NO. 31520-7-III

IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON

DIVISION THREE

STATE OF WASHINGTON,

Respondent,

v.

MATTHEW HIBBARD,

Appellant.

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

BRIEF OF APPELLANT

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A. ASSIGNMENTS OF ERROR

1. The trial court denied Mr. Hibbard his right to present a defense in violation of the Sixth Amendment to the United States Constitution and Article I, Section 22 of the Washington Constitution.

2. The trial court erred in failing to give Mr. Hibbard's proposed lesser included jury instruction for assault in the fourth degree.

3. The trial court violated Mr. Hibbard's constitutional right to a public trial by taking peremptory challenges during a private, unreported conference.

4. The trial court violated the public right to access all court proceedings by taking peremptory challenges during a private unreported bench conference.

5. The trial court violated Mr. Hibbard's constitutional right to be present at all critical stages of trial when it took peremptory challenges out of his presence.

B. ISSUE PERTAINING TO ASSIGNMENTS OF ERROR

1. The Sixth Amendment's guarantee of the right to present a defense and the Fourteenth Amendment guarantee of due process, along with similar guarantees of the Washington Constitution, are

violated where a trial court bars a defendant from presenting relevant evidence. Washington courts have concluded that so long as evidence is minimally relevant, the refusal to admit violates a defendant's rights unless the State can establish the relevance is outweighed by potential prejudice to the fairness of the process. Where the trial court found the evidence was relevant but nonetheless not admissible, even in the absence of any showing of prejudice by the State, did the court violate Mr. Hibbard's Sixth and Fourteenth Amendment rights as well as his rights under Article I, section 22?

2. A criminal defendant is entitled to a lesser-included offense jury instruction on a crime that is necessarily included within that with which the defendant is charged in the information. In the instant case, assault in the fourth degree is a lesser included offense of assault in the third degree. Because the evidence presented showed the jury could have found that Mr. Hibbard committed only assault in the fourth degree, did the trial court err in failing to instruct the jury on the lesser offense, as requested?

3. The right of the public and the accused to a public trial may only be restricted in the most unusual of circumstances, and if so, after

a trial court considers the Bone-Club[1] factors and finds it necessary. Voir dire is a critical stage of trial that must be open to the public. During jury selection, the court called the parties to a private conference, during which the parties apparently made juror-specific challenges. The proceeding was not recorded. Because the trial court did not make any Bone-Club assessment or findings before conducting this important portion of jury selection in private, did the court violate Mr. Hibbard's and the public's constitutional right to a public trial?

4. An accused has a fundamental right to be present at all critical stages of a trial, including voir dire and the empanelling of the jury. Did Mr. Hibbard's absence from the conference during which his jury was selected violate his constitutional right to be present at all critical stages of the trial?

C. STATEMENT OF THE CASE

Matthew Hibbard has lived in the Tri-Cities for his entire life, and has been working at various jobs in nightclub security since he came of age in 1992. 2RP 192-93.[2] By the summer of 2011, Mr. Hibbard had been promoted to general manager of Jack Didley's, a

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

[2] The verbatim report of proceedings consists of three consecutively paginated volumes, as follows: RP (voir dire); 2RP (trial); 3RP (sentencing).

popular bar in Kennewick. 2RP 187, 192-93. This promotion was due in large part to Mr. Hibbard's longstanding reputation for peaceful conflict resolution with patrons. Id.

The owner of the bar, Todd Jones, testified at trial that he and Mr. Hibbard often discussed how to handle situations with unruly customers. 2RP 189.

> You handle it in a peaceful manner. You spend as much time as you can with an individual to try to talk him down, and that is one of the skills Matt has always been incredible at. You can sit there and spend a long period of time. It's an investment. If you spend several minutes trying to talk somebody down or getting their friends to get the person to leave and that is again an incident where maybe that person is able to come back later and we don't lose a customer often. It's the last thing we want to do is go hands on with an individual.

2RP 189.

On the evening of July 4, 2012, Mr. Hibbard was working at Jack Didley's, when a group of young men came in. These men had never been to the bar before, and after they were asked by Mr. Hibbard to leave the VIP area, they became angry. 2RP 40-43, 195-96. One of the men, Ben Ensign, started to behave more aggressively, stripping off his shirt and unbuckling his pants. 2RP 212-13; Ex. 39. Mr. Ensign also took a drink from a female customer's table and then knocked over

two chairs, before returning to his own table. 2RP 195-96, 212-14; Ex. 39.

When Mr. Hibbard observed Mr. Ensign's behavior, he reviewed the security videotape in order to see exactly how the chairs had been tipped over. 2RP 195-96. When he determined that Mr. Ensign had clearly knocked the chairs over, Mr. Hibbard decided Mr. Ensign was too intoxicated to remain in the bar that evening. 2RP 196. Mr. Hibbard tapped Mr. Ensign on the shoulder and told him and his friends they had to leave, because they had kicked over the chairs. Id.

