NO. 45260-0-II

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

STATE OF WASHINGTON,

Respondent,

v.

MICHAEL DON OLMSTED,

Appellant.

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

The Honorable Robert Lewis, Judge

BRIEF OF APPELLANT

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2. The trial court violated Mr. Olmsted's constitutional right to a public trial by taking peremptory challenges in a private sidebar.

3. Mr. Olmstead's life sentence was imposed in violation of the Sixth and Fourteen Amendment right to a jury trial.

B. ISSUES PERTAINING TO ASSIGNMENT OF ERROR

1. Did the prosecutor commit reversible misconduct in closing argument by trivializing the burden of proof, mischaracterizing and embellishing evidence, and vouching for the credibility of Amy Yeager?

2. During jury selection, the State and Mr. Olmsted made peremptory challenges and dismissed jurors at a private sidebar. As the trial court did not analyze the *Bone-Club*[1] factors before conducting this important portion of jury selection in private, did the court violate Mr. Olmsted's constitutional right to a public trial?

3. An accused person is guaranteed the right to a jury determination beyond a reasonable doubt of any fact necessary to increase punishment above the otherwise-available statutory maximum. The trial

[1] *State v. Bone-Club*, 128 Wn.2d 254, 906 P.2d 325 (1995)

judge, using a preponderance of the evidence standard, found that Mr. Olmstead had two prior strikes offense, elevating his sentence from a statutorily maximum of ten years to life without the possibility of parole. Does the life sentence violate Mr. Olmsted's Sixth and Fourteenth Amendment right to due process and a jury trial?

C. STATEMENT OF THE CASE

Procedural History

The State charged Michael Olmsted with assault in the second degree alleging that he intentionally assaulted and recklessly inflicted substantial bodily harm on his girlfriend, Amy Yeager. CP 3.

Pre-trial, the court heard a CrR 3.5 hearing and found pre-arrest statements made by Mr. Olmsted admissible. RP 2 89-116.

Also pre-trial, the court granted the State's ER 404(b) motion to present testimony of several instances of alleged assaults by Mr. Olmsted against Ms. Yeager. RP 2 61-67. As Mr. Olmsted's stated defense was self-defense, the court felt the alleged prior assaults would help the jury determine if Mr. Olmsted had acted in self-defense in the current case. RP 2 66-67. The court also found the prior incident evidence more probative than prejudicial. Id.

The court held juror preemptory challenges at sidebar. RP 5 715. The court did not ask Mr. Olmsted if he personally assented to this

procedure occurring outside of the public's hearing. No one objected to the procedure. RP 5 715-17.

Before instructing the jury, the court dismissed a second, alternative charge of attempted second degree assault. CP 3-4; RP 3A 347; RP 3B 458-61. The court found that law did not support such a charge. RP 3B 461. At Mr. Olmsted's request, the court instructed the jury on the lesser offense of assault in the fourth degree. RP 3B 461; Supplemental Designation of Clerk's Papers, Court's Instructions to the Jury, Instruction 15 (sub.nom 95).

Included in the jury instructions was an instruction that told the jurors they were to consider the prior alleged incidents only in determining whether Mr. Olmsted acted in self-defense. Supp. DCP, Court's Instructions to the Jury, Instruction 5. The court instructed the jury on the State's duty to disprove self-defense. Supp. DCP, Court's Instructions to the Jury, Instruction 16.

In closing argument, the prosecutor invited the jury to think of reasonable doubt as something they could "sleep with" after finding guilt. RP 3B 542. The prosecutor assured the jury that Ms. Yeager had been "honest" with them. RP 3B 547. And the prosecutor made statements unsupported by the record: Ms. Yeager's ongoing nose bleed was a reflection of being hit with "a lot of strength"; Mr. Olmsted tried to attack

an innocent person in a car; and a person can avoid injury to their hand if they know how to punch someone correctly. RP 3B 498, 502, 546. Mr. Olmsted did not object to any portion of the State's closing arguments. RP 3B 498-515, 541-59.

The jury returned a verdict of guilty as charged and a special verdict finding Ms. Yeager and Mr. Olmsted were family or household members thus making the charge a domestic violence offense. RP 3B 570; Supp. DCP Verdict A, Verdict Form B, Special Verdict Form (sub. noms. 96, 97, 98).

