NO. 44487-9

COURT OF APPEALS, DIVISION II
STATE OF WASHINGTON

STATE OF WASHINGTON, RESPONDENT

v.

LARDELL COURTNEY, APPELLANT

Appeal from the Superior Court of Pierce County
The Honorable James Orlando

No. 12-1-03395-3

BRIEF OF RESPONDENT

MARK LINDQUIST
Prosecuting Attorney

By
KATHLEEN PROCTOR
Deputy Prosecuting Attorney
WSB # 14811

930 Tacoma Avenue South
Room 946
Tacoma, WA 98402
PH: (253) 798-7400

Table of Contents

Table of Authorities

State Cases

Federal and Other Jurisdiction

Constitutional Provisions

Statutes

Rules and Regulations

Other Authorities

A. ISSUES PERTAINING TO APPELLANT'S ASSIGNMENTS OF ERROR.

1. Has defendant failed to show that there was a closure of the courtroom during jury selection or that he was denied his right to be present during jury selection when all jury selection proceedings occurred in an open courtroom with the defendant present?

2. Has defendant failed to show that his convictions for robbery in the second degree and assault in the third degree violate double jeopardy where each conviction is based on a separate offense?

3. Has defendant failed to show that the trial court abused its discretion in considering his robbery and assault convictions as separate for purposes of calculating his offender score?

B. STATEMENT OF THE CASE.

1. Procedure

On September 7, 2012, the Pierce County Prosecutor's Office charged appellant, Lardell Courtney ("defendant"), with one count of robbery in the second degree (count I) and two counts of assault in the third degree (count II, count III). CP 1–2. On October 25, 2012, the State

amended the information to add the aggravating factor that defendant committed each offense shortly after being released from incarceration. CP 5–7.

On January 23, 2013, the case proceeded to a jury trial before the Honorable James Orlando. 1 RP 1.[1]

After hearing the evidence, the jury convicted defendant of robbery in the second degree (count I) and assault in the third degree (count II). 4 RP 136; CP 10, 12. The jury acquitted defendant of assault in the third degree as charged in count III. 4 RP 136; CP 13. The jury answered "yes" to a special verdict form indicating that defendant committed the crimes charged in counts one and two shortly after being released from incarceration. 4 RP 148; CP 9.

Sentencing occurred on February 1, 2013. CP 44-58. Defendant's offender score was a ten. CP 44–58. The court imposed an exceptional sentence on the robbery (comprised of a high end sentence of 84 months plus an additional 12 months confinement based upon the aggravating factor) of 96 months, and a standard range sentence of 60 months for the

[1] The State will refer to the verbatim Report of Proceedings as follows: The five sequentially paginated volumes referred to as 1–5 will be referred to by the volume number followed by RP. There is also an amended fifth volume that will be referred to as 5A followed by RP.

assault in the third degree conviction, to be served concurrently. 5 RP 171-172; CP 44–58.

Defendant filed this timely notice of appeal on February 6, 2012. CP 61–74.

2. Facts

Shortly after 9:00 p.m. on September 6, 2012, defendant entered a Safeway store, placed two bottles of alcohol into his pants, and exited the store. 2 RP 37–40. Store security officer Nathanial Duval-Igarta ("Duval") observed the theft, and followed defendant out of the store. 2 RP 41. A second security officer, Axel Engelhardt-Parales ("Engelhardt") followed about thirty feet behind Mr. Duval. 2 RP 41.

Mr. Duval identified himself as store security and defendant began to run. 2 RP 42–43. Mr. Duval gained ground on defendant who, while still in the parking lot, turned and attempted to punch Mr. Duval. 2 RP 45. The punch missed, and Mr. Duval wrestled defendant to the ground. 2 RP 47–48. The two bottles of alcohol fell out of defendant's pants, but did not break. 2 RP 67–68. Defendant fought his way on top of Mr. Duval and punched him in the face. 2 RP 50. Mr. Engelhardt grabbed defendant and brought him back to the ground. 2 RP 51, 81–82. Mr. Duval handcuffed defendant. 2 RP 82.

C. ARGUMENT.

1. AS VOIR DIRE WAS DONE IN OPEN COURT AND WITH THE DEFENDANT PRESENT, DEFENDANT FAILS TO SHOW ANY CLOSURE OF THE COURTROOM OR DENIAL OF HIS RIGHT TO BE PRESENT.

a. RAP 2.5(a)(3) Should Be Applied to Right to Public Trial Cases, As It Is To Other Constitutional Rights.

Ordinarily an appellate court will consider a constitutional claim for the first time on appeal only if the alleged error is manifest and truly of constitutional dimension. ***State v. McFarland***, 127 Wn.2d 322, 332–33, 899 P.2d 1251 (1995); ***State v. Davis***, 41 Wn.2d 535, 250 P.2d 548 (1952); RAP 2.5(a)(3)[2]. Such a restriction is necessary because the failure to raise an objection in the trial court "deprives the trial court of [its] opportunity to prevent or cure the error" thereby undermining the primacy of the trial court. ***State v. Kirkman***, 159 Wn.2d 918, 926, 155 P.3d 125 (2007); ***State v. Scott***, 110 Wn.2d 682, 687, 757 P.2d 492 (1988) (the constitutional error exception in RAP 2.5(a)(3) is not intended to afford criminal defendants a means for obtaining new trials whenever they can identify a constitutional issue not litigated below). A defendant attempting to raise a claim for the first time on appeal must show both a

[2] Which states: "The appellate court may refuse to review any claim of error which was not raised in the trial court. However, a party may raise the following claimed errors for the first time in the appellate court: ... (3) manifest error affecting a constitutional right.

constitutional error and prejudice to his rights. *Id.* at 926-27. A defendant can demonstrate actual prejudice on appeal by making a "plausible showing ... that the asserted error had practical and identifiable consequences in the trial of the case." *Id.* at 935.

Prior to the adoption of RAP 2.5 the Washington Supreme Court held that a closed courtroom claim could be raised on appeal even if there was no objection on this ground in the trial court. ***State v. Marsh***, 126 Wn. 142, 145-46, 217 P.705 (1923).

> At common law, constitutional issues not raised in the trial court were not considered on appeal, with just two exceptions. If a defendant's constitutional rights in a criminal trial were violated, such issue could be raised for the first time on appeal. Secondly, where a party raised a constitutional challenge affecting the jurisdiction of the trial court, an appellate court could also reach the issue.

