips, 455 U.S. 209, 219, 102 S. Ct. 940, 71 L. Ed. 2d 78 (1982)).

"The criterion always is, has such a feeling of prejudice been engendered or located in the minds of the jury as to prevent a [defendant] from having a fair trial?" Emery, 174 Wn.2d at 762 (quoting Slattery v. City of Seattle, 169 Wn. 144, 148, 13 P.2d 464 (1932)). Even though the jury is presumed to follow the instructions of the trial court, prosecutorial misconduct in some circumstances can be so prejudicial that neither objection nor instruction can cure it. State v. Stith, 71 Wn. App. 14, 23, 856 P.2d 415 (1993) (prosecutor's personal assurance of defendant's guilt was flagrant misconduct requiring reversal).

The cumulative effect of misconduct can overwhelm the power of instruction to cure. Glasmann, 49 Wn.2d at 73; State v. Walker, 164 Wn. App. 724, 737, 265 P.3d 191 (2011); State v. Suarez-Bravo, 72 Wn. App. 359, 367, 864 P.2d 426 (1994). Repeated instances of misconduct and their cumulative effect must be considered as a whole. See Walker, 164 Wn. App. at 738 (improper comments used to develop theme in closing argument impervious to curative instruction). The prosecutor here made the improper comments not just once or twice, but frequently. He used them

to develop a theme of expressing personal opinions on guilt, and aligning the prosecutor and his office with the jury against Thomas.

The cumulative effect is magnified by the prosecutor's repeated references to the fact that Thomas had been in jail. RP 1052, 1053, 1064, 1103. A jury has a natural inclination to believe that once a criminal, always a criminal. See State v. Bacotgarcia, 59 Wn. App. 815, 822, 801 P.2d 993 (1990) (ER 404 intended to prevent common assumption that "since he did it once, he did it again."). While it was impossible to remove all reference to Thomas' community custody status and prior incarceration, the prosecutor's repeated "we know" statements emphasized that fact while aligning the prosecutor with the jury on the side of truth and justice.

> The best rule for determining whether remarks made by counsel in criminal cases are so objectionable as to cause a reversal of the case is, Do the remarks call to the attention of the jurors matters which they would not be justified in considering in determining their verdict, and were they, under the circumstances of the particular case, probably influenced by these remarks.

State v. Rose, 62 Wn.2d 309, 312, 382 P.2d 513 (1963) (quoting State v. Buttry, 199 Wn. 228, 251, 90 P.2d 1026 (1939) (internal quotation marks omitted)). If this Court is unable to conclude from the record whether the jury would or would not have reached its verdict but for the misconduct, then it may not deem it harmless. Charlton, 90 Wn.2d at 664. Because

the prosecutor's argument brought several improper considerations into play, Thomas' trial was unfair and his convictions should be reversed.

5. CONVICTION IN A SECOND TRIAL FOR A CHARGE THE STATE ABANDONED IN THE FIRST TRIAL VIOLATES THE MANDATORY JOINDER RULE.

"Joinder rules generally prohibit pursuit of theories in a second trial that were not pursued in a first trial." In re Pers. Restraint of Andress, 147 Wn.2d 602, 616 n.5, 56 P.3d 981 (2002). Mandatory joinder rules protect against

> successive prosecutions based upon essentially the same conduct, whether the purpose in so doing is to hedge against the risk of an unsympathetic jury at the first trial, to place a 'hold' upon a person after he has been sentenced to imprisonment, or simply to harass by multiplicity of trials.

State v. Lee, 132 Wn.2d 498, 503, 939 P.2d 1223 (1997) (quoting State v. McNeil, 20 Wn. App. 527, 532 & n.9, 587 P.2d 524 (1978)). Mandatory joinder is thus grounded in basic principles of fairness and finality.

CrR 4.3.1 requires dismissal when related offenses are not joined for trial:

> A defendant who has been tried for one offense may thereafter move to dismiss a charge for a related offense, unless a motion for consolidation of these offenses was previously denied or the right of consolidation was waived as provided in this rule. The motion to dismiss must be made prior to the second trial, and shall be granted unless the court determines that because the prosecuting attorney was unaware of the facts constituting the related offense or did not have sufficient evidence to warrant trying this offense at

> the time of the first trial, or for some other reason, the ends of justice would be defeated if the motion were granted.

CrR 4.3.1(3). Thomas' conviction for possession of cocaine should be reversed because, under CrR 4.3.1, the court should have dismissed that charge after it was not tried in the first trial.

Offenses are related when they involve "a single criminal incident or episode." Lee, 132 Wn.2d at 503. The court has not defined the exact contours of related conduct, but emphasized that it includes "offenses based upon the same physical act or omission" often characterized by "close temporal or geographic proximity." Id. In the first trial, Thomas was tried for unlawful possession of a firearm, violation of a protection order, and driving with a suspended license. CP 133-35. Possession of cocaine is a related offense because the cocaine was found in the same search on the same day in the same room as the firearm. RP 955-58, 969. Thus, the offenses occurred in "close temporal [and] geographic proximity." Lee, 132 Wn.2d at 503.