The standard range for Mr. Olmsted's conviction was 22-29 months. CP 9. The statutory maximum was ten years. CP 9. The court held a sentencing hearing on August 19 and 20, 2013. RP 4 578-637. The court found by a preponderance of the evidence that Mr. Olmsted had a 1994 conviction for assault in the second degree and a 1996 conviction for assault in the first degree. RP 4 632. Mr. Olmstead pleaded guilty to both charges in Clark County, Washington. RP 4 605-09. Both convictions are "strike" offenses under the Persistent Offender Accountability Act. RCW 9.94A.570; RCW 9.94A.030(37). Unable to use any discretion under the POAA, the court sentenced Mr. Olmsted to life without the possibility of parole on this third strike. RP 4 634.

Mr. Olmsted is 42 years old. CP 2.

Mr. Olmsted made a timely appeal of all portions of his judgment and sentence. CP 19.

Trial testimony

Although Michael Olmsted and Amy Yeager had known each other for years, they had only been in a dating relationship and lived together for a few months. RP 3B 387-88. Ms. Yeager came home one evening after being gone for a few days on a methamphetamine bender. RP 3B 389. Mr. Olmsted was familiar with what Ms. Yeager was like in that condition. He anticipated she would be very tired and nodding off to sleep soon. RP 3B 389-92. They laid on the bed and talked. Mr. Olmsted took a few drinks from Ms. Yeager's bottle of vodka. RP 3B 389.

When Ms. Yeager did start to nod off, Mr. Olmsted went around to her side of the bed to turn off her light. RP 3B 392. When he did, he noticed a glass methamphetamine pipe on the floor wrapped in tissue. RP 3B 392. Mr. Olmstead disapproved of Ms. Yeager's methamphetamine use. He broke up the pipe and flushed it down the toilet. He went back into the bedroom and told Ms. Yeager to leave. RP 3B 392-95.

Ms. Yeager got mad. She was sitting on the side of the bed. She struck out with her foot and delivered a hard blow to Mr. Olmsted's testicles. RP 3B 395-97. Reflexively, Mr. Olmsted slapped Ms. Yeager

once across the face. RP 3B 397, 425. Mr. Olmsted doubled-over with pain, and did all he could to not vomit. RP 3B 396, 398.

Ms. Yeager left their small apartment shortly thereafter. RP 3B 390-91, 402. It was around 1 a..m. RP2 128. Mr. Olmsted thought that Ms. Yeager would go looking for his aunt who worked in a nearby urgent care clinic. 3B 402.

Still in extreme pain, all Mr. Olmsted could think about was getting to the local convenience store to buy cigarettes. 3B RP 402, 404-05. He left the apartment shortly after Ms. Yeager. On his way to the store, he noticed a person sitting in a car looking at a phone screen and listening to loud music. He stopped at the car and shouted over the music asking for a ride. The person in the car gave him an angry look and did not offer him a ride. RP 3B 403. After buying some cigarettes, he decided to walk to a friend's house. RP 405.

The person in the car, Lukas McNett, had a different take on Mr. Olmsted. Mr. McNett had just arrived home from work. RP 2 155. He parked his car near his home and was "social networking" before he went inside. RP 2 155. He noticed Mr. Olmsted walking toward him. RP 2 157, 162. Mr. Olmsted was suddenly at his car window shouting at him. RP 2 158. "What are you fucking looking at," and "Do you have a fucking problem with me?" RP 2 158. He seemed "enraged." RP 2 160.

Mr. McNett did not know Mr. Olmsted. He had never seen him before. RP 2 158. Mr. Olmstead cupped his hands to the car's tinted windows as if to see inside. RP 2 160. Mr. McNett did not engage Mr. Olmsted. RP 2 158. Mr. Olmsted walked away. Mr. McNett called 911. RP 2 158. Mr. McNett had never seen anyone so angry. RP 2 164.

Ms. Yeager also called 911 around the same time Mr. McNett made his call. RP 3A 244. She had walked about 10 minutes from the apartment to get to the nearby urgent care clinic. RP 3A 300. While walking, she heard Mr. Olmstead yelling at her from about two bocks away. He was screaming at her to 'give me the phone." RP 3A 285. At one point, she hid behind a dumpster so Mr. Olmsted would get past her. RP 3A 283.

Ms. Yeager told a different version of what happened earlier in her shared apartment. She was lying on her stomach in bed. RP 3A 268. While kicking the covers off her feet, she might have accidentally kicked Mr. Olmsted's testicles. He told her that she had done so as he punched her several times in the face with his fist. RP 3A 268. She moved around their small bedroom to get away from him but twice more he struck her four to five times on her face and head. RP 3A 270-71, 275-76. One of the strikes was so hard she lost control of her bladder and urinated in her pants. RP 3A 270. She did not fight back. RP 3A 278. Her nose was

bleeding and she was finding it hard to breathe out of her swollen nose. RP 3A 276. She changed her pants, gathered up a few things, and left the apartment to walk about ten blocks to an urgent care clinic. RP 3A 275, 281-83. Once there, she used her phone to call the police. RP 3A 288.