State v. WWJ Corp. 138 Wn.2d 595, 601, 980 P.2d 1257, 1260 (1999) (citations omitted). These common law rules were replaced in 1976 by the adoption of the Rules of Appellate procedure, and specifically RAP 2.5(a). *Id.* at 601. As noted in a recent opinion, *see* ***State v. Beskurt***, 176 Wn.2d 441, 449-50, 293 P.3d 1159 (2013) (Madsen, J. concurring), when the Supreme Court decided ***State v. Bone-Club*** in 1995, it cited to the rule in ***Marsh*** without taking into consideration of the impact of RAP 2.5(a)(3). *See* ***State v. Bone-Club***, 128 Wn.2d 254, 257, 906 P.2d 325 (1995). This failure to consider the impact of RAP 2.5(a)(3) has persisted in other

decisions. *See, e.g.*, ***State v. Brightman***, 155 Wn.2d 506, 514–15, 122 P.3d 150 (2005).

As three justices of the Supreme Court recently concluded, the appellate courts should refuse to apply a rule that conflicts with the Rules of Appellate Procedure and subverts the intent of RAP 2.5(a). ***State v. Beskurt***, 176 Wn.2d 441, 449-51, 293 P.3d 1159 (2013). (Madsen, J., concurring). The Court in ***Bone-Ciub*** did not consider the change effected by RAP 2.5(a); its holding that a public trial error need not be raised in the trial court to be considered on appeal should be corrected.

Respect for *stare decisis* requires a clear showing that an established rule is incorrect and harmful before it is abandoned. ***State v. Devin***, 158 Wn.2d 157, 168, 142 P.3d 599 (2006). In this instance, the rule is incorrect because it contradicts the spirit and letter of the Rules of Appellate Procedure adopted by this Court. It is harmful in at least three respects: 1) the trial court is denied the opportunity to correct any error when no objection is required to preserve the issue for review; 2) it allows a defendant to participate in procedures and practices in the trial court that are to his benefit, yet still claim that these practices are the basis for error in the appellate court; and 3) as the ***Marsh*** rule does not require a defendant to show a manifest error or any actual prejudice before obtaining new trial, public respect for the court is

diminished and judicial resources are wasted when retrial is given as a remedy when it is evident from the record that there is no prejudice to the defendant.

These harms can be seen in the case now before the court. The trial court articulated how it wanted the attorneys to handle any possible challenge for cause and did not hear any objection from either party. RP 4-5. The defense counsel used a side bar to address challenges for cause that he wanted to bring against potential jurors. SRP 33, 47; RP 10-11. The court gave the parties a piece of paper on which to write their peremptory challenges and neither party voiced an objection. SRP 47. Had defendant objected to these procedures and argued that they constituted a violation of his right to an open courtroom, the trial court might have opted for different procedures just to eliminate a potential claim. The defendant's attorney succeeded in getting both jurors removed for cause during the side bar, without any risk that such action might engender animosity or displeasure in the venire; yet defendant is still able to argue that a procedure he used to his benefit is a basis for reversal on appeal. A jury panel that was acceptable to the defense was obtained after the exercise of only two peremptory challenges on paper, after which the court made a record of what had transpired during the sidebar so that anyone still in the courtroom could understand what happened and why.

CP 83, RP 10-11. Defendant cannot show any practical and identifiable consequences to his trial or that he was prejudiced. To the contrary, from the record it would appear that he benefited from procedures used without harmful consequences. His failure to object to what he now claims was a courtroom closure within the scope of the right to a public trial and his inability to establish resulting actual prejudice should preclude appellate review. Despite the fact that he cannot show any actual prejudice from the procedures used, defendant nevertheless, argues that he is entitled to a new trial. This is an abuse of the judicial process that should not be condoned.

This court should find that defendant's failure to object brings this issue under RAP 2.5(a)(3) and that he has failed to show an issue of truly constitutional magnitude that has caused him actual prejudice. As such this court should refuse to review the claim.

b. The Courtroom Was Open Throughout Voir Dire Proceedings.

A criminal defendant's right to a public trial is found in article I, section 22 of the Washington Constitution, and the Sixth Amendment to the United States Constitution; both provide a criminal defendant the right to a "public trial by an impartial jury." The state constitution also provides that "[j]ustice in all cases shall be administered openly," which grants the public an interest in open, accessible proceedings, similar to

rights granted in the First Amendment of the federal constitution. Wash. Const. article I, section 10; ***State v. Lormor***, 172 Wn.2d 85, 91, 257 P.3d 624 (2011); ***Seattle Times Co. v. Ishikawa***, 97 Wn.2d 30, 36, 640 P.2d 716 (1982); ***Press–Enterprise Co. v. Superior Court***, 464 U.S. 501, 104 S. Ct. 819, 78 L. Ed. 2d 629 (1984). The public trial right "serves to ensure a fair trial, to remind the prosecutor and judge of their responsibility to the accused and the importance of their functions, to encourage witnesses to come forward, and to discourage perjury." ***State v. Sublett***, 176 Wn.2d 58, 72, 292 P.3d 715 (2012). "There is a strong presumption that courts are to be open at all trial stages." ***Lormor***, 172 Wn.2d at 90. The right to a public trial includes voir dire. ***Presley v. Georgia***, 558 U.S. 209, 130 S. Ct. 721, 175 L. Ed. 2d 675 (2010).

Whether the right to a public trial has been violated is a question of law reviewed de novo. ***State v. Momah***, 167 Wn.2d 140, 147, 217 P.3d 321 (2009). The right to a public trial is violated when: 1) the public is fully excluded from proceedings within a courtroom, ***State v. Bone–Club***, 128 Wn.2d 254, 257, 906 P.2d 325 (1995) (no spectators allowed in courtroom during a suppression hearing) and ***State v. Easterling***, 157 Wn.2d 167, 172, 137 P.3d 825 (2006) (all spectators, including codefendant and his counsel, excluded from the courtroom while codefendant plea-bargained); 2) the entire voir dire is closed to all

spectators, ***State v. Brightman***, 155 Wn.2d 506, 511, 122 P.3d 150 (2005); 3) and is implicated when individual jurors are privately questioned in chambers, *see* ***State v. Momah***, 167 Wn.2d 140, 146, 217 P.3d 321 (2009) and ***State v. Strode***, 167 Wn.2d 222, 224, 217 P.3d 310 (2009) (jury selection is conducted in chambers rather than in an open courtroom without consideration of the ***Bone–Club*** factors). In contrast, conducting individual voir dire in an open courtroom without the rest of the venire present does not constitute a closure. ***State v. Erickson***, 146 Wn. App. 200, 189 P.3d 245 (2008).

When faced with a claim that a trial court has improperly closed a courtroom, the Washington Supreme Court has held that the reviewing court determines the nature of the closure by the presumptive effect of the plain language of the court's ruling, not by the ruling's actual effect. ***In re Personal Restraint of Orange***, 152 Wn.2d 795, 807-8, 100 P.3d 291 (2004).