Mr. Ensign initially agreed, but then immediately returned to the club. Id. at 197-99. Mr. Hibbard reminded him that he had been kicked out of the bar, but Mr. Ensign swore at him and demanded proof of what he had done wrong. Id. Mr. Ensign's friends promised to escort him out again, but Mr. Ensign demanded that Mr. Hibbard physically remove him from the bar. Id. Mr. Ensign's friends apologized for his belligerent behavior, explaining that he was "f'd up." 2RP 199.

In fact, tests would show that Mr. Ensign's blood-alcohol level was between .22 and .24 at the time of the incident – three times the legal limit. CP 50 (stipulation). Mr. Ensign's friends finally pulled

him down the street, as he struggled with them. 2RP 200. Moments later, however, Mr. Ensign broke free of his friends and charged the door to Jack Didley's again. 2RP 200. Since Mr. Hibbard did not know Mr. Ensign's intentions, he and the other doorman barred Mr. Ensign's entrance to the club. 2RP 200. Mr. Hibbard grabbed Mr. Ensign in a head-lock, and the other doorman held Mr. Ensign by the ankles, because he was flailing. Id. at 170-72, 201. Mr. Hibbard repeatedly told Mr. Ensign to relax and asked, "Are you done? Are you done? Just relax. Calm down." 2RP 201. Mr. Ensign's arms were flailing and he was squirming. When Mr. Ensign started throwing punches, this caused Mr. Hibbard to release his hold, and Mr. Ensign dropped to the sidewalk. Id.[3]

Mr. Ensign's head hit the sidewalk, causing a subdural hematoma. 2RP 17-20. The injuries were extensive, requiring surgery, an induced coma, and extensive rehabilitation. Id. at 21-33.

Mr. Hibbard was charged with assault in the third degree. CP 1-2. Numerous defense witnesses offered to testify as to Mr. Hibbard's good character and reputation at trial. 2RP 107, 109-10, 124-25, 139, 238.

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[3] Mr. Hibbard noted that the way he held Mr. Ensign was by design, with one hand pushed against his own chest, so as not to tighten up and compress too tightly, thus distinguishing between a head-lock and a choke-hold. 2RP 202-03.

The trial court severely limited the number and scope of these defense witnesses. Id.

The jury found Mr. Hibbard guilty as charged; the jury also returned a special verdict stating Mr. Ensign's injuries exceeded the statutory definition of bodily harm. CP 52, 53.

After presiding over the trial, which had included a strong showing of community support for Mr. Hibbard, the court expressed its understanding of the pathos involved at sentencing:

> With regard to confinement, I don't think I've heard a case that has been more problematic and tragic and devastating to everyone involved than this one. Probably true justice would be that it never happened in the first place. My guess is that the families of both the defendant and the victim are probably under a life sentence.

3RP 28.

The trial court sentenced Mr. Hibbard to 12 months custody, 345 days of which could be served on work release.[4]

[4] Mr. Hibbard cares for his parents and for his disabled child. 3RP 26.

D. ARGUMENT

1. THE TRIAL COURT'S EXCLUSION OF RELEVANT EVIDENCE DEPRIVED MR. HIBBARD OF HIS SIXTH AMENDMENT RIGHT TO PRESENT A DEFENSE

a. The Sixth Amendment guarantees an individual the right to present a defense. The Sixth Amendment guarantees a defendant the right to present a defense. Davis v. Alaska, 415 U.S. 308, 318, 94 S.Ct. 1105, 39 L.Ed.2d 347 (1974). A defendant must receive the opportunity to present his version of the facts to the jury so that it may decide "where the truth lies." Washington v. Texas, 388 U.S. 14, 19, 87 S.Ct. 1920, 18 L.Ed.2d 1019 (1967); Chambers v. Mississippi, 410 U.S. 284, 294-95, 302, 93 S.Ct. 1038, 35 L.Ed.2d 297 (1973); State v. Jones, 168 Wn.2d 713, 720, 230 P.3d 576 (2010). "[A]t a minimum . . . criminal defendants have . . . the right to put before the jury evidence that might influence the determination of guilt." Pennsylvania v. Ritchie, 480 U.S. 39, 56, 107 S.Ct. 989, 94 L.Ed.2d 40 (1987).

So long as evidence is minimally relevant

> ". . . the burden is on the State to show the evidence is so prejudicial as to disrupt the fairness of the fact-finding process at trial." The State's interest in excluding prejudicial evidence must also "be balanced against the defendant's need for the information sought," and

> relevant information can be withheld only "if the State's interest outweighs the defendant's need."

