SUPREME COURT NOs. 93685-4
COURT OF APPEALS NOs. 33073-7-III, 33074-5-III

IN THE SUPREME COURT OF THE STATE OF WASHINGTON

THE STATE OF WASHINGTON, PETITIONER,

v.

RALPH E. WHITLOCK, Respondent.

AND

THE STATE OF WASHINGTON, PETITIONER,

v.

DAVID R. JOHNSON, Respondent.

PETITION FOR REVIEW

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The State of Washington, Plaintiff below, requests this Court accept review of the decision designated in Part II.

II. DECISION OF THE COURT OF APPEALS

The Petitioner, State of Washington, seeks review of the decision of the Court of Appeals, filed September 1, 2016, reversing the convictions of Ralph E. Whitlock and David R. Johnson for Burglary in the First Degree and Robbery in the First Degree and the finding that both crimes were committed while armed with a firearm. A copy of the published opinion of the Court of Appeals is attached and designated in the appendix hereto.

III. ISSUES PRESENTED FOR REVIEW

Whether the Trial Court's decision to hold a sidebar evidentiary conference in chambers, to address an evidentiary objection concerning inappropriate and abusive cross examination by defense counsel, constituted a closure of the courtroom and triggered the requirement that the trial court review and consider the factors set forth in State v. Bone-Club, 128 Wn.2d 254, 256, 906 P.2d 325 (1995).

IV. STATEMENT OF THE CASE

In the very early hours of June 10, 2014, Ralph E. Whitlock, and his accomplice, David R. Johnson, went to Tanya Routt's home in Clarkston, Washington for the purposes of robbing Routt. Report

of Proceedings (RP) at 248. Mr. Johnson knew that Routt had been involved with selling drugs. RP 180, 192.

On the night of this incident, Ms. Routt left the residence at around midnight, and was gone until morning. RP 185-190. Mr. Whitlock and Mr. Johnson arrived at approximately 1:00 a.m., entered the residence without permission, and through the use of threats and force against several of those present in the residence, took property belonging to Ms. Routt. RP 185-190, 247, 248, 249, 252, 254-7, 309, 310. 570-1. Present in the residence were Lisa Jones, Damien Hester, Crista Ansel, Ms. Routt's two daughters, Ms. Jones' daughter, and three unidentified friends of Mr. Hester. RP185.

Crista Ansel, who had been downstairs when Mr. Whitlock and Mr. Johnson entered the house, went upstairs and saw the two. RP RP 307-09. Ansel saw Mr. Johnson in the kitchen with a silver handgun. RP 310-13. Ansel testified that Mr. Johnson had the pistol out, pointing it at her and the others and said, "Don't do anything stupid." RP 311.

Mr. Whitlock and Mr. Johnson removed a security camera system with a monitor from Routt's bedroom, along with a dial entry safe. RP 193. Inside the safe were methamphetamine, pills, and three thousand dollars ($3,000.00) cash, as well as other personal records, which Whitlock and Johnson took when they the residence. RP 194, 385.

Mr. Whitlock was charged by information with Burglary in the First Degree, Robbery in The First Degree, both with deadly weapon and firearm enhancements, and two counts of Bribing a Witness. Clerk's Papers, Whitlock (CPW) 60-63. The State charged Mr. Johnson with Burglary in the First Degree and Robbery in The First Degree, both with deadly weapon and firearm enhancements. Clerk's Papers, Johnson (CPJ) 83-84.

Mr. Whitlock and Mr. Johnson waived jury and were tried to the bench. RP 679. During trial and upon cross examination of a State's witness, counsel for Mr. Johnson attempted to examine the witness concerning the witness's prior cooperation with law enforcement. RP 338, 424. The State anticipated that the Defense would ask whether the witness had previously been a "confidential informant" for the local narcotics task force, and objected to the question. RP 339. The State believed that the questioning was a calculated effort to expose the witness as a cooperative informant for the purposes of intimidating the witness and exposing the witness to further threats and retaliation. RP 424. The State requested a sidebar to discuss its concerns without exposing the witness. RP 339. At that time, the court called for a break and took the side bar into chambers. RP 339. After the sidebar, trial recommenced and Mr. Johnson's counsel proceeded on a different line of questioning. RP 339. Neither Mr. Whitlock nor Mr.

Johnson objected to the sidebar or that it was held in chambers. RP 339.

At the conclusion of the morning's testimony, a record was made regarding the discussion that occurred during the sidebar. RP 424-427. The State reiterated that it had concerns regarding Mr. Johnson's attempt to elicit testimony concerning the witness's alleged prior cooperation as a confidential informant. RP 424. The State argued that such inquiry was not relevant to the credibility of the witness or any of the facts at issue in the case. RP 424. Instead, the State argued, the purpose of such questioning was merely to embarrass or intimidate the witness and place the witness in jeopardy of possible retaliation, potentially including physical harm. RP 424. The State's position was that any arguable relevance that such testimony might have was substantially outweighed by the risk of unfair prejudice and harassment of the witness. RP 424. At sidebar, the trial court agreed with the State and said it would allow limited inquiry to whether the witness had previously provided statements to police, but that the defense would not be allowed to force the witness to reveal whether or not the witness was or had officially been a confidential informant. RP 425. The court's ruling further allowed counsel to develop whether or not Mr. Johnson or Mr. Whitlock suspected that the witness might have been an informant for the police. RP 425-6. Mr. Johnson's counsel agreed this approach would

adequately address the defense's interest. RP 425-6. Neither defense counsel had any substantive disagreement with the State's characterization of the discussions that occurred during the evidentiary conference, nor did either object to the summary of the discussions and Court's ruling. RP 425-6. The court then recessed for lunch. The courtroom remained open during this discussion and during the sidebar in chambers. RP 339, 424-427.

The trial court found both Mr. Whitlock and Mr. Johnson guilty of Burglary in the First Degree and Robbery in the First Degree. CPW 71-77, CPJ 98-103. The Court further found that Mr. Johnson was Mr. Whitlock's accomplice and that Mr. Johnson was armed with a firearm during the commission of these crimes. CPW 71 -77, CPJ 98-103.