In the case now before the Court, defendant argues that the procedure used by the court for exercising challenges for cause and peremptory challenges each constituted a courtroom closure. The record shows that the following occurred: In an open court room with the defendant present, the trial court articulated how it wanted counsel to address challenges for cause. See RP 2-5.

> COURT: ... If there are any causes that arise, challenges for cause that arise while you are talking to jurors, I would ask that you just stop and we'll deal with that outside the presence of other jurors. If we need to excuse them outside in the hallway, we can do that; otherwise, we can take them up at the end of the juror questioning and prior to you doing your peremptory challenges, executing any challenges for cause. ...
>
> ...
> PROSECUTOR: Your Honor, just to clarify, the cause challenges you want us making at the time they arise?
>
> COURT: I would just ask you call for a sidebar, and we can talk about it briefly and then figure out what we are going to do to deal with it formally on the record.
>
> PROSECUTOR: Okay.
>
> COURT: If it's an obvious one, I may, if you're doing the questioning and it's a fairly obvious challenge, then I'll ask Mr. Shaw if he has any objections to excusing that juror, just to move things along rather than setting it out. Any other procedural issues?

RP 4-5. Neither defendant nor his attorney objected to this proposal. RP 5-8. Defense counsel asked for a sidebar after his first opportunity to question the venire members. SRP 33. Both venire persons who were ultimately excused for cause, Juror Nos. 11 and 16, were asked questions after this sidebar, which would indicate that the court had not excused either for cause during this sidebar. SRP 34, 39-40, 41, 44-46. At the close of questioning, the court called both counsel to a sidebar before the

attorneys started the peremptory challenge process. SRP 47. The peremptory challenge process went as follows:

> THE COURT: Folks, you can sit back and relax. The attorneys will be making their final selection here in writing and then when they're done, we will have folks take the jury box. You can talk quietly between yourselves over anything other than this case. Okay?
>
> And [defense counsel], I'm going to turn off the headset. [Judicial assistant] if you would do that.
>
> Defense Counsel: Thank you.
> (Off the record while the attorneys are doing their peremptory challenges.)
>
> THE COURT: At this time, when I call your name, I'm going to ask you to come forward and take a seat in our jury box. ...

SRP 47. The court then read off the names of the jurors who would sit on the case and excused the remainder of the venire. SRP 47-48. After seating the jury and excusing the remainder of the jury venire, the court made the following record about the sidebar:

> COURT: I want to indicate, while everyone is still present in the courtroom, which remains an open courtroom and it was in all parts of the jury selection process. I would indicate that we had a discussion at sidebar regarding two jurors, No. 11 and No. 16. I excused both of them for cause. [The prosecutor] was not in agreement with excusing Juror No. 11, and I would let you make any additional record you want to on that.

RP 10-11. The prosecutor then made a record as to why his disagreed with the for cause challenge on Juror No.11 and the court made a record of

its reasoning in granting the challenge for cause. RP 11. It would appear from this record that the defense sought the removal of both jurors for cause during the sidebar.

Defendant has failed to identify any ruling of the court that closed the courtroom to any person. The court expressly noted that the courtroom was open throughout jury selection and all jury selection was conducted in the courtroom as opposed to the judge's chambers or the jury room. Defendant can point to no Washington case that has found a courtroom closure under these circumstances. Rather, defendant argues that the challenges for cause done during a sidebar conference effectively "closed" the courtroom as did conducting the peremptory challenge process in writing.

The right to a public trial serves to ensure a fair trial, to remind the prosecutor and judge of their responsibility to the accused and the importance of their functions, to encourage witnesses to come forward, and to discourage perjury. ***Brightman***, 155 Wn.2d at 514 (citing ***Peterson v. Williams***, 85 F.3d 39, 43 (2d Cir. 1996)). But not every interaction between the court, counsel, and defendants will implicate the right to a public trial. ***Sublett***, 176 Wn.2d at 71. To decide whether a particular process must be open to the press and the general public, the ***Sublett*** court

adopted[3] the "experience and logic" test formulated by the United States Supreme Court in ***Press–Enterprise Co. v. Superior Court***, 478 U.S. 1, 8, 106 S. Ct. 2735, 92 L. Ed. 2d 1 (1986). ***Sublett***, 176 Wn.2d at 73, 141.

> The first part of the test, the experience prong, asks "whether the place and process have historically been open to the press and general public." The logic prong asks "whether public access plays a significant positive role in the functioning of the particular process in question." If the answer to both is yes, the public trial right attaches and the Waller or Bone–Club factors must be considered before the proceeding may be closed to the public. We agree with this approach and adopt it in these circumstances.

Sublett, 176 Wn.2d at 73. Applying that test, the ***Sublett*** court held that no violation of the right to a public trial occurred when the court considered a jury question in chambers. ***Sublett***, 176 Wn.2d at 74–77. "None of the values served by the public trial right is violated under the facts of this case.... The appearance of fairness is satisfied by having the question, answer, and any objections placed on the record." ***Sublett***, 176 Wn.2d at 77.

Division III of the Court of Appeals recently addressed whether challenges for cause done in a sidebar constituted a courtroom closure under the experience and logic test in ***State v. Love***, ___ Wn. App. ___, 309 P.3d 1209 (2013). As to the experience prong the court concluded:

---

[3] Although no opinion gathered more than four votes, eight of the nine justices sitting in ***Sublett*** approved the "experience and logic" test.

> The history review confirms that in over 140 years of cause and peremptory challenges in this state, there is little evidence of the public exercise of such challenges, and some evidence that they are conducted privately. Our experience does not require that the exercise of these challenges be conducted in public.

Love, ___ Wn. App. ___, 309 P.3d at 1214. Under the logic prong, the court found that none of the purposes of the public trial right were furthered by a party's actions is making a challenge for cause or a peremptory challenge as a challenge for cause creates an issue of law for the judge to decide and a peremptory challenge "presents no questions of public oversight" *Id.* The court concluded that use of a side bar to conduct challenges for cause did not constitute a courtroom closure. *Id.*

In addition to the historical review conducted in ***Love***, there is some additional authority that the public announcement of a peremptory challenge in open court by the party exercising the challenge is not a widespread practice. When the United States Supreme Court decided that it was just as improper for a criminal defendant to excuse a potential juror for an improper reason as it was a prosecutor, the court commented that "it is common practice not to reveal the identity of the challenging party to the jurors and potential jurors[.]" ***Georgia v. McCollum***, 505 U.S. 42, 53 n.8, 112 S. Ct. 2348 (1992), citing Underwood, *Ending Race*

Discrimination in Jury Selection: Whose Right Is It, Anyway?, 92 Colum.L.Rev. 725, 751, n. 117 (1992).