Vancouver Police Officer Mary Kay Long was dispatched to handle both 911 calls. RP 2 168-71. As she was headed to contact Mr. Lukas, she used her patrol car's computer to pull up a photo of Mr. Olmsted. RP 2 171. About that time, she saw a person matching Mr. Olmsted's description walking down the street. RP 2 171-72. She contacted the person who was, in fact. Mr. Olmsted. She described Mr. Olmsted as yelling very loudly and being very uncooperative. RP 2 176. He complained that his "balls hurt." RP 2 173. Mr. Olmsted declined Officer Long's offer to send for medical assistance.[2] RP 2 173.

Mr. Olmsted was sitting on a curb when Vancouver Police Officer David Krebs arrived to assist Officer Long. RP 3A 244. Mr. Olmsted was shouting. RP 3A 244. Together the two officers patted down Mr. Olmsted and then placed him in Officer Krebs's car. RP 2 178. Officer Long went to the urgent care clinic to talk to Ms. Yeager. RP 2 179. Mr. Olmsted continued to complain about his "ball" pain. RP 248.

[2] Mr. Olmsted testified the officer never offered medical assistance. RP 3B 420.

When Officer Long arrived at the clinic, Ms. Yeager's nose was still bleeding. RP 2 181. To Officer Long, Ms. Yeager's jaw looked like it was hanging at an odd angle. RP 2 184. The clinic transferred Ms. Yeager to the emergency room at Peace Health Southwest. RP 2 124, 186. Officer Long drove her there. RP 2 186. The ER had available more sophisticated medical resources than the clinic. RP 2 124. ER Doctor Carolyn Martin assessed Ms. Yeager's injuries. RP 2 123-28. Ms. Yeager had swelling and bruises around her face to include her forehead, under both eyes, and both sides of her jaw. RP 2 126. Ms. Yeager complained of chest pain although no bruising was noted. RP 2 127. She also complained of pain to her right hand where she said she was struck with a pair of pliers. RP 2 126. The doctor ordered a CT scan on Ms. Yeager's face and an x-ray of her hand. RP 2 127. The test revealed no fractures. RP 2 128. The doctor thought Ms. Yeager's injuries were inconsistent with a single blow. RP 2 128. It appeared she was stuck on both sides of her face and at least four to five times on her forehead. RP 2 128. Ms. Yeager was discharged early that morning. RP 2 127-28.

Ms. Yeager described how her head and face looked and felt over the next two weeks as her bruising ran its course. All but the back of her head was very sore. She had two black eyes. Her face hurt so much for the first week that she could not wear her glasses. She had to use a

magnifying glass to read or have someone else read things to her. Lying down was painful so she did not sleep well. Being out in public was embarrassing. No amount of makeup could conceal her bruising. Strangers would stare and ask her about her injuries. RP 3A 306-16. The prosecutor provided the jury with photos of Ms. Yeager showing the progression of her injuries over several days. Id.

After being booked into jail, Mr. Olmsted received medical assistance from a nurse and a physician's assistant. Both noted bruising and discoloration on Mr. Olmsted's scrotum. RP 3A 369-74, 376-85. A private investigator hired to assist with Mr. Olmsted's defense, took pictures of Mr. Olmsted's penis and scrotum in jail. He noted the area was significantly bruised and discolored. RP 350-59.

D. ARGUMENTS

1. PROSECUTORIAL MISCONDUCT IN CLOSING ARGUMENT VIOLATED MR. OLMSTED'S CONSTITUTIONAL RIGHT TO A FAIR TRIAL.

A public prosecutor is a quasi-judicial officer with a duty to act impartially and seek a verdict free from prejudice and based upon law and reason. *State v. Reed*, 102 Wn.2d 140, 147, 684 P.2d 699 (1984). The prosecutor violated this duty when, in closing argument, she (1) misstated the burden of proof, (2) mischaracterized and embellished the evidence, and (3) and vouched for the credibility of Amy Yeager.

Prosecutorial misconduct may deprive a defendant a fair trial. Only a fair trial is a constitutional trial. *State v. Charlton*, 90 Wn.2d 657, 664-65, 585 P.2d 142 (1978) (when a prosecutor commits misconduct, the defendant's constitutional rights to due process and a fair trial is violated).