In addition, these are related offenses because the culpable act in each charge is the same, namely, possession, and the elements overlap to a significant degree. See State v. Dallas, 126 Wn.2d 324, 329, 892 P.2d 1082 (1995) (theft and possession of stolen property were related charges since based on the same conduct); State v. Kindsvogel, 149 Wn.2d 477,

483-84, 69 P.3d 870, 873 (2003) (not related charged when no overlapping elements). In Kindsvogel, the court held that offenses are related when proof of one offense necessarily involves proof of the other. 149 Wn.2d at 483. Here, the only disputed element was the possession, which rested on Thomas' dominion and control over the home. This evidence pertains equally to possession of the firearm and of the cocaine. These were related offenses, triggering the provisions of the mandatory joinder rule, CrR 4.3.1.

"[F]or purposes of CrR 4.3, a defendant has been 'tried' when the issue has been submitted to the jury but a mistrial declared, thus leaving the issue of guilt or innocence unresolved." State v. Carter, 56 Wn. App. 217, 219-20, 783 P.2d 589, 591 (1989) (citing State v. Russell, 101 Wn.2d 349, 678 P.2d 332 (1984)).[9] Because Thomas had already been tried on a related offense, he moved to dismiss, as the rule provides. RP 691-92, 698. That motion should have been granted.

The State may argue Thomas should have moved to consolidate the possession charge. This argument should be rejected for two practical reasons. First, it is not the role of defense counsel to urge that her client be prosecuted. "Defense counsel is an advocate for her client, not a 'law clerk' for the prosecutor." State v. Hobbs, 71 Wn. App. 419, 424, 859 P.2d 73

[9] Former CrR 4.39(c)(3), discussed in Carter, is identical to the current CrR 4.3.1(b)(3).

(1993), disapproved on other grounds, State v. Hickman, 84 Wn. App. 646, 929 P.2d 1155 (1997). Second, counsel approached the prosecutor informally about the missing charge, and was assured the State had opted not to proceed. RP 1139.

We can only speculate as to what the reasons for that decision might be, beyond the obvious confusion. Only when the jury hung on the most serious charge did the State opt to reinstate the other felony it had previously abandoned. This case hearkens back to the double jeopardy analysis from State v. Womac, 160 Wn.2d 643, 651, 160 P.3d 40 (2007), where the court found it unjust to permit convictions to be held, "in a safe for a rainy day . . . then they can sort of rise from the dead like Jesus on the third day and bite my client." The procedure in this case cuts against the purpose of the mandatory joinder rule, which is to protect defendants from a scenario in which certain charges are held in reserve to hedge against acquittal, or in this case, a hung jury. Lee, 132 Wn.2d at 503 (quoting McNeil, 20 Wn. App. at 532 & n.9).

The "ends of justice" exception does not apply here because it is meant for "extraordinary circumstances,"[10] which do not include ordinary mistakes. State v. Gamble, 168 Wn.2d 161, 169, 173-74, 225 P.3d 973

[10] For example, it was applied when Andress, 147 Wn.2d 602, unexpectedly and retroactively required reversal of a vast number of murder convictions. State v. Gamble, 168 Wn.2d 161, 171, 225 P.3d 973, 980 (2010).

(2010). It does not matter that multiple trials may result from mere absent-mindedness by the prosecutor rather than intentional vindictiveness. The mandatory joinder rules were enacted to protect defendants under either scenario. Dallas, 126 Wn.2d at 332.[11]

The State benefits from generous rules regarding amendments to the information. So long as there is no prejudice to the defense, the State may add charges up until the case is submitted to the jury. Dallas, 126 Wn.2d at 327 (citing State v. Vangerpen, 125 Wn.2d 782, 888 P.2d 1177 (1995)). But once the case has been given to the jury for consideration, no further amendment is permitted except to lesser-included charges. Id. There is no reason to afford the State yet another bite at the apple. The possession of cocaine conviction should be reversed and dismissed under CrR 4.3.1.

6. THE POSSESSION OF COCAINE CONVICTION ALSO VIOLATES DOUBLE JEOPARDY BECAUSE IT APPEARS THE CHARGE WAS NOT PRESENTED IN THE FIRST TRIAL DUE TO A LACK OF EVIDENCE.

Both our state and federal constitutions provide that no person may twice be put in jeopardy for the same offense. U.S. Const. amend. V; Const. art. I, § 9. Washington's double jeopardy clause is coextensive with federal double jeopardy protection and is given the same interpretation by the courts. State v. Gocken, 127 Wn.2d 95, 107, 896 P.2d 1267 (1995). Double jeopardy violations are manifest constitutional

[11] Former CrR 4.3(c)(3), discussed in Dallas, is identical to the current CrR 4.3.1(b)(3).

error, which may be reviewed for the first time on appeal. See RAP 2.5(a); State v. Jackman, 156 Wn.2d 736, 746, 132 P.3d 136 (2006).