In the case now before the court, defendant does not point to any ruling of the court that excluded spectators or any other person from the courtroom during voir dire proceedings. The record indicates that all voir dire was carried on in open court. Challenges for cause were initially made in a sidebar and the court later made a public record as to what had occurred in the sidebar. Peremptory challenges were made by the attorneys in open court, albeit by a written process. Presumably, defendant could see the peremptory sheet and discuss the process with his attorney while it was going on. The written record of the process was reviewed by the court and filed, making it available for public inspection. CP 83. None of the peremptory challenges were contested and there was no need for the court to make any decisions on the peremptory challenges. SRP 47- 49. The record offers no basis to assume that anything occurred during this process other than the written communication, among counsel and the court, of the names of the prospective jurors each counsel had decided to excuse by the right of peremptory challenge. Anyone can look at the peremptory challenge sheet and see exactly which party exercised which peremptory against which prospective juror and in what order. CP 83.

It should be noted that under ***McCollum***, both the prosecution and defense are forbidden from removing a juror with a peremptory challenge for an improper purpose. Thus, if there was a concern that a juror was being removed for an improper reason, it is immaterial which party exercised a peremptory against that juror. Any potential juror who felt that he or she was being improperly removed from the jury could raise his or her concern with the trial court. Under the written process used here, the court would know who had exercised its peremptory against that person and could decide whether it was necessary for that party to explain its reasons for doing so. The procedure used below protects the values of the public trial right.

Defendant has failed to identify any closure of the courtroom during jury selection and fails to show how the procedures used in an open court undermined the purposes of the public trial right. Anyone sitting in the court room would know which jurors were excused for cause and why. The parties carefully recorded the names of the prospective jurors who were removed by peremptory challenge, as well as the order in which each challenge was made and the party who made it. CP 83. This document is easily understood, and it was made part of the open court record, available for public scrutiny. These procedures satisfied the court's obligation to ensure the open administration of justice.

The only thing that did not occur was the vocal announcement of each peremptory challenge as it was made. There is no indication that our constitution requires that everything and anything that concerns a public trial be announced in open court. For example, seven years after statehood, the Washington Supreme Court issued its opinion in ***State v. Holedger***, 15 Wash. 443, 448, 46 Pac. 652 (1896). Holedger complained that his attorney was asked in open court and in front of the jury panel whether there was any objection to the jury being allowed to separate. The Supreme Court did not find any evidence that Holedger was prejudiced by this action, but did indicate that the better practice would be for the court to ask this question in a sidebar so as to avoid incurring the displeasure of juror who might be upset if there was an objection. The decision in ***Holedger*** was authored by Justice Dunbar and concurred in by Chief Justice Hoyt. Chief Justice Hoyt was the president of the 1889 constitutional convention, and Justice Dunbar was a delegate to the constitutional convention. *See* B. Rosenow, The Journal of the Washington State Constitutional Convention, at 468 (1889; B. Rosenow ed. 1962); C. Sheldon, The Washington High Bench: A Biographical History of the State Supreme Court, 1889-1991, at 134-37 (1992). Thus, at least two of the justices signing this opinion had considerable expertise in the protections given under the state constitution, yet neither found

certain trial functions being handled in a side bar to be inconsistent with the public's right to open proceedings. In 1904, the Court upheld the actions of trial court that utilized the "best-practice" recommended in ***Holedger***. *See* ***State v. Stockhammer***, 34 Wash. 262, 264, 75 P. 810 (1904) (noting that consent for the jury to separate was given by defense counsel at the bench out of the hearing of the defendant and the jury).

Defendant has failed to show that any of the values served by the public trial right was violated by use of a side bar or the written peremptory challenge procedure during the jury selection process when the court made a latter record in open court of what had occurred in the side bar and filed the written document created in the peremptory process, making it a public record. He relies upon a case from California to support his argument, ***People v. Harris***, 10 Cal. App. 4th 672, 12 Cal.Rptr.2d 758 (1992), but that was a case where the peremptory challenges were exercised in chambers then announced in open court so it is distinguishable from what happened here. The retreat of the parties and court into chambers and out of the open courtroom raises a closure issue. A public spectator at the ***Harris*** case could not see or hear what was happening in chambers, whereas in defendant's case, he could see that there was a brief sidebar discussion among court and counsel and would later hear what occurred during that sidebar.

As defendant has failed to show that any improper closure of the courtroom occurred this issue is without merit.

c. Defendant Allegation That He Was Denied The Right To Be Present Is Not Properly Before The Court And, Further, Any Error Is Harmless Beyond A Reasonable Doubt.

The right of a criminal defendant to be present at his trial is protected by the Fourteenth Amendment to the federal constitution and article 1, § 22 of the state constitution. ***State v. Irby***, 170 Wn.2d 874 880, 246 P.3d 796 (2011). A defendant has a right to be present at a proceeding "whenever his presence has a relation, reasonably substantial, to the fullness of his opportunity to defend against the charge." ***Snyder v. Massachusetts***, 291 U.S. 97, 105–06, 54 S. Ct. 330, 78 L. Ed. 674 (1934), *overruled in part on other grounds sub nom.* ***Malloy v. Hogan***, 378 U.S. 1, 84 S. Ct. 1489, 12 L. Ed. 2d 653 (1964). This right to be present extends to jury voir dire. ***Synder***, 291 U.S. at 106, ***Irby***, 170 Wn.2d at 883.

At issue in ***Irby***, were email communications between the court and counsel that concerned a portion of jury selection; the court and the attorneys agreed via email that several jurors could be removed for cause after review of their questionnaires. It is clear that Irby was in custody at the time that these email communications were exchanged and that the

timing of the email exchanges made it unlikely that Irby's attorney had consulted him about the challenged jurors. The court noted "significantly, the record here does not evidence the fact that defense counsel spoke to Irby before responding to the trial judge's e-mail." The court found a violation of Irby's right to be present under these facts.

In the case now before the court, defendant contends that his right to be present was violated because he was not allowed to be present at the sidebar conference when the court ruled upon his attorney's challenges for cause. SRP 47; RP 10-11.