Both Mr. Johnson and Mr. Whitlock filed timely notice of appeal and there cases were consolidated for review purposes.[1] While not raised by either defendant, the court of appeals, *sua sponte*, raised the issue of whether the evidentiary conference constituted a closure of the courtroom. Supplemental briefing was requested, and without oral argument, the court issued the opinion, concluding that the evidentiary sidebar was a closure, resulting in a structural error necessitating reversal of the convictions. Opinion, p. 11. In a

[1]The State also filed a cross appeal in each case raising issues not germane to this petition.

concurring opinion, Judge Pennell expressed great concern that the conference was not recorded. Concurrence, p. 2.

In a strong dissent, Judge Korsmo criticized the majority in ignoring established precedent. Dissent, p. 2. Judge Korsmo observed that the conference concerned legal issues typically addressed at sidebar and concluded that no violation of the public trial right occurred. *Id.* at 1. For the reasons stated in Judge Korsmo's well considered dissenting opinion and the reasons expounded below, the State respectfully requests this Court accept review of the decision of the court of appeals and reinstate the convictions of both defendants.

V. ARGUMENT FOR ACCEPTANCE OF REVIEW

Pursuant to RAP 13.4(b)(1) and (4), this Court will accept review where the decision of the Court of Appeals is in conflict with a decision of the Supreme Court or the petition involves an issue of substantial public interest that should be determined by the Supreme Court.

The Court of Appeals decision herein directly conflicts with this Court's decision in State v. Smith, 181 Wn.2d 508, 334 P.3d 1049 (2014). There, this Court held that "a sidebar conference, even if held outside the courtroom, does not implicate Washington's public trial right." *Id.* at 519. Ignoring this clear holding, which this Court characterized as "commons sense," the court of appeals held that this

sidebar did implicate the public trial right. Further, the court of appeals issued this decision in a published opinion, giving it statewide precedential value. This decision not only contravenes clear and controlling precedent, but raises a significant issue of substantial public interest. The decision of the court of appeals fails to recognize that the subject matter discussed during the sidebar herein was exactly the sort of evidentiary discussions historically considered at sidebar in accordance with Smith. The court of appeals' decision further suggests that contemporaneous recording of the sidebar proceeding is necessary. Citing concerns for the frailty of human memory, the court of appeals' decision effectively eliminates the ability to conduct a sidebar and later memorialize the discussions on the public record. Despite this Court's conclusion that sidebars may be conducted outside the courtroom, the court of appeals' decision erroneously distinguishes between "evidentiary objection in chambers" and sidebars conducted "even in hushed sidebar voices." Opinion, p. 10. The court of appeals' decision creates uncertainty where this Court has given clarity. This Court should grant review and re-clear the waters left muddied by the court of appeals' decision.

A. REVIEW IS NEEDED UNDER RAP 13.4(b)(1) BECAUSE THE COURT OF APPEALS OPINION MISAPPLIED AND UNDERMINED THIS COURT'S HOLDING IN SMITH.

1. Pursuant to this Court's Ruling in State v. Smith, Evidentiary Sidebar Conferences Do Not Implicate the Public Trial Right.

The decision of the Court of Appeals is in direct conflict with this Court's decision in Smith. As recognized by a member of the Supreme Court in summarizing the Smith decision:

> In Smith, this court applied the experience and logic test to hold that sidebar conferences involving evidentiary rulings on contemporaneous objections do not implicate the public trial right.

In re Pers. Restraint of Speight, 182 Wn.2d 103, 110, 340 P.3d 207 (2014) (Madsen C.J. concurring). In reaching this decision, the Supreme Court utilized the three step analysis in assessing claims of courtroom closure. *See* Smith, at 513 (*citing* State v. Sublett, 176 Wn.2d 58, 70-71, 292 P.3d 715 (2012)). The first step is to determine whether the public trial right is implicated. *Id.* Next, the Court looks to whether a closure occurred. *Id.* at 520. Finally, the Court reviews whether the closure was justified. *Id.* If the public trial right is not implicated, then it is unnecessary to determine whether a closure occurred, let alone decide whether it was justified. *Id.* at 519-21.

In determining whether the public trial right is implicated by a particular procedure or proceeding, the Court in Smith applied the "experience and logic" test. *See id.* at 514-515. As noted by the Court in Sublett, "not every interaction between the court, counsel, and defendants will implicate the right to a public trial, or constitute a

closure if closed to the public." 176 Wn.2d at 71. Under the experience prong, the Court looks at "'whether the place and process have historically been open to the press and general public.'" Smith, 181 Wn.2d at 514 (citing Press-Enter. Co. v. Superior Court, 464 U.S. 501, 508, 104 S. Ct. 819, 78 L. Ed. 2d 629 (1984)). "The logic prong asks 'whether public access plays a significant positive role in the functioning of the particular process in question.'" *See id.*

Under Smith, this Court determined that sidebar conferences on evidentiary rulings have traditionally been conducted outside public view. *Id.* at 515. The Court noted that these conferences involved evidentiary rulings on highly technical and "mundane" issues of little public interest. *See id.* 515-516.

As to the logic prong, this Court found no logical reason why "allowing the public to intrude on the huddle" would otherwise further the policies compelling public trials. *Id.* at 519. The Court further noted that many attorneys "fail to fully appreciate the complexities" of evidence rules. *Id.* The Court observed, "Nothing is added to the functioning of the trial by insisting that the defendant and the public be present during sidebar ***or in-chambers*** conferences." *Id.* (*emphasis added*). Ultimately, this Court held:

> Sidebars have traditionally been held outside the hearing of both the jury and the public. Because allowing the public to "intrude upon the huddle" would add nothing positive to sidebars in our courts, we hold

> that a sidebar conference, ***even if held outside the courtroom***, does not implicate Washington's public trial right.

Id. (*emphasis added*).