When a trial ends without a verdict on a particular charge, retrial is banned under double jeopardy principles, which protect the defendant's "'valued right'" to have the trial completed by a particular tribunal, and to prevent the State from manipulating the trial process by terminating the proceedings when it appears its case is weak or the jury is unlikely to convict. Crist v. Bretz, 437 U.S. 28, 35-36, 98 S. Ct. 2156, 57 L. Ed. 2d 24 (1978) (quoting Wade v. Hunter, 336 U.S. 684, 689, 69 S. Ct. 834, 93 L. Ed. 974 (1949)). The exception is when the defense requests a mistrial on that charge. Downum v. United States, 372 U.S. 734, 735-36, 83 S. Ct. 1033, 10 L. Ed. 2d 100 (1963).

Double jeopardy bars retrial when circumstances indicate the state's decision not to try a charge at the first trial was motivated by a concern it could not prove its case. State v. Wright, 165 Wn.2d 783, 805-06, 203 P.3d 1027, 1038 (2009). For example, in Downum, 372 U.S. at 735, the prosecutor requested a midtrial dismissal because a key state witness was unavailable. "[L]ack of preparedness by the Government to continue the trial directly implicates policies underpinning both the double jeopardy provision and the speedy trial guarantee." United States v. Jorn, 400 U.S. 470, 486, 91 S. Ct. 547, 27 L. Ed. 2d 543 (1971) (citing Downum, 372 U.S.

734). As the Court later explained, the double jeopardy clause "'forbids the prosecutor to use the first proceeding as a trial run of his case.'" Arizona v. Washington, 434 U.S. 497, 508 n. 24, 98 S. Ct. 824, 832, 54 L. Ed. 2d 717 (1978).

Here, the second trial gave the State an opportunity to strengthen its case. At the first trial, no evidence was presented that the substance found in the drawer was cocaine. Additionally, the evidence presented at the first trial was that the substance was found in a drawer that otherwise contained solely women's underwear, suggesting it was not possessed by Thomas. RP 444-45, 473-74. However, in the intervening time, the State obtained additional jail calls in which pills were discussed, thereby suggesting a link between Thomas and the pill bottle in which the substance was found. RP 703-05.

This is precisely the type of violation illustrated in Downum, which precludes mid-trial dismissals as a type of "post-jeopardy continuance to allow the prosecution an opportunity to strengthen its case." Illinois v. Somerville, 410 U.S. 458, 469, 93 S. Ct. 1066, 35 L. Ed. 2d 425 (1973) (discussing Downum). Thomas' conviction for possession of cocaine should be reversed as a violation of double jeopardy.

7. THE COURT ERRED IN SENTENCING THOMAS TO A FULL YEAR ON THE MISDEMEANOR CHARGES.

"A sentence that lacks statutory authority cannot stand." State v. Wilson, 170 Wn.2d 682, 688, 244 P.3d 950 (2010). The maximum sentence for a misdemeanor is 364 days. RCW 9.92.020. On the misdemeanors in Thomas' case, the court imposed a suspended sentence of one year. CP 87. This sentence exceeds the statutory maximum and should be corrected.

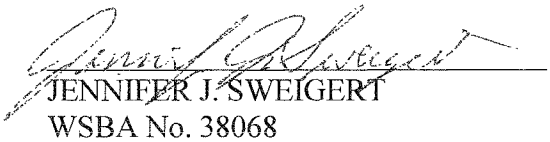
D. CONCLUSION

For the foregoing reasons, Thomas requests this Court reverse his convictions.

DATED this 9th day of September, 2013.

Respectfully submitted,

NIELSEN, BROMAN & KOCH, PLLC



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Attorney for Appellant

IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON
DIVISION TWO

STATE OF WASHINGTON	)	
	)	
Respondent,	)	
	)	
v.	)	COA NO. 44523-9-II
	)	
DERRICK THOMAS,	)	
	)	
Appellant.	)	

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 19TH DAY OF SEPTEMBER 2013, I CAUSED A TRUE AND CORRECT COPY OF THE **BRIEF OF APPELLANT** TO BE SERVED ON THE PARTY / PARTIES DESIGNATED BELOW BY DEPOSITING SAID DOCUMENT IN THE UNITED STATES MAIL.

[X] DERRICK THOMAS
DOC NO. 317612
WASHINGTON STATE PENITENTIARY
1313 N. 13TH AVENUE
WALLA WALLA,WA 99362

SIGNED IN SEATTLE WASHINGTON, THIS 19TH DAY OF SEPTEMBER 2013.

X Patrick Mayovsky

NIELSEN, BROMAN & KOCH, PLLC

September 19, 2013 - 2:20 PM

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Court of Appeals Case Number: 44523-9

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