At the outset, this court should refuse to review this claim because defendant did not object in the trial court and he cannot meet the standard set by RAP 2.5, as discussed above. Unlike Irby, defendant was present in the courtroom and had the opportunity to object when the court called counsel up to for the sidebar. More importantly, unlike Irby, defendant had ample opportunity to consult with his attorney during the selection process that was being conducted in the open courtroom. Because attorney client conversations are privileged, in-court communications and discussions between a defendant and his attorney not made part of the record; respect for the attorney-client relationship makes it unlikely that a trial court will inquire as to what is or is not being discussed between them. On occasion, the record might reflect that a private conversation

occurred between defense counsel and the defendant, because the attorney asks the court for a moment to consult with his client, but this is the exception rather than the rule. Generally, the record will be an unreliable indicator of whether such conversations occurred. As such no manifest error affecting a constitutional right can be shown from the silent record before an appellate court. A defendant present and represented by counsel in an open courtroom during jury selection cannot show that he is being denied his opportunity to consult with his attorney unless he objects. Here, defendant asks this court to engage in complete speculation as to whether he was denied his constitutional right to give input and consult with his attorney as to which potential jurors should be challenged for cause. Moreover, defendant cannot show that he was prejudiced by what occurred below. The defense successfully sought the removal of two jurors for cause. It is clear that defense counsel believed his client would receive a fairer trial without those jurors and sought their removal. Defendant cannot show how he was prejudiced by their removal.

In addition to RAP 2.5, the doctrine of invited error should also preclude appellate review of this claim. Under the doctrine of invited error, counsel cannot set up an error at trial and then complain of it on appeal. ***State v. Pam***, 101 Wn.2d 507, 511, 680 P.2d 762 (1984), *overruled on other grounds in* ***State v. Olson***, 126 Wn.2d 315, 893 P.2d

629 (1995). "The invited error doctrine prevents parties from benefiting from any error they caused at trial regardless of whether it was done intentionally or unintentionally." ***State v. Recuenco***, 154 Wn.2d 156, 163, 110 P.3d 188 (2005), *rev'd on other grounds by* ***Washington v. Recuenco***, 548 U.S. 212, 126 S. Ct. 2546, 165 L. Ed. 2d 466 (2006). The invited error doctrine is a "'strict rule' to be applied in every situation where the defendant's actions at least in part cause[d] the error." ***State v. Summers***, 107 Wn. App. 373, 381–82, 28 P.3d 780, 43 P.3d 526 (2001) (quoting ***State v. Studd***, 137 Wn.2d 533, 547, 973 P.2d 1049 (1999)). Here, defendant sought a ruling on two challenges for cause during a sidebar without lodging any objection to the use of a sidebar. He benefited from the court's grant of his two challenges for cause, yet now seeks to claim that he is entitled to a new trial for use of a procedure that he actively participated in.

Finally, even if this court finds that this issue that is properly before the court for review, it should find that any error is harmless beyond a reasonable doubt. A violation of the right to be present is subject to harmless error analysis under both the state and federal constitutions. ***Irby***, 170 Wn.2d at 885-86. It is clear that Juror No. 16, who had been a victim of a crime, did not think that he could be fair and impartial. SRP 9-10, 34-35. It is difficult to imagine any court failing to

remove a juror who repeatedly indicates that he cannot be fair. This is why both attorneys agreed that this juror should be removed for cause. RP 11-12. The removal of this juror did nothing but benefit the defendant.

Juror No. 11 was removed for cause over the prosecution's objection. RP 10-11. That juror worked for Safeway as a clerk and defendant was charged with committing a crime at a Safeway store against store employees. The trial court found that this was sufficient to establish implied bias and excused Juror No. 11 for cause. *Id.* If the court had denied the challenge for cause, the logical next step would have been for defense counsel to use a peremptory challenge to remove her as he clearly wanted her off the jury panel and had peremptory challenges to spare. CP 83. While defendant might have a constitutional right to give input to his attorney as to who should or should not sit on the jury, defendant has presented no authority that his decisions on peremptory challenges must control over those of his attorney and irrespective of the opinion or judgment of his attorney. It is clear that defense counsel wanted the removal of Juror No. 11 and that he had ample peremptory challenges to remove her if the motion for removal for cause was not granted. Thus Juror 11 would not have sat on defendant's jury regardless of what occurred in the sidebar conference and any error in granting a challenge for cause in a sidebar conference was harmless beyond a reasonable doubt.

2. DEFENDANT'S CONVICTIONS FOR ROBBERY IN THE SECOND DEGREE AND ASSAULT IN THE THIRD DEGREE DO NOT VIOLATE DOUBLE JEOPARDY BECAUSE EACH CRIME IS A SEPARATE OFFENSE.

The double jeopardy provisions of the federal and state constitutions "protect a defendant from being punished multiple times for the same offense." ***State v. Allen***, 150 Wn. App. 300, 312, 207 P.3d 483 (2009). When there are multiple punishments for the same conduct, the primary question is whether the legislature intended that multiple punishments be imposed. ***State v. Louis***, 155 Wn.2d 563, 569, 120 P.3d 936 (2005) (holding that the court must look to the statute to see if the legislature expressly authorized multiple punishments for conduct that violates more than one statute).

If the statute is unclear whether the legislature intended multiple punishments, then the court looks for legislative intent by applying a "same evidence" test. *Id.* Double jeopardy is violated if the defendant is convicted of offenses that are the same both in law and in fact. *See id.* at 569; *see also* ***State v. Calle***, 125 Wn.2d 769, 777, 888 P.2d 155 (1995).

The offenses are not the same in law where "each offense requires proof of an element not required in the other, [and] where proof of one does not necessarily prove the other." ***Louis***, 155 Wn.2d at 569 (noting that this test mirrors the "same elements" test in ***Blockburger v. United States***, 284 U.S. 299, 52 S. Ct. 180, 76 L. Ed. 306 (1932)).

"*Notwithstanding a substantial overlap in the evidence* that establishes the two crimes, if each requires proof of a fact that the other does not, the . . . same evidence test is satisfied." ***State v. Clark***, 170 Wn. App. 166, 188–89, 283 P.3d 1116 (2012) (emphasis added) (internal quotations omitted). Additional factors that demonstrate the legislature's intent to authorize multiple punishments include whether each crime is codified under a separate title or differs in severity (i.e., class A/B/C felony, offense level, etc.). *See id.* at 193.

a. Defendant's Convictions Do Not Violate Double Jeopardy Because Robbery In The Second Degree And Assault In The Third Degree Require Proof Of An Element Not Required By The Other And Thus Are Not The Same In Law.

The State charged defendant with robbery in the second degree, in violation of RCW 9A.56.190 and 9A.56.210, and assault in the third degree, in violation of RCW 9A.36.031(1)(a). Because neither statute expressly states the legislature's intent to impose multiple punishments in light of the other crime, a "same evidence" test is required here.