In deciding this case, the court of appeals gave Smith's analysis short shrift to and ignored its discussion concerning the experience prong. The Court of Appeals did not meaningfully distinguish the evidentiary conference[2] in this case from the one at issue in Smith, or explain why the proceeding involved anything more than ruling on an evidentiary objection. Without citation, the court of appeals simply decided that such experience dictates that such evidentiary rulings occur in open court. Opinion, p. 9. While the announcement of evidentiary rulings do routinely occur in open court, as recognized by Smith and ignored by the Court of Appeals, the arguments for and against the ruling often occur beyond earshot of spectators. That is precisely what occurred here. The objection was lodged on the record in open court. The arguments were had at sidebar in chambers, and the ruling was subsequently announced in the courtroom, along with a summary of the concerns of the State and both defendants.

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[2]The Court of Appeals specifically characterized the proceeding as an "evidentiary conference." Opinion, p. 8.

The court of appeals also failed to consider Smith's analysis under the logic prong regarding how the public's presence and input would aid the trial court. Indeed, the court of appeals did not explain or distinguish Smith on any substantive grounds.

The Court of Appeals did not consider the purpose or function of the chambers conference. Instead, the it focused on the location and lack of recording. Opinion, p. 10. The court did not consider the substance and subject matter of the evidentiary conference herein and instead focused on the fact that this was bench trial. Opinion, p. 8. The court emphasized that, since no jury needed to be removed, expedience was not at issue. The court's analysis demonstrates that it misunderstood the particular challenge faced by the trial court in this case.

The State did not object to the defense examination to avoid the trier of fact , in this case the trial judge, from hearing the question or the answer. Rather, pursuant to ER 403, the State sought to avoid unfairly and dangerously prejudicing the witness. Trial counsel was attempting to intimidate the witness on an issue of tangential relevance, for the purposes of chilling the witness's testimony or otherwise harassing the witness, thereby placing the witness at great risk of retaliation after trial.

To effectively articulate the prejudice underlying its objection, the State had to effectively expose the witness, causing the very harm that the objection sought to avoid. Thus, the issue was not that the trier of fact would hear this information, but that the ***defendants*** and ***spectators*** would have official confirmation about whether or not the witness had previously acted as a confidential informant.[3] The defendants were given fair opportunity through counsel to explain the relevance of the line of inquiry before the trial court decided whether to allow the question to be posed to the witness. This was a simple legal issue of relevance and prejudice under ER 403, wrapped in very complicated fact pattern that would not be obvious to the trial court without explanation. An open hearing to explain the need for a closure would have defeated the purpose. The court of appeals' conclusion that convenience reigned supreme is simply incorrect. As Judge Korsmo recognized in his dissent, the concerns raised could not adequately be addressed, even in the bench trial setting, in the manner suggested by the lead opinion of the Court of Appeals. This was recognized by Judge Korsmo in his dissent therein. Dissent, p.

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[3]Any claim that the Defendants' rights to be present at evidentiary sidebar was adequately addressed in In Re Pers. Restraint of Lord, 123 Wn.2d 296, 306, 868 P.2d 835 (1994). (Holding that a criminal defendant does not have the right to be present during in-chambers conferences or sidebar conferences on legal matters that do not involve the resolution of disputed facts.)

1. The decision of the court of appeals is in direct conflict with this Court's decision in Smith, and review should be granted.

2. The Court Made a Prompt Memorialization of the Court's Discussion with the Parties and the Substance of its Ruling on the Record as Required.

In determining that the evidentiary conference was not a sidebar "within the meaning of Smith," the court of appeals emphasized the fact that the conference was not recorded. Opinion, p. 8. Believing that recording was "an important factor in the Supreme Court's public trial jurisprudence," the Concurrence asserted that "[r]elying on human memory to accurately recount what happened during a court proceeding is inadequate." Concurrence, p. 3. However, as this Court noted in Smith, simultaneous recording is not required. Smith, at 516, fn. 10. Prompt memorialization is authorized where the proceeding is not recorded. *See id.*

Here, the contents and discussions of the sidebar were memorialized on the record. RP 424-426. All parties were given ample opportunity to place on the record the concerns they expressed during sidebar, and the announcement of the trial court's ruling, allowing for all objections to be preserved for the record. RP 424-426. Thus any member of the public wishing to inquire can readily discover exactly what happened during the evidentiary sidebar. *See* Smith, p. 518.

The court of appeals finds that the memorialization that did occur was not prompt. Opinion, p. 8. The court again provides no controlling authority that the memorialization was too delayed to be effective. In a footnote, the Court of Appeals observes that the court reporter did not make notation of the actual time, but that the objection and retirement to chambers for sidebar occurred at page 339 of the Report of Proceedings and that memorialization occurred at page 424-27. *Id.* p. 8, fn. 3. By this measure, the Court determined that the memorialization was not "prompt" within the meaning of Smith. But this is not a remotely accurate measure of time, nor is it the appropriate standard from measuring promptness.[4] What actually occurred during the morning session is a better indicator of whether the memorialization was sufficiently prompt within the meaning of Smith. Looking only at page numbers and using the Court of Appeals' "watch," the second day of trial commenced on December 9, 2014 and the State resumed its case at RP 281. RP 63, 281, 339. Testimony was taken from three witnesses that morning. RP 281-423. The State's objection that resulted in the sidebar occurred during the first round cross examination of the second[5] witness, which was

[4]The number of pages in the transcript is a poor measurement in light of the fact that it fails consider any pauses in dialog or pace of the speakers. It only measures the words actually spoken.