The prosecutor's comments during closing argument are reviewed in the context of the total argument, the issues in the case, the evidence addressed in the argument, and the jury instructions. *State v. Walker*, 164 Wn. App. 724, 730, 265 P.3d 191 (2011); *State v. Brown*, 132 Wn.2d 529, 561, 940 P.2d 546 (1997), *cert. denied*, 523 U.S. 1007 (1998). When, as here, prosecutorial misconduct is objected to for the first time on appeal, to prevail on appeal, the defendant must show that (1) "no curative instruction would have obviated any prejudicial effect on the jury" and (2) the misconduct resulted in prejudice that "had a substantial likelihood of affecting the jury verdict." *State v. Emery*, 174 Wn.2d 741, 760-761, 278 P.3d 653, 664 (2012).

a. The prosecutor trivialized the burden of proof.

The court instructed the jury on reasonable doubt:

> A reasonable doubt is one for which a reason exists and may arise from the evidence or lack of evidence. It is such a doubt as would exist in the mind of a reasonable person after fully, fairly, and carefully considering all the evidence or lack of evidence. If, from such consideration, you have an abiding belief in the truth of the charge, you are satisfied beyond a reasonable doubt.

Supp. Designation of Clerk, Papers, Court's Instructions to the Jury, Instruction 3 (sub. nom 95). But the prosecutor trivialized this definition when she told the jury, "Proof beyond a reasonable doubt doesn't mean proof beyond any doubt. It's a reasonable doubt, one you can sleep with." RP 3B 542.

In *Anderson*, the prosecutor committed prosecutorial misconduct by comparing the burden of proof to everyday decisions such as having surgery or leaving children with a babysitter. The comments were improper "because they minimized the importance of the reasonable doubt standard and of the jury's role in determining whether the State has met its burden." *State v. Anderson*,153 Wn. App. 417, 431, 220 P.3d 1273 (2011).

"By comparing the certainty required to convict with the certainty people often require when they make everyday decisions - both important decisions and relatively minor ones – the prosecutor trivialized and ultimately failed to convey the gravity of the State's burden and the jury's role in assessing its case against Anderson." *Anderson*, 153 Wn. App. at 431.

As in *Anderson*, the prosecutor improperly equated reasonable doubt to an everyday decision you can rest assured is right and can consequently sleep well after making. RP 3B 542. By doing so, the

prosecutor trivialized the reasonable doubt standard. The prosecutor's comments were improper and constituted misconduct.

b. The prosecutor improperly mischaracterized and embellished the evidence.

The prosecutor repeatedly mischaracterized and embellished the evidence in closing argument. Although the prosecutor is entitled to wide latitude in closing argument to reasonable inferences from the evidence, it is not proper to mischaracterize or embellish evidence. *State v. Thorgerson*, 172 Wn.2d 438, 448, 258 P.3d 43 (2011).

The State's overarching theme in the case, and to refute Mr. Olmsted's self-defense argument, was that Mr. Olmsted's assaulted Ms. Yeager while in a rage. RP 3B 498. In closing argument, to illustrate that point, the prosecutor argued Mr. Olmstead "tried to attack an innocent person in a car." RP 3B 498. Ostensibly, the prosecutor was referring to Mr. McNett. However, there was no evidence produced that Mr. Olmstead tried to attack Mr. McNett. For example, there was no evidence Mr. Olmsted tried to open Mr. McNett's car door or break the car window to get at Mr. McNett.

Similarly, the prosecutor argued that because Ms. Yeager's nose was still bleeding an hour after Mr. Olmstead hit her, it showed he had hit her with "huge force." RP 3B 502. However, nothing in the record tied

the length of time a nose will bleed with the amount of force in hitting a nose or, especially, Ms. Yeager's nose. The prosecutor could have, but chose not to, ask ER Doctor Martin if there was such a correlation. The prosecutor's argument was unsupported by the record and only made to inflame the jury and with no legitimate basis in the evidence.

Finally, the prosecutor argued that it was "just common knowledge" that if you know how to punch someone correctly, you can do so without injuring your own hand. RP 3B 546. This argument was seemingly made to answer why Mr. Olmstead did not have injury to his hand as might be expected if he truly hit Ms. Yeager multiple times. There was no support in the record for what the prosecutor mischaracterized as "common knowledge."

c. The prosecutor improperly vouched for the credibility of Ms. Yeager.