(Internal citations omitted.) Jones, 168 Wn.2d at 720 (quoting State v. Darden, 145 Wn.2d 612, 622, 41 P.3d 1189 (2002)).

b. The trial court's refusal to permit admission of relevant evidence denied Mr. Hibbard his right to present a defense. Evidence of a defendant's good character may be relevant and admissible, if a proper foundation is laid. State v. Grisvold, 98 Wn. App. 817, 829, 991 P.2d 657 (2000), abrogated on other grounds, State v. DeVincentis, 150 Wn.2d 11, 74 P.3d 119 (2003).[5]

Mr. Hibbard made an offer of proof stating that several witnesses would testify as to specific instances of conduct in which Mr. Hibbard acted in a diligent and peaceful manner on the job. 2RP 109-10. Mr. Hibbard argued this evidence was necessary to the defense that he remained calm, did not resort to violence, even when provoked, and that the evidence was essential to the defense. He argued that to limit the testimony to reputation alone was error. Id.

The trial court properly found the evidence as to Mr. Hibbard's reputation for peacefulness and diligence was relevant under ER

[5] DeVincentis abrogated the holding of Grisvold requiring a heightened showing of uniqueness prior to admission of other acts evidence as proof of a common scheme or plan under ER 404(b). 150 Wn.2d at 18-21.

405(b). 2RP 107. However, the court then improperly limited Mr. Hibbard's ability to introduce that relevant evidence. The court held that Mr. Hibbard could only offer such evidence by way of reputation evidence. Id. at 109-10. The court rejected, without explanation or findings, the notion that ER 405(b) allowed Mr. Hibbard to offer evidence of specific instances of conduct.

First, ER 405(a) does not require proof of character be made by evidence of reputation but rather the plain language of that rule merely allows that manner of proof. The rule provides:

> In all cases in which evidence of character or a trait of character of a person is admissible, proof may be made by testimony as to reputation. On cross examination, inquiry is allowable into relevant specific instances of conduct.

ER 405(a).

Courts rely on the rules of statutory construction to interpret court rules. State v. Blilie, 132 Wn.2d 484, 492, 939 P.2d 691 (1997). Generally, courts attempt to give effect to the plain terms of a statute. Tommy P. v. Board of Cy. Comm'rs, 97 Wn.2d 385, 391, 645 P.2d 697 (1982); see also, State v. Beaver, 148 Wn.2d 338, 343, 60 P.3d 586 (2002) (every statutory term is intended to have some material effect). ER 405(a) uses the word "may" rather than "shall" in describing the

manner of proof which may be employed. Use of the word "shall" creates a mandatory requirement whereas "may" confers discretion. See e.g., State v. Krall, 125 Wn.2d 146, 148-49, 881 P.3d 1040 (1994). Thus, the allowance in ER 405(a) for proof of character by reputation evidence is not a prohibition of proof by specific instances of conduct.

But in any event, ER 405(b) specifically permitted Mr. Hibbard to prove his character by specific instances of conduct. The rule allows:

> In cases in which character or a trait of character of a person is an essential element of a charge, claim, or defense, proof may also be made of specific instances of that person's conduct.

Here, the State argued, and the court seemed to agree, Mr. Hibbard's character trait was not an essential element of the "charge" and thus could not be proved by evidence of specific instances of conduct. 2RP 108-10. But the rule is not limited simply to cases where the character trait is an essential element of a charge. Instead, the rule also applies in cases where the trait is an element of a "claim [or] defense." ER 405(b). Mr. Hibbard's non-violence and the many specific examples of peaceful conflict-resolution were an essential component of his defense -- his claim that he acted reasonably, and not negligently, under the

circumstances. The evidence was relevant and plainly admissible pursuant to ER 405(b).

Applying the standard set forth in Jones, the court found the evidence relevant. Thus, the State was required to prove the evidence was "so prejudicial as to disrupt the fairness of the fact-finding process at trial" and that this prejudice outweighed Mr. Hibbard's need for the evidence. Jones, 168 Wn.2d at 720. The State did not meet that burden. The State made no showing of prejudice at all, much less a showing that admission of this relevant evidence would upset the fairness of the proceeding. The trial court's erroneous ruling deprived Mr. Hibbard of his Sixth Amendment right to present a defense.

In fact, at the point that the prosecutor objected to the extraordinary number of character witnesses on Mr. Hibbard's behalf as cumulative, Mr. Hibbard argued that there was no prejudice to the State to allow Mr. Hibbard to present his witnesses.

> We've already been limited to just reputation. Clearly he has a good reputation ... [t]hese witnesses – I think the last two took a total of four minutes. I think it's important for the jury to know just how many people know the good reputation of Mr. Hibbard. Anybody can find two or three or four but if you have ten people that can say that [--] that is important.