[5]This witness took the stand at RP 303.

conducted by Mr. Johnson. RP 339. The witness was then cross examined by Mr. Whitlock's counsel. RP 349 - 372. Redirect and recross followed. RP 372-377. Memorialization of the sidebar occurred before the Court recessed for the noon lunch break. RP 423-424. The memorialization thus occurred in a timely fashion and at an opportune moment in the trial. Anyone wishing to observe the morning proceedings would have been able to hear the summary of the discussions.[6] The memorialization was not buried in the record after conclusion of the trial or at some other inconvenient or illogical time where noone would think to look. Indeed, the appellate court did not find it necessary to remand the matter for reference hearing to determine what happened. *See* RAP 9.11. *C.f.* State v. Andy, 182 Wn.2d 294, 297, 340 P.3d 840 (2014)(Division Three of the Court of Appeals remanded for fact finding when facts concerning alleged closure were unclear). The appellate record was preserved for review and is available for public scrutiny. Under these circumstances memorialization was conducted promptly, within the meaning and Smith, and without any impairment to the defendants' public trial rights.

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[6]Even if the court conducted the sidebar in open court and it was recorded, anyone not in attendance who wished to review the record would have had to wait to review the record until the noon recess when the Clerk would have time to close the recording and make a copy.

B. REVIEW IS NEEDED UNDER RAP 13.4(b)(4) BECAUSE THE COURT OF APPEALS OPINION INTRODUCES CONFUSION WHERE THIS COURT HAD PROVIDED CLARITY AND FINALITY.

As stated above, the Court of Appeals failed to consider the purpose and subject of the sidebar conducted herein, instead focusing on location, convenience, and lack of recording. This distinction creates confusion. As in Smith, no testimony was taken during the in-chambers sidebar. The State objected to the question posed by defense counsel on the basis of relevance. RP 339. A sidebar was requested and the trial court decided to conduct the sidebar in chambers. RP 339. The State explained the potential prejudice to the State and the witness, as well as a lack of substantial relevance of the question and anticipated answer. RP 424. The defense was given opportunity to explain the perceived relevance. RP 425-6. This is clearly the traditional grist of the sidebar mill.

Judge Pennell's concurrence makes much of the relevance of the witness to the State, asserting that the discussion was not merely a single evidentiary issue but rather that it concerned an entire line of questioning. Concurrence, p. 1. Judge Pennell believed that this point was an important fact for the fact finder to consider, perhaps even touching upon constitutional considerations attendant to a fair trial. Concurrence, p. 1-2. Neither Mr. Whitlock nor Mr. Johnson claimed that their constitutional right to present a defense was

violated by the trial court's decision to limit cross examination. Judge Pennell's concerns were clearly unmerited. Further, the Concurring Judge's concerns that this involved not merely a single question, but rather a line of questions was effectively addressed in Smith, wherein the facts demonstrate that one of the discussions that occurred outside the courtroom involved "the extent of questioning allowed with certain witnesses." Smith, 181 Wn.2d at 538 (*Justice Owens dissenting*).

The subject matter discussed in this case was that traditionally addressed outside the public view at sidebar. That this discussion occurred in chambers and not in the hushed whispers of a bench conference is of no moment. The public trial right was not implicated by the sidebar herein. Application of the ruling announced by the court of appeals confuses the analysis of Smith, and substitutes new considerations of recording and location as primary considerations, rather than setting (mid trial) and function (to address finite evidentiary issues which invariably arise during trial).

There has never been any disagreement about what occurred at sidebar. There is no concern that the memorialization on the record was inaccurate.[7]

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[7]Both attorneys for the defendants and the deputy prosecutor, three members of the Bar in good standing, made a record of the discussions and had opportunity for input were there any substantive disagreements. Further, the Superior Court Judge, also in good standing, affirmed these representations.

Further, contrary to the concerns of the Concurrence regarding the frailty of the human memory, Washington law already allows for a similar procedure where the entire trial record is lost. There, reconstruction of the entire record is allowed for appellate review. *See* State v. Tilton, 149 Wn.2d 775, 785, 72 P.3d 735 (2003) ("[A] reconstructed record will provide the defendant a record of sufficient completeness for effective appellate review."). If an entire trial record can be effectively constructed from the memory of the trial judge and counsel months later, then so too can a few minutes of argument on a single legal issue be accurately recalled and related before the end of the morning session.

Finally, it should be recognized that the court of appeals' decision creates a hardship for smaller counties, like Asotin County, that lack the ability to record at sidebar or outside the courtroom,[8] and would be unable to utilize the sidebar mechanism as limited by the court of appeals. As recognized in Smith, sidebars have a long standing place in trial practice, certainly predating electronic recording. This result is harmful jurisdictions that don't have the current capability to record at sidebar, whether in the courtroom or otherwise.

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[8]At current and without substantial cost to the County, the Asotin County Superior Courtroom only records through the amplified sound system. As such, conducting a recorded sidebar would defeat the purpose as all person in the courtroom would be able to hear the conversation.

VI. CONCLUSION

The sidebar conducted here concerned an evidentiary ruling on a finite objection to a single question. Resolution of such objection is clearly within the proper scope of a sidebar. That the sidebar was not recorded is of no moment, as the sidebar was properly memorialized at a reasonable and prompt time and within the trial record, nor is the fact that the sidebar occurred outside the courtroom. Under State v. Smith, which concluded that a sidebar, at any other location, is still a sidebar, the defendants' public trial rights were not implicated by the sidebar. The court of appeals decision to the contrary is in direct conflict with this Court's published decision and harmful in that it unnecessarily creates confusion in an area that had been previously clarified by this Court. Review should be granted to correct this erroneous decision and restore clarity to the courts of this state. The State respectfully requests this Court grant review in this matter.

Dated this 19th day of September, 2016.

Respectfully submitted,

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APPENDIX

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In the Office of the Clerk of Court
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IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON
DIVISION THREE

STATE OF WASHINGTON, Respondent, v. RALPH E. WHITLOCK, Appellant.	)	No. 33073-7-III (consolidated with No. 33074-5-III) PUBLISHED OPINION
STATE OF WASHINGTON, Respondent, v. DAVID R. JOHNSON, Appellant.	)	

LAWRENCE-BERREY, A.C.J. — Ralph Whitlock and David Johnson appeal their bench trial convictions for first degree burglary and first degree robbery, including a firearm enhancement. We asked for supplemental briefing on whether the trial court's decision to recess court and go in chambers to hear argument and rule on an evidentiary objection violated the defendants' public trial rights. We hold that the defendants' public

trial rights were implicated by the in-chambers evidentiary argument and ruling. We further hold that the in-chambers argument and ruling was a closure, and the trial court's failure to explicitly or implicitly weigh the *Bone Club*[1] factors constitutes structural error that is presumed prejudicial. We, therefore, reverse the convictions and remand for a new trial.