It is improper for the prosecution to vouch for the credibility of a government witness. *State v. Coleman*, 155 Wn. App. 951, 957, 231 P.3d 212 (2010). Vouching may occur in two ways: the prosecution may place the prestige of the government behind the witness or may indicate that information not presented to the jury supports the witness's testimony. *United States v. Roberts*, 618 F.2d 530, 533 (9th Cir.1980). Here the former occurred when, during her closing argument, the prosecutor told

the jury that "[Ms. Yeager] was being honest. She was under oath." RP 3B 547. "[A] prosecutor errs by expressing a personal opinion about the credibility of a witness and the guilt or innocence of the accused." *State v. Horton*, 116 Wn. App. 909, 921, 68 P.3d 1145 (2003) (quoting *State v. Sargent*, 40 Wn. App. 340, 343-44, 698 P.2d 598 (1985), *reversed on other grounds,* 111 Wn.2d 641 (1988)).

d. The prosecutor's errors entitle Mr. Olmsted to a retrial.

While this single instance of assuring the jury of Ms. Yeager's honestly may not in and of itself require reversal, the cumulative effect of the above-detailed repetitive prejudicial prosecutorial misconduct was so flagrant that no instruction or series of instructions could erase the combined prejudicial effect. *State v. Case*, 49 Wn.2d 66, 73, 298 P.2d 500 (1956); *State v. Walker*, 164 Wn. App. 724, 737, 265 P.3d 191 (2011). Mr. Olmsted is entitled to a new trial.

2. THE TRIAL COURT VIOLATED MR. OLMSTED'S RIGHT TO A PUBLIC TRIAL BY CONDUCTING PEREMPTORY CHALLENGES AT SIDEBAR.

The trial court heard and ruled on peremptory challenges to individual jurors in sidebar. This private conference, intentionally made unavailable to the public, denied Mr. Olmsted his constitutionally

guaranteed right to a public trial. Mr. Olmsted's conviction should be reversed and his case remanded for a new trial.

The Sixth Amendment to the United State Constitution and Article I, Section 22 of the Washington Constitution guarantee the accused a public trial by an impartial jury.[3] *Pressley 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 325 (1995). Additionally, Article I, Section 10 of the Washington Constitution provides that "[j]ustice in all cases shall be administered openly, and without unnecessary delay." This later provision gives the public and the press a right to open and accessible court proceedings. *Seattle Times Co. v. Ishikawa*, 97 Wn.2d 30, 36, 640 P.2d 716 (1982).

The public trial requirement is for the benefit of the accused; it allows the public to ensure the accused is tried fairly and to keep the court and the parties keenly aware of their responsibilities and the importance of their roles. *Bone-Club*, 128 Wn.2d at 259. As the United States Supreme Court observed:

> The open trial…plays as important a role in the administration of justice today as it did for centuries before our separation from England....Openness…enhances both the basis fairness of the

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

> criminal trial and the appearance of fairness so essential to public confidence.

Press-Enterprise Co. v. Superior Court, 464 U.S. 501, 508, 104 S.Ct. 819, 78 L.Ed.2d 629 (1984).

The right to a public trial includes "circumstances in which the public's mere presence passively contributes to the fairness of the proceedings, such as determining deviations from established procedures, reminding the officers of the court of the importance of their functions, and subjecting judges to the check of public scrutiny." *State v. Slert*, 169 Wn. App. 766, 772, 282 P.3d 101 (2012), *review granted in part*, 176 Wn.2d 1031 (2013)[4] (quoting *State v. Bennett*, 168 Wn. App. 197, 202, 275 P.3d 1224 (2012)).

While the right to a public trial is not absolute, a trial court may restrict the right only "under the most unusual circumstances." *Bone-Club*, 128 Wn.2d at 259. Before a trial judge can close any part of a trial,

[4] In *Slert*, this court reversed Slert's convictions, holding that an in-chambers conference at which various jurors were dismissed based on their answers to a jury questionnaire violated Slert's right to a public trial. *Slert*, 169 Wn. App. at 778-79.

it must first apply on the record the five factors set forth in *Bone-Club*.[5] *In re Personal Restraint of Orange*, 152 Wn.2d 795, 806-07, 809, 100 P.3d 291 (2004)). A violation is presumed prejudicial and is not subject to harmless error analysis. *State v. Wise*, 176 Wn.2d 1, 16-19, 288 P.3d 1113 (2012); *State v. Strode*, 167 Wn.2d 222, 231, 217 P.3d 310 (2009); *State v. Esterling*, 157 Wn.2d 167, 181, 137 P.3d 825 (2006); *In re Orange*, 152 Wn.2d 795, 814, 100 Wn.2d 291(2004).