A person is guilty of robbery in the second degree if "he or she commits robbery." RCW 9A.56.210. And, 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 or his or her property or the person or property of anyone. Such force or fear must be used to obtain or retain possession of the property, or to prevent or overcome resistance to the taking; in either of which cases the degree of force is immaterial. 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 jury was instructed that, to convict defendant of robbery in the second degree, each of the following elements must be met:

> (1) That on or about the 6th day of September, 2012; the defendant unlawfully took personal property from the person or in the presence of another;
>
> (2) That the defendant intended to commit theft of the property;
>
> (3) That the taking was against the person's will by the defendant's use or threatened use of immediate force, violence or fear of injury to that person or to that person's property or to the person or property of another;
>
> (4) That force or fear was used by the defendant to obtain or retain possession of the property or to prevent or overcome resistance to the taking; and
>
> (5) That any of these acts occurred in the State of Washington.

CP 14-43 (Instruction #7).

A person is guilty of assault in the third degree if "her or she, under circumstances not amounting to assault in the first or second degree" "With intent to prevent or resist the execution of any lawful process or mandate of any court officer *or the lawful apprehension or detention of himself*, herself, or another person, assaults another[.]" RCW 9A.36.031(1)(a) (cited in relevant part).

The jury was instructed that, to convict defendant of assault in the third degree, each of the following elements must be met:

> (1) That on or about the 6th day of September, 2012; the defendant assaulted Nathaniel Duvall;
>
> (2) That the assault was committed with intent to prevent or resist the lawful apprehension or detention of defendant; and
>
> (3) That this act occurred in the State of Washington.

CP 14-43 (Instruction #13).

Under the same evidence test, robbery in the second degree and assault in the third degree each require proof of a factual element that the other does not. This factual distinction centers around the force required under each charge.

Robbery in the second degree requires the State to prove that defendant use force in one of three specific ways: (1) to obtain possession of stolen property; (2) to retain possession of stolen property; or, (3) to prevent or overcome resistance to the taking of stolen property.

As charged in this case, the assault in the third degree required proof that defendant assaulted a person with intent to prevent or resist lawful apprehension. Assault inherently requires a force element. The State is thus required to prove that defendant used force against another with intent to prevent or resist lawful apprehension. Unlike robbery, which places specific limitations on the ways in which force must be used, third degree assault contains no such restrictions.

Unlike assault in the third degree, which requires the State to prove that defendant intended to prevent or resist his lawful apprehension, second degree robbery requires the State to prove that defendant used force to prevent or overcome resistance to *the taking*.

Robbery in the second degree does not require the State to prove that defendant intended to prevent or resist his lawful apprehension. Thus each crime has a separate and distinct specific intent that is connected to the use of force. Proof of the robbery will not prove the assault in the third degree and proof of the assault in the third degree will not prove the robbery.

b. Defendant Did Not Receive Multiple Punishments For The Same Offense Where He Completed The Robbery Before Assaulting Mr. Duval.

To determine whether a defendant has received multiple punishments for the same offense, the court must determine the unit of prosecution that the legislature intended to constitute the prohibited act. ***State v. Green***, 156 Wn. App. 96, 98, 230 P.3d 654 (2010) (citing ***State v. Adel***, 136 Wn.2d 629, 634, 965 P.2d 1072 (1998)). "The 'unit of prosecution' refers to the scope of the criminal act." ***Green***, 156 Wn. App. at p. 98 (quoting ***Adel***, 136 Wn.2d at 634).

The unit of prosecution for robbery encompasses "both a taking of property and a forcible taking against the will of the person from whom or from whose presence the property is taken." ***State v. Tvedt***, 153 Wn.2d 705, 720, 107 P.3d 728 (2005). The unit of prosecution for robbery is not a course of conduct. *Id.* at 713.

With regard to the scope of robbery, this State has adopted the "transactional view of robbery," by which "[...] a robbery can be considered an ongoing offense so that, regardless of whether force was used to obtain property, force used to retain the stolen property or to effect an escape can satisfy the force element of robbery." ***State v. Robinson***, 73 Wn. App. 851, 856, 872 P.2d 43 (1994); *see also* ***State v. Truong***, 168

Wn. App. 529, 277 P.3d 74, 77 (2012). "The taking is ongoing until the assailant has effected an escape." *Id.* at 77.

The force used to effect an escape, however, must relate to the taking or retention of property. In ***State v. Johnson***, 155 Wn.2d 609, 121 P.3d 91 (2005), defendant walked into a Wal-Mart, loaded a television into his shopping cart, and pushed the cart out the front door. Store security followed defendant and confronted him in the parking lot. Defendant abandoned the shopping cart which contained the stolen merchandise and began to run away, but then turned back and punched one of the security guards in the nose. The Supreme Court reversed defendant's first degree robbery conviction because the defendant "was not attempting to retain the property when he punched the guard but was attempting to escape after abandoning it." *Id.* at 611 (emphasis added). The court emphasized that the force used to sustain a robbery conviction" [...] must relate to the taking or retention of property." *Id.* at 611.

Here, the force used to sustain defendant's robbery conviction consists of the punch that defendant took at Mr. Duval, but which missed him. When defendant used this force against Mr. Duval, he still had possession of the stolen liquor. Therefore, the threatened use of immediate force was used to both retain possession of the stolen property and effectuate an escape. *See* RCW 9A.56.190 (Robbery-definition). The

force used after defendant lost possession of the stolen property, however, is not relevant to the robbery charge because, at that point, defendant was not using such force to retain possession of the stolen property. Like the defendant in ***Johnson***, defendant was no longer retaining stolen property when he succeeded in punching Mr. Duval - so that use of force cannot be connected to the robbery. Rather defendant was trying to escape capture by the security officer.

In sum, because the unit of prosecution of robbery is limited to force used to obtain or *retain* stolen property, defendant's punch which connected with Mr. Duval 's face falls outside of the scope of robbery as he no longer had possession of the stolen property. As such, defendant did not receive multiple punishments for the same offense. He was punished for the robbery which was complete before he committed the assault in the third degree.

Defendant cites ***State v. Freeman***, 153 Wn.2d 765, 108 P.3d 753 (2005) to support the notion that his convictions for second degree robbery and third degree assault violate double jeopardy. In ***Freeman*** the Supreme Court addressed whether the legislature intended to punish separately both a robbery elevated to *first* degree by an assault, and the assault itself, nothing that "[i]f the legislature authorized cumulative punishments for both crimes, then double jeopardy is not offended." *Id.*,

153 at 771. The court held that whether separate punishments were authorized depended on the degree of the assault committed in connection with the robbery:

> Accordingly, we conclude that there is evidence that the legislature did intend to punish first degree assault and robbery separately. But we find no evidence that the legislature intended to punish second degree assault separately from first degree robbery when the assault facilitates the robbery.

Id. at 758. Thus, ***Freeman*** is instantly distinguishable as it concerns cases where an offender is convicted of an assault charge and *first* degree robbery. In the instant case defendant was convicted of *second* degree robbery.