FACTS

In June 2014, Mr. Whitlock and Mr. Johnson entered Tonya Routt's house, refused to leave when requested, and used a gun as a threat of force to obtain and depart with personal property belonging to Ms. Routt. The State charged the men with first degree burglary and first degree robbery, including firearm enhancements. The cases were consolidated and tried to the bench.

During trial, counsel for Mr. Johnson attempted to cross-examine a witness on whether she had previously served as a confidential informant. The State objected and requested a sidebar. The trial court chose instead to recess the trial and discuss the evidentiary objection with counsel in chambers. Neither defendant objected to this procedure. Trial thereafter resumed and counsel for Mr. Johnson asked the witness questions not related to the issue discussed in chambers.

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[1] *State v. Bone-Club*, 128 Wn.2d 254, 258-59, 906 P.2d 325 (1995).

At the end of the morning testimony, the trial court asked each attorney to place on the record what was discussed earlier in chambers. The State mentioned its concerns about requiring the witness to disclose whether she had served as an informant, explained why it believed the line of questioning was not relevant, and summarized the trial court's ruling made in chambers. Counsel for Mr. Johnson mentioned why he believed the line of questioning was relevant and added that the trial court's ruling allowed him to explore the subject through other witnesses. Counsel for Mr. Whitlock agreed with the prior summaries and also added that the trial court discussed other impeachment approaches in chambers.

After hearing all the evidence and closing arguments, the trial court found the defendants guilty of first degree burglary and first degree robbery, including the charged firearm enhancement. The defendants filed separate timely appeals that we consolidated.

Our review of the briefs and the record resulted in us directing the parties to submit briefing on the obvious but overlooked public trial issue. Because that issue is dispositive, we do not address the defendants' other contentions.

ANALYSIS

A. CONSIDERATION OF PUBLIC TRIAL ISSUE TO PROPERLY DECIDE CASE

RAP 12.1(a) sets forth the general rule that an appellate court will decide the case

only on the basis of issues set forth by the parties in their briefs. RAP 12.1(b) sets forth the exception:

> If the appellate court concludes that an issue not set forth in the briefs should be considered to properly decide a case, the court may notify the parties and give them an opportunity to present written argument on the issue raised by the court.

There are two reasons, consistent with the above standard, to address the public trial issue. First and foremost, the public trial right is so weighty that its violation is considered structural error. *State v. Wise*, 176 Wn.2d 1, 13, 288 P.3d 1113 (2012). "Where there is structural error 'a criminal trial cannot reliably serve its function as a vehicle for determination of guilt or innocence, and no criminal punishment may be regarded as fundamentally fair.'" *Id.* at 14 (internal quotation marks omitted) (quoting *Arizona v. Fulminate*, 499 U.S. 279, 310, 111 S. Ct. 1246, 113 L. Ed. 2d 302 (1991) (Rehnquist, C.J., majority opinion)). Second, the in-chambers conference occurred in December 2014, so the trial court had the benefit of *Wise*, which forewarns trial courts against conducting any portion of the trial in chambers.

B. PUBLIC TRIAL RIGHT

Defendants have a constitutional right to a public trial. U.S. CONST. amend. VI; CONST. art. I, § 22. A violation of the public trial right can be raised for the first time on appeal. *Wise*, 176 Wn.2d at 9. Failure to object at trial does not constitute a waiver of a

defendant's public trial right. *State v. Shearer*, 181 Wn.2d 564, 569, 334 P.3d 1078 (2014). Violation of a defendant's public trial right is a question of law reviewed de novo. *Wise*, 176 Wn.2d at 9 (quoting *State v. Easterling*, 157 Wn.2d 167, 173-74, 137 P.3d 825 (2006)).

The right to a public trial is not absolute. *Shearer*, 181 Wn.2d at 569. Competing rights and interests often require trial courts to limit public access to a trial. *Id.* Trial courts assess these competing interests by using the five factor analysis articulated in *Bone-Club*.[2] A trial court must consider the five *Bone-Club* factors on the record before closing the courtroom. *Wise*, 176 Wn.2d at 10. Closing the courtroom without considering the *Bone-Club* factors is structural error and is presumed to be prejudicial.

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[2] The five 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."

Bone-Club, 128 Wn.2d at 258-59 (alteration in original) (quoting *Allied Daily Newspapers v. Eikenberry*, 121 Wn.2d 205, 210-11, 848 P.2d 1258 (1993)).

Shearer, 181 Wn.2d at 569.

The first step in analyzing whether a defendant's right to a public trial has been violated is to inquire whether the court proceeding implicated the right. *State v. Smith*, 181 Wn.2d 508, 513, 334 P.3d 1049 (2014). If the public trial right is implicated, the second step inquires whether there was a closure, and the third step inquires whether the closure was justified. *Id.* (quoting *State v. Sublett*, 176 Wn.2d 58, 92, 292 P.3d 715 (2012) (Madsen, C.J., concurring).