2RP 140.

c. This Court must reverse Mr. Hibbard's conviction so that he may have a trial that satisfies his right to present a defense and his right to due process. A constitutional error requires reversal unless the State can establish beyond a reasonable doubt the error "did not contribute to the verdict obtained." Chapman v. California, 386 U.S. 18, 24, 87 S.Ct. 824, 17 L.Ed.2d 705 (1967); United States v. Neder, 527 U.S. 1, 9, 119 S.Ct. 1827, 144 L.Ed.2d 35 (1999). To meet its burden here, the State must prove beyond a reasonable doubt that none of the jurors could have entertained a doubt as to Mr. Hibbard's guilt after hearing evidence that he had a reputation for nonviolence and peaceful conflict resolution, which would have been shown by specific examples of conduct. The State simply cannot meet that standard here, and this Court must reverse Mr. Hibbard's conviction.

2. THE TRIAL COURT ERRONEOUSLY REFUSED TO INSTRUCT THE JURY ON MR. HIBBARD'S PROPOSED JURY INSTRUCTIONS THEREBY DEPRIVING HIM OF HIS RIGHT TO PRESENT A DEFENSE

At the close of evidence, Mr. Hibbard proposed a lesser-included offense jury instruction for assault in the fourth degree. 2RP 237. The trial court denied the requested instruction. 2RP 237-38.

a. An instruction on a lesser-included offense is required whenever the evidence supports an inference the lesser crime was committed. "A defendant in a criminal case is entitled to have the jury fully instructed on the defense theory of the case." State v. Fernandez-Medina, 141 Wn.2d 448, 461-62, 6 P.3d 1150 (2000) (quoting State v. Staley, 123 Wn.2d 794, 803, 872 P.2d 502 (1994)). A criminal defendant is entitled to a lesser-included offense jury instruction on a crime that "is necessarily included within that with which [the defendant] is charged in the indictment or information." See RCW 10.61.003; 10.61.006; State v. Berlin, 133 Wn.2d 541, 546, 947 P.2d 700 (1997). A court's failure to instruct the jury on a lesser included offense which is the basis of the defendant's theory of the case may violate the Sixth and Fourteenth Amendments to the United States Constitution. Beck v. Alabama, 447 U.S. 625, 633, 100 S.Ct. 2382, 65 L.Ed.2d 392 (1980); Conde v. Henry, 198 F.3d 734, 739-40 (9th Cir. 1999).

Under RCW 10.61.006, a two-prong test determines when a lesser-included offense instruction must be given:

> [W]hen each element of the lesser-included offense must be a necessary element of the offense charged, and when the evidence in the case supports an inference that the lesser-included crime was committed.

State v. Workman, 90 Wn.2d 443, 447-48, 584 P.2d 382 (1978); see also Berlin, 133 Wn.2d at 546-47. These two requirements are commonly known as the "legal" and "factual" prongs of the lesser-included test. State v. Walden, 67 Wn. App. 891, 893, 841 P.2d 81 (1992) (citing State v. Rodriguez, 48 Wn. App. 815, 817, 740 P.2d 904, review denied, 109 Wn.2d 1016 (1987)).

b. Mr. Hibbard was entitled to a lesser-included jury instruction of assault in the fourth degree because the legal prong was satisfied. The "legal prong" of the lesser-included test required the court to instruct the jury on assault in the fourth degree. To meet the legal prong, each of the elements of the lesser offense must be a necessary element of the greater crime charged and prosecuted. Berlin, 133 Wn.2d at 548. In other words, a crime is a lesser-included offense if a person cannot commit the greater offense without also committing the lesser one. See, e.g., State v. Peterson, 133 Wn.2d 885, 890, 948 P.2d 381 (1997) (discussing analysis in charging of inferior degree offense).

Mr. Hibbard was charged with assault in the third degree, as follows:

(1) A person is guilty of assault in the third degree if he or she, under circumstances not amounting to assault in the first or second degree:

(f) With criminal negligence, causes bodily harm accompanied by substantial pain that extends for a period sufficient to cause considerable suffering;

RCW 9A.36.031.

Assault in the fourth degree is defined as follows:

(1) A person is guilty of assault in the fourth degree if, under circumstances not amounting to assault in the first, second, or third degree, or custodial assault, he or she assaults another.

RCW 9A.36.041.

The legal prong is met, therefore, as each of the elements of the lesser offense [assault-4] is an element of the offense charged [assault-3]. RCW 9A.36.031; RCW 9A.36.041.

Mr. Hibbard was charged with assault in the third degree. CP 1-2. Considering the elements of assault in the third degree, the lesser offense of assault in the fourth degree is necessarily included in the greater offense of assault in the third degree as an inferior degree offense. RCW 9A.36.031; RCW 9A.36.041; State v. Tamalini, 134 Wn.2d 725, 731, 953 P.2d 450 (1998) ("the terms 'lesser included offense' and 'inferior degree offense' have often been used

interchangeably").[6] One must necessarily commit assault in the fourth degree when committing assault in the third degree. Accordingly, under Berlin, assault in the fourth degree is a lesser included offense of assault in the third degree as charged. Consequently, the legal prong of the test for a lesser included offense instruction is met.