The discussion in ***Freeman*** of past cases that had merged convictions for robbery and assault is also relevant. The Court noted that "since 1975, courts have generally held that convictions for assault and robbery stemming from a single violent act are the same for double jeopardy purposes[,] " but concluded that" no per se rule has emerged; instead, courts have continued to give a hard look at each case." *Id.* at 758. Thus, there is no controlling authority that defendant's convictions for assault in the second degree and robbery in the second degree *must* be merged. It is not necessary to assault a person to commit a robbery in the second degree as "the threatened use of force" will suffice for robbery.

Here, without the conduct amounting to assault (the successful punch), defendant would still be guilty of second degree robbery as he took an unsucessful swing at Mr. Duvall while still in possession of the stolen merchandise.[4] The successful punch to the face did not - and could not - elevate defendant's second degree robbery to first degree robbery because defendant was not retaining the stolen property when the blow was landed. In other words, *with or without* the successful punch to the face, defendant still committed robbery in the second degree. Defendant was charged accordingly; the State did not use the successful punch to elevate the robbery in the second degree charge to robbery in the first degree.

The ***Freeman*** court also considered an instance in which a defendant struck a victim *after* completing a robbery and concluded that "there was a separate injury and intent justifying a separate assault conviction, especially since the assault did not forward the robbery." *Id.* at 779. Here, the assault caused a separate injury to Mr. Duval (he was punched in the face, rather than merely getting swung at) and the intent

[4] This is consistent with the charging language: the act of force alleged in the count charging third degree assault ("intentionally assault Nathaniel Duvall") is not the same act of force alleged in the count charging second degree robbery ("by use or threatened use of immediate force, violence, or fear of injury to Nathaniel Duvall and/or Axel M. Engelhardt, said force or fear being used to obtain or retain possession of the property or to overcome resistance to the taking[.]"). CP 5–7.

behind the act was necessarily different given that defendant was no longer retaining stolen property. As such, the latter use of force did not forward the robbery and the assault conviction should be treated separately.

Defendant also cites ***In re Personal Restraint of Butler***, 24 Wn. App. 175, 177, 599 P.2d (1979) for the proposition that the merger doctrine is not limited to first degree robber y. His reliance is misplaced. First, the Supreme Court has said that the merger doctrine is a rule of statutory construction which *only* applies where the Legislature has clearly indicated that in order to prove a particular degree of crime the State must prove not only that the defendant committed that crime but that the crime was accompanied by an act which is defined as a crime elsewhere in the criminal statutes. ***State v. Vladovic***, 99 Wn.2d 413, 421, 662 P.2d 853 (1983); ***State v. Frohs***, 83 Wn.App. 803, 924 P.2d 384 (1996). Next, ***Butler*** predates the Supreme Court's decision in ***State v. Calle***, 125 Wn.2d 769, 776, 888 P.2d 155 (1995), which caused courts to reassess the proper use of the merger doctrine, *see, e.g.*, ***Frohs***, 83 Wn. App. at 805-11, as many cases prior to ***Calle*** would examine multiple convictions under double jeopardy grounds and the merger doctrine as if they were separate issues. *See, e.g.*, ***Vladovic***, 99 Wn.2d at 417-22. ***State v. Slemmer***, 48 Wn. App. 48, 738 P.2d 281 (1987); ***State v. Fryer***, 36 Wn. App. 312, 673

P.2d 881 (1983). Finally, the court in ***Butler***, held that "charges of second-degree robbery and second-degree assault merge where, as here, the acts of force necessary to commit the robbery are the same as the acts of force alleged in the count charging second degree assault." Here, and as argued above, the act of force necessary to commit the robbery is different from the act of force necessary to commit the assault.

b. Double Jeopardy Was Not Violated Where It Was Manifestly Apparent To Jurors That Each Count Was Based On A Separate Act.

"A double jeopardy violation occurs if it was not 'manifestly apparent to the jury' from the evidence, arguments, and instructions that 'the State [was] not seeking to impose multiple punishments for the same offense and that each count was based on a separate act.'" ***State v. Wallmuller***, 164 Wn. App. 890, 897, 265 P.3d 940 (2011) quoting ***State v. Mutch***, 171 Wn.2d 646, 663–64, 254 P.3d 803 (2011). An appellate court may review the entire record in determining whether a double jeopardy violation has occurred. ***Mutch*** at 664. "'No double jeopardy violation results when the information, instructions, testimony, and argument clearly demonstrate that the State was not seeking to impose multiple punishments for the same offense.'" ***Mutch*** at 664, quoting ***State v. Hayes***, 81 Wn. App. 425, 440, 9214 P.2d 788 (1996).

Here, it was manifestly apparent to the jury that the State was seeking to impose separate punishments for separate offenses.

First, the jury was instructed that "A separate crime is charged in each count. You must decide each count separately. Your verdict on one count should not control your verdict on any other count." CP 14–43 (Instruction #2).

Second, Mr. Duval testified to each separate crime. Mr. Duval first described, in detail, defendant's initial swing and miss. 2 RP 45. This testimony also included at least two physical demonstrations of the act. 2 RP 45 ln. 19–21; 2 RP 46 ln. 3–4; 2 RP 46 ln. 19–20. It was clear from Mr. Duval's testimony that the initial swing occurred while defendant was still running and still possessed the stolen bottles of liquor. 2 RP 48, 66–68. Mr. Duval then testified to the assault, that defendant punched him in the face after resisting arrest. 2 RP 50–51.

Third, during closing argument, the Prosecutor explained to the jury (twice) that the force element for second degree robbery was distinct from the force element used for third degree assault. The Prosecutor first described the force used for second degree robbery as follows:

> Was it by the use or threatened use of immediate force or fear of injury? Yes. This was the swing at Nathaniel Duval, who you will remember that as Nathaniel Duval is chasing the defendant out of the store and through the parking lot, the defendant stops, turns, looks over his shoulder, and

> takes a swing with a closed fist at Mr. Duval. Missed him, but still took a swing at him. That is force. That is threat of force, at least.

3 RP 109–10. The Prosecutor then described the force used for third degree assault as follows:

> [...] the swing and the miss. That was related to robbery. I'm talking about when they're on the ground and the defendant is swinging and the defendant -- I should say the defendant is in the grasp of loss prevention, and the defendant takes a swing at the loss prevention officer, so he actually lands a punch on Nathaniel Duval, and Nathaniel ends up hitting his head back up against the concrete. That was an assault. That was an intentional touch or strike that was harmful or offensive.