1. *Does the proceeding implicate the public trial right?*

The Washington Supreme Court has adopted the "experience and logic" test developed by the United States Supreme Court to determine if a court proceeding implicates the public trial right. *Sublett*, 176 Wn.2d at 72-75. The "experience prong" asks "'whether the place and process have historically been open to the press and general public.'" *Id.* at 73 (quoting *Press-Enter. Co. v. Superior Court*, 478 U.S. 1, 8, 106 S. Ct. 2735, 92 L. Ed. 2d 1 (1986)). The "logic prong" asks "'whether public access plays a significant positive role in the functioning of the particular process in question.'" *Id.* (quoting *Press-Enter.*, 478 U.S. at 8). If both questions are answered yes, then the court proceeding implicates the public trial right. *Id.* The Washington Supreme Court has held that sidebar conferences do not implicate the public trial right. *Smith*, 181 Wn.2d at 511.

a. Smith *is not dispositive*

The State asserts that *Smith* controls the outcome of this case. In *Smith*, the trial court conducted 13 sidebar conferences during the jury trial to consider evidentiary objections. *Id.* at 512. The Cowlitz County courtroom has a peculiar layout that makes it difficult to have a traditional sidebar discussion outside of the jury's hearing. *Id.* To prevent the jury from hearing potentially prejudicial information, sidebars occur in a hallway outside of the courtroom. *Id.* The sidebar conference is videotaped and recorded and is, thus, part of the trial court record. *Id.* The *Smith* court applied the "experience and logic" test and held that sidebar conferences do not implicate the defendant's public trial right. *Id.* at 515-19. Especially pertinent to this case, the *Smith* court held, "a sidebar conference, *even if held outside the courtroom*, does not implicate Washington's public trial right." *Id.* at 519 (emphasis added).

But reaching the conclusion urged by the State is not so simple. The *Smith* court explicitly limited its holdings to sidebars in fact.

> We caution that merely characterizing something as a "sidebar" does not make it so. *To avoid implicating the public trial right, sidebars must be limited in content to their traditional subject areas, should be done only to avoid disrupting the flow of trial, and must either be on the record or be promptly memorialized in the record.* Whether the event in question is actually a sidebar is part of the experience prong inquiry . . . .

Id. at 516 n.10 (emphasis added).

We determine that the evidentiary conference in this case was not a sidebar as contemplated by the *Smith* court. The *Smith* court explained that a sidebar is a method used by a trial judge to hear evidentiary objections so to avoid delay caused by sending the jury to and from the jury room, often located some distance from the courtroom. *Id.* at 515 (quoting *In re Det. of Ticeson*, 159 Wn. App. 374, 386 n.38, 246 P.3d 550 (2011)). The hallway conference in *Smith* was a sidebar because it was the most expedient method for resolving evidentiary objections, given the courtroom's peculiar layout that allowed a jury to hear a traditional sidebar.

But here, the trial was to the bench. There was no expediency justification for holding an evidentiary conference outside the courtroom. Rather, the trial court's decision to recess court and hold an in-chambers argument and ruling actually disrupted the expedient flow of the trial.

Moreover, the in-chambers argument and ruling were neither recorded nor promptly memorialized on the record. Rather, quite some time passed between when the in-chambers argument and ruling concluded and when the in-chambers argument and ruling were placed on the record.[3] We conclude that *Smith* does not control the outcome

[3] The Report of Proceedings (RP) does not reflect the time the in-chambers hearing concluded and the time the argument and ruling were placed on the record. But we note that the former occurred at RP 339, and the latter occurred at RP 424-27.

of this case.

b. *Application of the "experience and logic" test*

The experience prong asks "'whether the place and process have historically been open to the press and general public.'" *Sublett*, 176 Wn.2d at 73 (quoting *Press-Enter.*, 478 U.S. at 8). Evidentiary arguments and rulings have always occurred in open court, although sometimes in hushed sidebar tones. There rarely are good reasons for private evidentiary conferences, absent compelling factors that could be weighed in a *Bone-Club* analysis. Any other reason to conduct a private evidentiary conference would be based on mere convenience and, thus, would not be appropriate. *State v. Frawley*, 181 Wn.2d 452, 460, 334 P.3d 1022 (2014).

The logic prong asks "'whether public access plays a significant positive role in the functioning of the particular process in question.'" *Sublett*, 176 Wn.2d at 73 (quoting *Press-Enter.*, 478 U.S. at 8). *Smith* held that the logic prong did not implicate the defendant's public trial rights because (1) forcing a jury in and out of court every time an evidentiary objection is made would be problematic, (2) traditional sidebars did not invoke concerns of perjury, transparency, or the appearance of fairness, especially where the communications were contemporaneously memorialized and recorded, and (3) evidentiary rulings are the province of the trial court, and laypersons do not

understand the intricate hearsay rules. *Smith*, 181 Wn.2d at 518-19. Here, however, jury expediency was not a concern, nor was this a traditional sidebar, nor was the discussion and ruling contemporaneously memorialized or recorded.

Hearing and ruling on an evidentiary objection in chambers is different than hearing and ruling on an evidentiary objection in open court—even in hushed sidebar voices. In chambers, the public cannot watch to ensure that the adversarial process is in fact adversarial. Especially here, where no jury was present and there was no recording of what was said in chambers, logic dictates there is little to gain and much to lose by excluding the public from an evidentiary conference. We hold that hearing and ruling on an evidentiary objection in chambers implicates the defendants' public trial right.

2. *Was there a closure?*

When a trial court conducts a court proceeding in chambers, thus causing the public to be excluded, there is a closure. *Frawley*, 181 Wn.2d at 459-60; *Wise*, 176 Wn.2d at 11-13.

3. *Was the closure justified?*

"A closure unaccompanied by a *Bone-Club* analysis on the record will almost never be considered justified." *Smith*, 181 Wn.2d at 520. "When a court fails to conduct an express *Bone-Club* analysis, a reviewing court may examine the record to determine if

the trial court effectively weighed the defendant's public trial right against other compelling interests." *Id.* Here, the trial court did not explicitly or implicitly weigh the *Bone-Club* factors. Instead, the State asked for a sidebar and the trial court chose to address the evidentiary objection in chambers. We conclude the closure was not justified.

CONCLUSION

Hearing argument and ruling on an evidentiary objection in chambers implicates a defendant's public trial right. Moreover, conducting such a conference in chambers constitutes a closure. The trial court's decision to hear argument and rule on an evidentiary objection in chambers without explicitly or implicitly weighing the *Bone-Club* factors is, by binding precedent, structural error and is presumed prejudicial. We, therefore, are constrained to reverse both convictions and remand for a new trial.

Reversed and remanded.

Lawrence-Berrey, A.C.J.

I CONCUR:

Pennell, J.