c. Mr. Hibbard was entitled to the lesser-included instruction because taking the evidence in the light most favorable to Mr. Hibbard, the factual prong was satisfied. To determine whether the factual prong is satisfied, this Court must determine whether there was evidence affirmatively establishing Mr. Hibbard's guilt of the lesser offense – here, assault in the fourth degree. Berlin, 133 Wn.2d at 551; State v. Perez-Cervantes, 141 Wn.2d 468, 481, 6 P.3d 1160 (2000). "'It is not enough that the jury might simply disbelieve the State's evidence.'" Perez-Cervantes, 141 Wn.2d at 481, quoting State v. Fowler, 114 Wn.2d 59, 67, 785 P.2d 808 (1990). "If the evidence would permit a jury to rationally find a defendant guilty of the lesser offense and acquit him of the greater, a lesser included offense instruction should be given." Berlin, 133 Wn.2d at 551.

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[6] The Tamalini Court noted the confusion between lesser included offenses and inferior degree offenses "is unfortunate, because it blurs the difference between the two." Under either analysis, Mr. Hibbard was entitled to the fourth degree assault instruction.

Evidence to support the lesser crime may come from any source, including but not limited to the defendant. Fernandez-Medina, 141 Wn.2d at 456; State v. McClam, 69 Wn. App. 885, 889, 850 P.2d 1377, review denied, 122 Wn.2d 1021 (1993). Moreover, the fact the defendant's primary theory at trial is inconsistent with the lesser-included offense will not abrogate the need to give the requested instruction, as long as there is some evidence found in the record to support a finding of guilt on that offense. Fernandez-Medina, 141 Wn.2d at 457-61 (in first-degree assault case, instructions for second-degree assault were mandated by the evidence, even though the primary defense was alibi); McClam, 69 Wn. App. at 889 (in VUCSA delivery case, simple possession instructions were warranted by the evidence, even though defendant denied both delivery and possession); see also State v. Gostol, 92 Wn. App. 832, 838, 965 P.2d 1121 (1998) (in vehicular assault case, negligent driving instructions were warranted by the evidence, even though the defendant denied liability for either). Finally, the evidence presented by all the parties must be examined in the light most favorable to the party requesting the instruction. Fernandez-Medina, 141 Wn.2d at 455-56.

Here, sufficient facts supporting assault in the fourth degree were presented, and the lesser included instruction was requested. 2RP 237-38. The evidence showed that on the night of the incident, Mr. Hibbard came into contact with Mr. Ensign, a bar patron who was aggressive and highly intoxicated. 2RP 169, 196-201; CP 50; Ex. 39. A number of witnesses testified to Mr. Hibbard's standard of care and reputation for doing his job peacefully and with the highest standard of patience and conflict-avoidance. 2RP 112, 118-19, 133, 137, 138, 141-42, 142-44, 144-46, 152, 173-76, 188-89. There was uncontroverted testimony that Mr. Hibbard conducted himself in the same methodical and cautious manner on the night in question.

That conduct is sufficient for the jury to rationally find that Mr. Hibbard did not act with criminal negligence, as charged. Accordingly, in the light most favorable to the requesting party, Mr. Hibbard was entitled to a lesser-included – or inferior degree -- jury instruction on assault in the fourth degree. Mr. Hibbard is entitled to reversal of his conviction and remand for a new trial with the jury properly instructed.

3. THE TRIAL COURT VIOLATED MR. HIBBARD'S RIGHT TO A PUBLIC TRIAL BY CONDUCTING PEREMPTORY CHALLENGES IN A PRIVATE UNRECORDED CONFERENCE.

a. The federal and state constitutions provide parties the right to a public trial and also guarantee the public access to court proceedings. Public trials are a hallmark of the Anglo-American justice system. Globe Newspaper Co. v. Superior Court, 457 U.S. 596, 605, 102 S.Ct. 2613, 73 L.Ed.2d 248 (1982); Richmond Newspapers, Inc. v. Virginia, 448 U.S. 555, 564-73, 100 S.Ct. 2814, 65 L.Ed.2d 973 (1980); State v. Coe, 101 Wn.2d 364, 380, 679 P.2d 353 (1984), quoting Craig v. Harney, 331 U.S. 367, 374, 67 S.Ct. 1249, 91 L.Ed.2d 1546 (1947).

In the criminal context, the Sixth Amendment to the federal constitution and article I, section 22 of the Washington Constitution guarantee an accused the right to a public trial. Presley v. Georgia, 558 U.S. 209, 130 S. Ct. 721, 724, 175 L. Ed. 2d 675 (2010); State v. Bone-Club, 128 Wn.2d 254, 261-62, 906 P.2d 629 (1995).