The accused's right to a public trial under both the federal and the state constitutions applies to voir dire. *Pressley*, 130 S.Ct. at 724; *State v. Momah*, 167 Wn.2d 140, 148, 217 P.3d 321 (2009). Washington courts have repeatedly held that jury selection conducted in chambers violates the right to a 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*, 176 Wn.2d 29, 35, 288 P.3d 1126 (2012); *State v. Heath*, 150

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[5] The *Bone–Club* factors are:
"1. The proponent of closure or sealing must make some showing [of a compelling 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." (quoting Allied *Daily Newspapers of Wash. v. Eikenberry*, 121 Wn.2d 205, 210–11, 848 P.2d 1258 (1993)).

Wn. App. 121, 125-29, 206 P.3d 712 (2009); *State v. Frawley*, 140 Wn. App. 713, 718-21, 167 P.3d 593 (2007).

The right to challenge a potential juror for cause is an integral part of a "fair trial." *People v. Rhodus*, 870 P.2d 470, 474 (Colo 1994). Thus, the constitutional public trial right must extend to that portion of criminal proceedings as well. *People v. Harris*, 10 Cal.App.4th 672, 684, 12 Cal.Rptr.2d 758 (1992) (holding peremptory challenges conducted as sidebar violate public trial right, even when such proceedings are reported). The trial court violated Mr. Olmsted's constitutional right to a public trial by taking for-cause challenges during a private sidebar. Because the error is structural, prejudice is presumed, and thus reversal is required. *Strode*, 167 Wn.2d at 231.

Division Three of this court, in *State v. Love*, 176 Wn. App. 911, 309 P.3d 1209 (2013), reached a contrary result than argued above, as has this division in *State v. Dunn*, __ Wn. App. __, 321 P.3d 1283 (2014).

In *Love*, the trial court heard for-cause challenges at sidebar. Like Mr. Olmsted, defendant Love argued the sidebar voir dire denied him his right to a public trial. In holding that Love's public trial right was not denied, the court applied the "experience and logic" test announced in *State v. Sublett*, 176 Wn.2d 58, 141, 292 P.3d 715 (2012). The "experience and logic" test requires courts to assess the necessity for

courtroom closure by consideration of both history (experience) and the purposes of the open trial provision (logic). *Sublett*, 176 Wn.2d at 73.[6] The experience prong asks whether the practice in question historically has been open to the public, while the logic prong asks whether public access is significant to the functioning of the right. *Id.* If both prongs are answered affirmatively, then the *Bone-Club* test must be applied before the court can close the courtroom. *Sublett*, 176 Wn.2d at 73.

Applying the experience prong, the *Love* court concluded, "[T]here is little evidence of the public exercise of such challenges, and some evidence that they are conducted privately." *Love*, 176 Wn. App. at 919. Applying the logic prong, the court concluded such challenges do not need to be conducted in public because to do so does not further the goal of ensuring a fair trial. *Id.*

The court's analysis in *Love*[7] misses the mark and ignores the historical importance of an open voir dire. It is well established that the right to a public trial extends to voir dire. *Sublet*t, 176 Wn.2d at 71; *Strode*, 167 Wn.2d at 226. The process of jury selection "is itself a matter

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

[7] The Supreme Court has stayed Love's petition for review of Division Three's opinion pending the outcome of *State v. William Glenn Smith* (85809-8). The Court heard the *Smith* oral argument on October 15, 2013.

of importance, not simply to the adversaries but to the criminal justice system." *Orange*, 152 Wn.2d at 804.

Openness of jury selection clearly enhances core values of the public trial right, i.e., "both the basic fairness of the criminal trial and the appearance of fairness so essential to public confidence in the system." *Sublett*, 176 Wn.2d at 75. "For-cause" challenges are an integral part of voir dire. *Strode*, 167 Wn.2d at 230 (for-cause challenges of six jurors in chambers not de minimus violation of public trial right); *State v. Wilson*, 174 Wn. App. 328, 298 P.3d 148 (2013) (unlike potential juror excusals governed by CrR 6.3, exercise of peremptory challenges, governed by CrR 6.4, constitutes part of "voir dire," to which the public trial right attaches).

Accordingly, the experience and logic test is clearly met in the case of voir dire: historically, voir dire has been conducted in open court; and logically, openness clearly enhances the basic fairness of the proceeding.

In *Dunn*, the defendant argued the trial court violated his public trial right because the trial court conducted the peremptory challenges portion of jury selection at the clerk's station. *Dunn*, 321 P.3d at 1285. This court did not engage in a separate analysis. Rather it adopted the rationale in *Love*. "We agree with Division Three that experience and logic do not suggest that exercising peremptory challenges at the clerk's station implicates the public trial right." *Id at* 1285.