PENNELL, J. (concurrence) — I join the majority opinion in full. I write separately to emphasize additional circumstances supporting our conclusion that the in-chambers conference implicated the defendants' public trial rights.

When it comes to mundane legal arguments, the use of an expedient such as a sidebar or in-chambers conference is of no moment. The "experience prong" of the public trial test is not met because, historically, the public has had little involvement in such matters. *See State v. Smith*, 181 Wn.2d 508, 516-18, 334 P.3d 1049 (2014). Resolving technical legal issues outside of direct public view or earshot does not impair public oversight of court proceedings or deny the public the ability to weigh a defendant's guilt or innocence. *Id.* The "logic prong" also fails because discussions of evidentiary rules and similar matters often appear to the public as "a foreign language." *Id.* at 519. There is generally nothing to gain by including the public in these discussions while they are taking place. *Id.*

The in-chambers arguments conducted in this case were different. Counsel did not merely address technical legal issues. The subject was the scope of cross-examination. Specifically, whether defense counsel could cross-examine the State's witness regarding prior cooperation with law enforcement. The discussion involved significant factual proffers. It held constitutional magnitude. *See Davis v. Alaska*, 415 U.S. 308, 316-17, 94 S. Ct. 1105, 39 L. Ed. 2d 347 (1974) (constitutional right to cross-examine on bias created by relationship between witness and the State). Unlike what may be true in the often arcane context of hearsay or statutory construction, the public can readily

understand the idea that a witness may be biased due to a relationship with law enforcement. Moreover, the public has a strong interest in assessing the significance of any such relationship and whether the defendant has been permitted to challenge the State's evidence and thereby "discourage perjury." *State v. Sublett*, 176 Wn.2d 58, 72, 292 P.3d 715 (2012); *see also Walker v. Georgia*, 467 U.S. 39, 46, 104 S. Ct. 2210, 81 L. Ed. 2d 31 (1984).

Also important to the public trial analysis is the fact that the in-chambers conference was not recorded. Contrary to the dissent's assertions, the existence of simultaneous recording is an important factor in the Supreme Court's public trial jurisprudence. *Smith*, 181 Wn.2d at 518. Under the experience prong, simultaneous recording undercuts a public trial claim because "[a]ny inquiring member of the public can discover exactly what happened." *Id.* Under the logic prong, simultaneous recording means "[t]he public was not prevented from knowing what occurred." *Id.* I agree with my dissenting colleague that use of simultaneous recording is not sufficient to comport with the public trial requirement. But it does not therefore stand to reason that simultaneous recording is unnecessary, let alone unimportant.

The use of simultaneous recordings goes a long way toward ensuring public access to court proceedings. When the subject matter of a proceeding is largely legal, simultaneous recording ensures substantially the same kind of public access as what is available when a legal matter is decided in writing. Judges undoubtedly can resolve

numerous legal issues in writing, through motion practice, without implicating the public trial right. It stands to reason the same is true for oral decisions. *See Sublett*, 176 Wn.2d at 77 (public trial not implicated when judge substitutes oral presentation for what would normally occur in writing). So long as there is a recording, the public's access to oral decisions is largely preserved.

No simultaneous recording occurred here. The fact that the attorneys placed their recollections of what happened on the record was an insufficient substitute. The human mind does not operate like a video or audio recorder. *State v. Henderson*, 208 N.J. 208, 245, 27 A.3d 872 (2011). Information offered through memory can be contaminated by an array of psychological and perceptive processes. *Id.* Relying on human memory to accurately recount what happened during a court proceeding is inadequate. More importantly, there can be little public confidence in a system where justice is administered privately, behind a judge's closed doors. The public's ability to independently scrutinize court proceedings depends on access to complete and accurate information. Access is denied and independent review is thwarted when the public is forced to rely on the assurances from the bench and bar that nothing untoward has happened. The constitutional guarantee of open administration of justice requires more.

Had the trial court followed proper closure procedure, it may well have been possible to narrowly restrict the public's access to information. *See State v. Bone-Club*, 128 Wn.2d 254, 258-59, 906 P.2d 325 (1995). But because the court never recognized

the defendants' public trial rights, the required analysis and narrowing did not occur. Our Supreme Court has treated this as the type of error that will warrant reversal, even when not preserved by way of objection. *Id.* at 261-62. Given this circumstance, I concur in the decision to reverse the defendants' convictions.

Pennell, J.

33073-7-III; 33074-5-III

KORSMO, J. (dissenting) — The subject matter of the chambers conference involved legal issues typically addressed at sidebar and, thus, the trial court's closure of the courtroom did not amount to a public trial violation. Indeed, that is probably why the parties did not even raise this claim and left it to this court to, quite mistakenly, raise the issue. *Smith* controls here.[1] For two reasons, I respectfully dissent.

While most bench trials will seldom present matters that call for sidebar conferences, let alone raise issues that require retreat to chambers, this case presents a clear exception to that norm. The defense was trying to intimidate the witness concerning her past cooperation with the police and the prosecutor understandably sought to have the judge resolve the matter out of earshot of the witness. When the objection appeared to be rather involved, as this one ultimately was, the trial court aptly concluded that it was not a matter easily handled by whispering at the side of the bench. In retrospect, it might have been better to have sent the witness out in the hallway while the argument was heard in the courtroom, but hearing the matter in chambers did not violate article I, § 22. The experience and logic test demonstrates that the public trial right was not implicated in this case.

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[1] *State v. Smith*, 181 Wn.2d 508, 334 P.3d 1049 (2014).

The first, and controlling, reason for this dissent is *Smith*, a case that the majority distinguishes on irrelevant bases. There the court concluded that sidebar conferences held in the hallway outside the courtroom did not violate the defendant's public trial rights. 181 Wn.2d at 513-19. The court announced a three-part test for adjudging public trial claims: (1) use the experience and logic test to see if the public trial right was implicated, (2) decide if there is a closure, and (3) determine if the closure was justified. *Id.* at 513-14. If the public trial right is not implicated, there is no reason to determine whether a closure occurred, let alone decide whether it was justified. *Id.* at 519-21.