Likewise, Article I, section 10 recognizes that the public has a vital interest in access to the court system: "Justice in all cases shall be administered openly, and without unnecessary delay." This clear constitutional provision entitles the public and the press to openly

administered justice. Seattle Times Co. v. Ishikawa, 97 Wn.2d 30, 36, 640 P.2d 716 (1982); Federated Publications Inc. v. Kurtz, 94 Wn.2d 51, 59-60, 615 P.2d 440 (1980).[7] The First Amendment's guarantees of free speech and a free press also protect the right of the public to attend trials. Globe Newspaper, 457 U.S. at 603-05; Richmond Newspapers, 448 U.S 555, 580, 100 S.Ct 2814, 65 L.Ed 2d 973 (1980) (plurality).

Although a defendant's right to a public trial and the public's right to open access to the court system are different, they serve "complementary and interdependent functions in assuring the fairness of our judicial system." Bone-Club, 128 Wn.2d at 259.

> The requirement of a public trial is for the benefit of the accused; that the public may see he is fairly dealt with and not unjustly condemned, and that the presence of interested spectators may keep his triers keenly alive to a sense of their responsibility and to the importance of their functions.

Id.(quoting In re Oliver, 333 U.S. 257, 270 n.25, 68 S.Ct. 499, 92 L.Ed. 682 (1948)).

Whether a trial court procedure violates the right to a public trial is a question of law that is reviewed de novo. State v. Easterling, 157 Wn.2d 167, 174, 137 P.3d 825 (2006); Bone-Club, 128 Wn.2d at 256.

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[7] Our Supreme Court has noted that article I, section 22, with its requirement of speedy and open justice, has no exact parallel in the federal constitution. State v. Wise, 176 Wn.2d 1, 9 n.2, 288 P.3d 1113 (2012).

State v. Strode, 167 Wn.2d 222, 229-30, 217 P.3d 310 (2009) (holding the defendant cannot waive the public's right to open proceedings).

b. Washington courts apply a five-part test when addressing a request for full or temporary exclusion of the public from a trial. In order to protect the accused's constitutional right to a public trial:

> a trial court may not close a courtroom without, first, applying and weighing five requirements as set forth in Bone-Club and, second, entering specific findings justifying the closure order.

Easterling, 157 Wn.2d at 175 (emphasis added).

The constitutional right to a public trial is not waived by counsel's failure to object. Id. at 176 n.8 ("explicitly" holding "a defendant does not waive his right to appeal an improper closure by failing to lodge a contemporaneous objection."); State v. Brightman, 155 Wn.2d 506, 514-15, 122 P.3d 150 (2005); Strode, 167 Wn.2d at 229-30; Bone-Club, 128 Wn.2d at 257.[8]

The presumption of openness may be overcome only by a finding that closure is necessary to "preserve higher values" and the closure must be narrowly tailored to serve that interest. Waller v.

[8] This case is distinguishable from State v. Momah, in which the courtroom closure was suggested by defense counsel, and in which the closure was promoted to protect Momah's other constitutional rights, such as to an impartial jury. 167 Wn.2d 140, 151-52, 217 P.3d 321 (2009).

Georgia, 467 U.S. 39, 45, 104 S.Ct. 2210, 81 L.Ed.2d 31 (1984) (citing Press-Enterprise I, 464 U.S. at 510). Moreover, the trial court must enter specific findings identifying the interest so that a reviewing court may determine if the closure was proper. Id.

In Washington, a court faced with a request for closure must perform a test based upon the five criteria adopted in Bone-Club and Ishikawa. Bone-Club, 128 Wn.2d at 259-60.[9] Although it is conceivable that a court might find circumstances exist to justify some form of courtroom closure, the factors justifying any such limitation of public access must be articulated with specificity. E.g., Presley, 558 U.S. at 213-14; State v. Lormor, 172 Wn.2d 85, 91-92, 257 P.3d 624 (2011).

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[9] 1. The proponent of closure or sealing must make some showing [of a compelling state interest], and where that need is based on a right other than an accused's right to a fair trial, the proponent must show a "serious and imminent threat" to that right;

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 258-59, quoting Eikenberry, 121 Wn.2d at 210-11.

The accused's right to a public trial under both the federal and state constitutions applies to voir dire. Presley, 558 U.S. at 213-14; State v. Momah, 167 Wn.2d 140, 148, 217 P.3d 321 (2009); State v. Orange, 152 Wn.2d 795, 812, 100 P.3d 291 (2004). Washington courts have repeatedly held that jury selection conducted in chambers violates the right to public trial. See, e.g., Strode, 167 Wn.2d at 226-29 (Alexander, C.J., lead opinion); 167 Wn.2d at 231-36 (Fairhurst, J., concurring); State v. Paumier, 155 Wn. App. 673, 679, 685, 230 P.3d 212, review granted, 169 Wn.2d 1017 (2010); State v. Heath, 150 Wn. App. 121, 125-29, 206 P.3d 712 (2009).