Dunn, in its adoption of *Love*, relies on the same flawed reasoning of *Love*.

The procedure in Mr. Olmsted's case violated the right to a public trial to the same extent as any in-chambers conference or other courtroom closure would have. Even though the procedure occurred in an otherwise open courtroom, any assertion that the procedure was in fact public should be rejected. The procedure was a sidebar which occurs outside of the public's hearing, and thus violates Mr. Olmsted's right to a fair public trial. *Slert*, 169 Wn. App. at 774 n. 11 (rejecting argument that no violation occurred if jurors were actually dismissed not in chambers but at a sidebar and stating, "If a side-bar conference was used to dismiss jurors, the discussion would have involved dismissal of jurors for case-specific reason and, thus, was a portion of jury selection held wrongfully outside Slert's and the public's purview").

3. MR. OLMSTED'S LIFE SENTENCE VIOLATED HIS SIXTH AMENDMENT RIGHT TO A JURY DETERMINATION BEYOND A REASONABLE DOUBT THAT HE HAD TWO PRIOR "STRIKE" CONVICTIONS.

a. Any fact which increased the penalty for a crime must be found by a jury beyond a reasonable doubt.[8]

[8] The Supreme Court heard this argument in *State v. Witherspoon*. (No. 88118-9) on October 22, 2013. The court has yet to issue its opinion.

The Sixth and Fourteen Amendments guarantee an accused person the right to a trial by a jury. U.S. Const Amend VI; U.S. Const. Amend XIV; *Duncan v. Louisiana*, 391 U.S. 145, 88 S.Ct. 1444, 20 L.Ed.2d 491 (1968). Any fact which increases the penalty for a crime must be found by a jury. *Blakely v. Washington*, 542 U.S. 296, 124 S.Ct. 2531, 159 L.Ed.2d 403 (2004). This principle extends to facts labeled "sentencing factors" if those facts increase the maximum penalty. *Blakely,* 542 U.S. at 301*; Apprendi v. New Jersey*, 530 U.S. 466, 490, 120 S.Ct. 2348, 147 L.Ed.2d 435 (2000); *see also Ring v. Arizona*, 536 U.S. 584, 609, 122 S.Ct. 2428, 153 L.Ed 2d 556 (2002). Arbitrary distinctions between sentencing factors and elements of the crime do not diminish the accused person's constitutional rights: "Merely using the label 'sentencing enhancement'...does not provide a principled basis for treating [sentencing factors and elements] differently." *Apprendi*, 530 U.S. at 476. The dispositive question is one of substance, not form: "If a State makes an increase in defendant's authorized punishment contingent on the finding of a fact, that fact – no matter how the State labels it – must be found by a jury beyond a reasonable doubt." *Ring,* 536 U.S. at 602 (citing *Apprendi*, 530 U.S. at 482-83).

b. The U.S. Supreme Court has retreated from the *Almendarez-Torres* exception allowing judicial fact-finding where recidivism is concerned.

Prior to the Supreme Court's decision in *Apprendi*, the existence of prior convictions did not need to be pled, even if used to increase a sentence. *Almendarez-Torres v. United States*, 523 U.S. 224, 246, 118 S.Ct. 1219, 140 L.Ed.2d 350 (1998). The *Almendarez-Torres* decision was based on four factors: (1) recidivism is a traditional basis for increasing an offender's sentence; (2) the increased statutory maximum was not binding upon the sentencing judge, (3) the procedure was not unfair because it created a broad permissive sentencing range, allowing for the exercise of judicial discretion, and (4) the statute did not change a pre-existing definition of the crime; thus Congress did not try to "evade the Constitution. *Almendarez-Torres*, 523 U.S. at 244-45.

Almendarez-Torres addressed a sentencing scheme in which the standard range was doubled upon proof of certain prior convictions. It was not concerned with a qualitative change in the sentence. Here, by contrast, Mr. Olmsted was subject to a sentence that was not merely increased, but that changed from one type (a determinate period of time, with the possibility of early release) to another type (a life term, with no possibility of release).

Since *Almendarez-Torres*, the Supreme Court has not addressed recidivism and has been careful to distinguish prior convictions from other facts used to enhance the possible penalty. *Blakely*, 542 U.S at 301-02; *Apprendi*, 530 U.S. at 476; *Jones v. United States*, 526 U.S. 227, 243 n.6, 119 S.Ct. 1215, 143 L.Ed.2d 311 (1999). In *Apprendi*, the Court noted that the possibility "that *Almendarez-Torres* was incorrectly decided, and that a logical application of our reasoning today should apply if the recidivist issue were contested[.]" *Apprendi*, 530 U.S. at 489-90. The Court had not yet considered the issue of prior convictions under *Apprendi*. See Colleen P. Murphy, *The Use of Prior Convictions after Apprendi*, 37 U.C. Davis L. Rev 973, 989-90 (2004).

c. *Almendarez-Torres* does not preclude application of *Blakely* to Mr. Olmstead's case.