3 RP 111–112. And, during rebuttal closing argument, the Prosecutor again reiterated the distinction between the two crimes as follows:

> [...] for this to be a robbery [,] [defendant] only needs to use or threaten to use force, and clearly that is what happened with that first swing when he missed Nathaniel Duval. That was clearly force or threat of force. [...] The robbery already took place at the time that Nathaniel Duval was swung at the first time. That swinging, when he first, when the defendant first swung at Mr. Duval that was robbery, because at that time the defendant still had the bottles of liquor on his person. [...] So clearly, at the time that the defendant first swung at Nathaniel Duval, when the defendant still had the bottles on his person, that is robbery. Once those bottles slid out, slid away, the defendant no longer had the property. So any assault that took place later on is not part of a robbery. They're kind of -- they're two different chunks of this. We had the robbery that occurred

> while the defendant still had the bottles, and then we had two assaults that occurred after the bottles skidded across the pavement.

3 RP 123–24.

Defendant cites ***State v. Kier***, 164 Wn.2d 798, 813, 194 P.3d 212 (2008) for the notion that an election in closing argument is insufficient to cure a double jeopardy violation. Brief of Appellant, 8. ***Kier*** is distinguishable. In ***Kier***, the State relied solely upon the Prosecutor's election in closing argument to escape a double jeopardy violation. *Id.* at 813. The court rejected the State's argument because it "[could not] consider the closing argument in isolation" and because the jury verdict was ambiguous as to the victim of the robbery. *Id.* at 813. Here, the State is not relying solely upon closing arguments to rebut an alleged double jeopardy violation. Rather, the State is relying upon the record as a whole, including Jury Instruction #2, Mr. Duval's testimony, closing argument, and rebuttal closing argument. Indeed, the record supports that it was manifestly apparent to jurors that the State was not seeking multiple punishments for the same offense and that each charge was based upon a separate act.

3. THE TRIAL COURT DID NOT ABUSE ITS DISCRETION OR MISAPPLY THE LAW BY CONSIDERING DEFENDANT'S CONVICTIONS AS SEPARATE FOR PURPOSES OF CALCULATING HIS OFFENDER SCORE.

Under RCW 9.94A.589(1)(a), two crimes shall be considered the "same criminal conduct" only when all three of the following elements are established: (1) the two crimes share the same criminal intent; (2) the two crimes are committed at the same time and place; and (3) the two crimes involve the same victim. ***State v. Lessley***, 118 Wn.2d 773, 777, 827 P.2d 996 (1992). The Legislature intended the phrase "same criminal conduct" to be construed narrowly. *See* ***State v. Flake***, 76 Wn. App. 174, 180, 883 P.2d 341 (1994). If one of these elements is missing, then two crimes cannot constitute the same criminal conduct. ***Lessley***, 118 Wn.2d at 778. An appellate court will generally defer to a trial court's decision on whether two different crimes involve the same criminal conduct, and will not reverse absent a clear abuse of discretion or a misapplication of the law. ***State v. Haddock***, 141 Wn.2d 103, 3 P.2d 733 (2000).

Two crimes share the same intent if, viewed objectively, the criminal intent did not change from the first crime to the second. ***Lessley***, 118 Wn.2d at 777. A defendant's subjective intent is irrelevant. ***Lessley***, 118 Wn.2d at 778. "In deciding if crimes encompassed the same criminal conduct, trial courts should focus on the extent to which the criminal

intent, as objectively viewed, changed from one crime to the next." ***State v. Dunaway***, 109 Wn.2d 207, 215, 749 P.2d 160 (1988). In determining whether multiple crimes constitute the same criminal conduct, courts consider how intimately related the crimes are, whether between the crimes charged there was any substantial change in the nature of the criminal objective, and whether one crime furthered the other. ***State v. Burns***, 114 Wn.2d 314, 318, 788 P.2d 531 (1990). When a defendant has the time to "pause, reflect, and either cease his criminal activity or proceed to commit a further criminal act," and makes the decision to proceed, the defendant has formed a new intent to commit the second act. ***State v. Grantham***, 84 Wn. App. 854, 859, 932 P.2d 657 (1997).

Here, defendant's assault conviction is not based upon the same criminal intent as his robbery conviction. As discussed above, the force used while defendant retained possession of the stolen liquor was done with an intent to steal the merchandise. This intent was not longer applicable, however, the moment that defendant lost possession of the stolen liquor as he was no longer using force to retain stolen property. After losing control of the stolen merchandise, defendant's did not use force with the intent to retain possession of the stolen property but used force with the intent to avoid lawful arrest. His objective intent changed from one crime to the next.

Furthermore, defendant had time to cease his criminal activity before committing the assault. Defendant was on his feet and running when he initially swung at Mr. Duval. 2 RP 48. Mr. Duval then took defendant to the ground. 2 RP 48. After a struggle, defendant managed to throw Mr. Duval off and stand up. 2 RP 48. At that point defendant could have run off or otherwise ceased his criminal activity; instead defendant punched Mr. Duval in the face. 2 RP 50. The trial court did not commit a clear abuse of discretion or misapply the law in considering defendant's crimes as being separate.

D. CONCLUSION.

For the reasons stated above, the State respectfully asks this Court to affirm defendant's conviction and sentence.

DATED: December 9, 2013

MARK LINDQUIST
Pierce County
Prosecuting Attorney

KATHLEEN PROCTOR
Deputy Prosecuting Attorney
WSB # 14811

Certificate of Service:
The undersigned certifies that on this day she delivered by ~~U.S. mail~~ or ABC-LMI delivery to the attorney of record for the appellant and appellant c/o his attorney true and correct copies of the document to which this certificate is attached. This statement is certified to be true and correct under penalty of perjury of the laws of the State of Washington Signed at Tacoma, Washington, on the date below.

12/9/13 [signature]
Date Signature

PIERCE COUNTY PROSECUTOR

December 09, 2013 - 1:28 PM

Transmittal Letter

Document Uploaded: 444879-Respondent's Brief~2.pdf

Case Name: State v. Lardell Courtney

Court of Appeals Case Number: 44487-9

Is this a Personal Restraint Petition? Yes ■ No

The document being Filed is:

Designation of Clerk's Papers Supplemental Designation of Clerk's Papers

Statement of Arrangements

Motion: ____

Answer/Reply to Motion: ____

■ Brief: __Respondent's__

Statement of Additional Authorities

Cost Bill

Objection to Cost Bill

Affidavit

Letter

Copy of Verbatim Report of Proceedings - No. of Volumes: ____
Hearing Date(s): _____

Personal Restraint Petition (PRP)

Response to Personal Restraint Petition

Reply to Response to Personal Restraint Petition

Petition for Review (PRV)

Other: _____

Comments:

No Comments were entered.

Sender Name: Heather M Johnson - Email: **hjohns2@co.pierce.wa.us**

A copy of this document has been emailed to the following addresses:

sloanef@nwattorney.net