Exercising peremptory challenges is a vital part of voir dire. See State v. Wilson, 174 Wn. App. 328, 343, 298 P.3d 148, 156 (2013) (observing that unlike hardship strikes made by clerk, "voir dire" involves trial court and counsel questioning prospective jurors to determine their ability to serve fairly and to enable counsel to exercise informed challenges for cause and peremptory challenges); State v. Vreen, 99 Wn. App. 662, 668, 994 P.2d 905 (2000) (recognizing "it is the interplay of challenges for cause and peremptory challenges that assures the fair and impartial jury"), aff'd, 143 Wn.2d 923 (2001); People v. Harris, 10 Cal. App. 4th 672, 684, 12 Cal. Rptr. 2d 758 (Cal.

App. 1992) (exercising peremptory challenges in chambers, "tracking" them on paper, and then announcing in open court the names of the stricken prospective jurors, violated federal and state public trial rights, even where such proceedings were reported).[10] Because the peremptory challenge process is an integral part of voir dire, the constitutional public trial right also extends to that portion of criminal proceedings.

c. The trial court conducted peremptory challenges in a private conference, off the record, without making specific findings or employing the required five-part *Bone-Club* test. The trial court here effectively closed the courtroom when it conducted peremptory challenges off the record, in the absence of oral or written findings explaining the need for such a procedure, or any apparent analysis of the rights and interests at stake or the alternatives available. RP 80.

The report of proceedings from the relevant portion of voir dire appears as follows:

> COURT: Anybody need a break at this time. Okay. We will take a short recess.
>
> (Recess taken)

[10] Unlike in Harris, the peremptory challenges in Mr. Hibbard's case were not reported. RP 80.

(Peremptory challenges taken and a jury was impaneled)

RP 80.

By requiring counsel to exercise peremptory challenges off the record, the trial court violated Mr. Hibbard's right to a public trial to the same extent any in-chambers conference or other courtroom closure would have. Because the conference occurred privately, outside the public's scrutinizing eyes and ears, it thus violated Mr. Hibbard's right to a fair and public trial. State v. Slert, 169 Wn. App. 766, 774 n. 11, 282 P.3d 101 (2012) (rejecting argument that no violation occurred if jurors were dismissed at sidebar rather than in chambers), review granted, 299 P.3d 20 (2013); State v. Leyerle, 158 Wn. App. 474, 483, 242 P.3d 921 (2010) (questioning juror in public hallway outside courtroom is a closure despite the fact courtroom remained open to public).[11] The conference was not recorded, could not be heard by the public, and no record memorializes who made which peremptory strike, and in which order. By failing to first apply the Bone-Club factors before hearing the peremptory challenges at the

[11] Undersigned counsel is aware of this Court's decision in State v. Love, 176 Wn. App. 911, 309 P.3d 1209 (2013); however, due to the procedural posture of other public trial cases currently on review in the Washington Supreme Court, Mr. Hibbard preserves this issue for review.

bench, the trial court violated Mr. Hibbard's constitutional right t o a public trial.

d. Reversal is required. The remedy for a violation of the public's right of access is remand for a new trial. Easterling, 157 Wn.2d at 179-80. In Easterling, the court rejected the possibility that a courtroom closure may be de minimus, even for a limited closure. 157 Wn.2d at 180 ("a majority of this court has never found a public trial right violation to be de minimus"). Where a portion of the proceedings are fully closed to the public, the closure is not trivial or subject to harmless error analysis and requires reversal. Id. at 174, 180-81.

Because the court's violation of Mr. Hibbard's right to a public trial constitutes structural error, prejudice is presumed and reversal is required. Strode, 167 Wn.2d at 231; Bone-Club, 128 Wn.2d at 257.

4. THE TRIAL COURT VIOLATED MR. HIBBARD'S RIGHT TO BE PRESENT AT ALL CRITICAL STAGES BY CONDUCTING PEREMPTORY CHALLENGES AT A PRIVATE CONFERENCE.

"A criminal defendant has a fundamental right to be present at all critical stages of a trial." State v. Irby, 170 Wn.2d 874, 880, 246 P.3d 796 (2011). This includes the right to be present during voir dire and empanelling of the jury. Diaz v. United States, 223 U.S. 442, 455, 32 S. Ct. 250, 56 L. Ed. 500 (1912). The right to be present derives

from the Confrontation Clause of the Sixth Amendment and the Due Process Clauses of the Fifth and Fourteenth Amendments. Id.[12]

Jury selection is "'the primary means by which a court may enforce a defendant's right to be tried by a jury free from ethnic, racial, or political prejudice, or predisposition about the defendant's culpability.'" Irby, 170 Wn.2d at 884 (quoting Gomez v. United States, 490 U.S. 858, 873, 109 S. Ct. 2237, 104 L. Ed. 2d 923 (1989)). "[A] defendant's presence at jury selection 'bears, or may fairly be assumed to bear, a relation, reasonably substantial, to his opportunity to defend' because 'it will be in his power, if present, to give advice or suggestion or even to supersede his lawyers altogether.'" Irby, 170 Wn.2d at 883 (quoting Snyder v. Massachusetts. 291 U.S. 97, 105-06, 54 S. Ct. 330, 78 L. Ed. 674 (1934), overruled on other grounds by Malloy v. Hogan, 378 U.S. 1, 84 S. Ct. 1489, 12 L. Ed. 2d 653 (1964)). This right attaches from the time empanelment of the jury begins. Irby, 170 Wn.2d at 883.