The Washington Supreme Court has made note of the U.S. Supreme Court's failure to embrace *Almendarez-Torres* decision in the wake of more recent decisions. *State v. Smith*, 150 Wn.2d 135, 75 P.3d 934 (2003) (addressing *Ring*) cert., denied sub nom *Smith v. Washington*, 124 S.Ct. 1616 (2004) (*Smith III*); *State v. Wheeler*, 145 Wn.2d 116, 121-24, 34 P.2d 799 (2001) (addressing *Apprendi*). The Washington Supreme Court, however, has felt obligated to "follow" *Almendarez-Torres*. *Smith III*, 150 Wn.2d at 143; *Wheeler*, 145 Wn.2d at 123-24.

Almendarez-Torres does not control under the circumstances here. First, it does not address an offender's rights when the government seeks to change a crime from one punished by a determinative term with the possibility of early release to one punished by life in prison with the possibility of parole.

Second, Washington has historically required a jury determination of prior convictions, priors to sentencing as a habitual offender. *State v. Manussier*, 129 Wn.2d 652, 690-9, 921 P.2d 473 (1996) (Madsen, L. dissenting); *State v. Furth*, 5 Wn.2d 1, 18, 104 P.2d 925 (1940).

Third, Almendarez-Torres, the case citied therein, and its progeny address only the requirement that elements be pled in the charging document; it does not address the burden of proof or jury trial right. *Almendarez-Torres*, 523 U.S. at 243-45. It is solely a Fifth Amendment charging case, and the Court explicitly reserved ruling on whether or not an offender had a right to a jury trial or to proof on whether or not an offender had a right to a jury trial or to proof beyond a reasonable doubt. 523 U.S. at 248 ("we express no view on whether some heightened standard of proof might apply" at sentencing). Thus, *Almendarez-Torres's* applicability is limited in Mr. Olmstead's case.

Fourth, the statute at issue in *Almendarez-Torres* (which expanded the permissive sentencing range) did "not itself create significantly greater

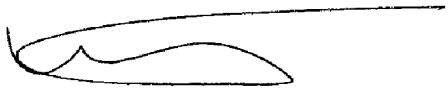
unfairness" for the offender because judges traditionally exercise discretion with broad statutory ranges. *Almendarez-Torres, 523* U.S. at 246. Here, by contrast, Mr. Olmstead's prior convictions led to a mandatory sentence much higher than the maximum sentence under the sentencing guidelines. RCW 9.94A.510; RCW 9.94A.515; RCW 9.94A.570. Under the Persistent Offender Accountability Act, judicial discretion is eliminated for people with Mr. Olmstead's criminal history. RCW 9.94A.570.

For all these reasons, *Almendarez-Torres* does not apply to Mr. Olmstead's case. Under the logic of *Blakely*, Mr. Olmsted is entitled to a jury determination of his qualifying prior convictions, with proof beyond a reasonable doubt. Accordingly his sentence must be vacated and the case remanded for a new sentencing hearing.

E. CONCLUSION

Mr. Olmsted's conviction should be reversed and his case remanded for a new trial. Alternatively, Mr. Olmsted' three-strike sentence should be reversed and remanded for a jury determination of his prior convictions beyond a reasonable doubt.

Respectfully submitted this 6th day of June 2014.



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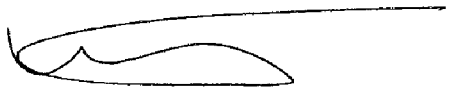
CERTIFICATE OF SERVICE

Lisa E. Tabbut declares as follows:

On today's date, I efiled Appellant's Brief to: (1) Anne Mowry Cruser, at prosecutor@clark.wa.gov; (2) the Court of Appeals, Division II; and (3) I mailed it to Micheal D. Olmsted/DOC# 961702, Clallam Bay Corrections Center, 1830 Eagle, Crest Way, Clallam Bay, WA 98326.

I CERTIFY UNDER PENALTY OF PERJURY UNDER THE LAWS OF THE STATE OF WASHINGTON THAT THE FOREGOING IS TRUE AND CORRECT.

Signed June 6, 2014, in Longview, Washington.



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