This case resembles Irby in important respects. In Irby, both counsel exercised their challenges by email while the accused was in

[12] In situations in which the accused is not actually confronting witnesses or evidence against him, this right is protected by the Due Process. Irby, 170 Wn.2d at 880-81 (quoting United States v. Gagnon, 470 U.S. 522, 526, 105 S. Ct. 1482, 84 L. Ed. 2d 486 (1985)).

custody, unable to hear or participate. Id. at 878-79. Here, the trial court took peremptory challenges while the court was at recess, and there is no indication that Mr. Hibbard was present or permitted to participate in the peremptory challenge proceedings. See Lewis v. United States, 146 U.S. 370, 372, 13 S. Ct. 136, 36 L. Ed. 1011 (1892) ("[W]here the [defendant's] personal presence is necessary in point of law, the record must show the fact."); see also People v. Williams, 858 N.Y.S.2d 147, 52 A.D.3d 94, 96-97 (2008) (exclusion of defendant from sidebar conference where jurors excused by agreement violates right to be present; court refuses to speculate that defendant could overhear conversations).

The fundamental purpose of a defendant's right to be present during jury selection, including the exercise of peremptory challenges, is to allow him to give advice or suggestions to counsel or even to supersede counsel's decisions. Irby, 170 Wn.2d at 888; Gomez, 490 U.S. at 874. Here, as in Irby, because Mr. Hibbard was evidently not present for this portion of jury selection, he was unable to exercise that right. See Commonwealth v. Owens, 414 Mass. 595, 602, 609 N.E.2d 1208 (1993) (defendant "has a right to be present when jurors are being examined in order to aid his counsel in the selection of jurors and in

the exercise of his peremptory challenges") (citing Lewis, 146 U.S. at 372).

Nonetheless, violation of the right to be present is subject to harmless error analysis. Irby, 170 Wn.2d at 885. The State bears the burden of proving beyond a reasonable doubt that the error is harmless. Id. at 886.

The Irby Court found Irby's absence from the portion of jury selection at issue was not harmless:

> [T]he State has not and cannot show that three of the jurors who were excused in Irby's absence ... had no chance to sit on Irby's jury. Those jurors fell within the range of jurors who ultimately comprised the jury, and their alleged inability to serve was never tested by questioning in Irby's presence . . . . Therefore, the State cannot show beyond a reasonable doubt that the removal of several potential jurors in Irby's absence [was harmless].

Id. at 886-87.

Thus, the Irby Court considered whether the same jurors would have inevitably sat on the jury regardless of Irby's participation and concluded the answer was no. Accordingly, the State could not show the error was harmless. Id. As in Irby, the State cannot show that the venire members excused during the proceedings at sidebar had no chance to sit on this jury; indeed, since the peremptory challenge process was not reported, there is no record of what transpired in the

unreported conference. Peremptory challenges are largely based on subjective decision-making, albeit with some limitations.

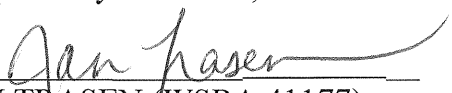
Accordingly, the State cannot show that Mr. Hibbard's absence during this critical stage was harmless beyond a reasonable doubt. Reversal and a new trial are required. Irby, 170 Wn.2d at 886-87.

E. CONCLUSION

For the reasons stated above, Mr. Hibbard respectfully asks this Court to reverse his conviction and remand for a new trial.

DATED this 25th day of April, 2014.

Respectfully submitted,



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Attorney for Appellant

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

STATE OF WASHINGTON,	)	
	)	
RESPONDENT,	)	
	)	
v.	)	NO. 31520-7-III
	)	
MATTHEW HIBBARD,	)	
	)	
APPELLANT.	)	

DECLARATION OF DOCUMENT FILING AND SERVICE

I, MARIA ARRANZA RILEY, STATE THAT ON THE 25TH DAY OF APRIL, 2014, I CAUSED THE ORIGINAL **OPENING BRIEF OF APPELLANT** TO BE FILED IN THE **COURT OF APPEALS – DIVISION THREE** AND A TRUE COPY OF THE SAME TO BE SERVED ON THE FOLLOWING IN THE MANNER INDICATED BELOW:

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[X]	MATTHEW HIBBARD 416 COTTONWOOD DR RICHLAND, WA 99352	(X) ( ) ( )	U.S. MAIL HAND DELIVERY _____

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