In *Smith*, the court concluded that the sidebar conferences outside the courtroom did not implicate the public trial right. First, the experience prong did not support a public trial right. Sidebar conferences are traditionally held outside the hearing of the public because they generally must be outside the hearing of the jury, and there was no evidence that the public ever participated in sidebar conferences. *Id.* at 515-16. The logic prong likewise did not support finding a public trial right. The public has no input in legal rulings. *Id.* at 518-19. "Nothing is added to the functioning of the trial by insisting that the defendant or public be present during sidebar or in-chambers conferences." *Id.* at 519.

Despite this clear resolution of the argument, the majority attempts to avoid it by focusing on the fact that this was a bench trial, thus rendering public viewing of legal arguments more amenable since there would be no jury to inconvenience. For a couple

of reasons, this observation is meaningless. First, not all sidebar conferences are about keeping information from the jury. Some involve keeping information from the witness, as in this case. Many counsel seeking guidance in limine want to assure the propriety of their questions before asking them in public—and they also do not want to tip the witness off as to what is coming next. Second, and more importantly, the public trial right is concerned with what the public brings to the decision-making process, not the curiosity of the audience. That the public can see and hear more legal arguments in a bench trial does not define the public trial right. Indeed, it would be curious if the defendant's exercise of the right to a jury trial somehow diminishes the defendant's article I, § 22 right to a public trial. But, that appears to be the implication of the majority's argument—there is a greater public right to hear legal argument in a bench trial than during a jury trial.

Smith tells us that a "sidebar" is defined by what happens during the conference, not where the conference takes place. The majority is unduly squeamish about the fact that this sidebar discussion related to the questioning of the witness took place in chambers rather than in the courtroom. While chambers meetings have often been a source of public trial violations over the last decade, the location does not itself demonstrate a violation of the constitution. The public had no role in determining which questions could be asked and which could not be asked. As in *Smith*, these were legal questions for the trial judge to answer. The experience and logic test, as applied in *Smith*

to the same type[2] of evidentiary proceedings involved in this case, dictate that there was no violation of the public trial right.

The majority also, quite curiously, seems to be concerned that the chambers discussion was not recorded. However, it cites no authority for the proposition that any sidebar conference, or any chambers conference, needs to be recorded. It notes that the sidebar conference in *Smith* was recorded and distinguishes that case from this one on that basis. Why it should do so is a mystery.[3] Whether a sidebar conference is reported or not typically is dependent on the location of the sidebar with respect to the court

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[2] According to Justice Owens' dissent, the sidebars at issue in *Smith* included discussions of "the extent of questioning allowed with certain witnesses" and "rulings regarding the admissibility of evidence and testimony." 181 Wn.2d at 538.

[3] The concurrence goes astray in its defense of recording some sidebar hearings by focusing on public access to the recordings and noting that the "guarantee of open administration of justice requires more" than reconstruction of a chambers hearing. This statement indicates the majority's focus on article I, § 10 ("justice in all cases shall be openly administered") instead of the proper focus on the defendant's article I, § 22 right to a "public trial." This case comes to us on the appeal of the defendants who are now, in response to this court's invitation, belatedly asserting their article I, § 22 right to a public trial. They lack standing to assert the public's article I, § 10 interest in the proceedings. *State v. Herron*, 183 Wn.2d 737, 747-48, 356 P.3d 709 (2015). Instead, the question of whether or not the public trial right was violated is assessed by the experience and logic test, *Smith*, 181 Wn.2d at 518, and *State v. Sublett*, 176 Wn.2d 58, 73, 292 P.3d 715 (2012), unadorned by considerations of whether the public had a right to know what went on at a sidebar hearing. Far from being critical to the holding, the statements in *Smith*, 181 Wn.2d at 518, noting that the recording of the sidebar conferences satisfied any public interest in those aspects of the trial, did not add a new factor to the experience and logic test. They were used to distinguish a Fifth Circuit case argued by the defendant. *Id.* at 517-18. If contemporaneous recording is required to ensure that a sidebar conference was properly limited to legal matters, our court will tell us. They have not yet done so.

reporter or the recording system, matters of courtroom design that hold no constitutional significance of which I am aware. I strongly suspect that the majority would reach the same result even if the chambers conference had been reported. However, just as reporting a chambers conference does not prevent a public trial violation, *State v. Effinger*, 194 Wn. App. 554, 375 P.3d 701 (2016) (citing cases), failing to report a chambers conference does not create a public trial violation. Instead, it is the substance of the conference that determines whether the public trial right attached or not.

While *Smith* is dispositive here, there is a second reason that the majority's approach is suspect. That reason is that article IV, § 23 of our constitution, a provision enacted at the same time as article I, §§ 10 and 22, recognized and enshrined in our constitution the judge's power to act in chambers. The provision reads:

> SECTION 23 COURT COMMISSIONERS. There may be appointed in each county, by the judge of the superior court having jurisdiction therein, one or more court commissioners, not exceeding three in number, *who shall have authority to perform like duties as a judge of the superior court at chambers*, subject to revision by such judge, to take depositions and to *perform such other business connected with the administration of justice* as may be prescribed by law.

(Emphasis added.)

This provision and its history was discussed at some length in our opinion in *In re Detention of Reyes*, 176 Wn. App. 821, 315 P.3d 532 (2013), *aff'd*, 184 Wn.2d 340 (2015). There we summed up article IV, § 23 as follows:

> Washington thus recognized at the time of adopting its constitution that judges had authority to conduct business, other than trial, outside of the public courtroom. However, that authority was still subject to the command that it be "administered openly." Since the same constitutional convention produced both provisions, the constitution appears to envision that judges can perform their activities "openly" without all activities taking place in public.

Id. at 834.

As discussed in *Reyes*, the meaning of this provision is less than clear and has varied, even in the early years of statehood. It should, however, serve as a caution against viewing negatively everything that occurs in chambers. We should not interpret the public trial right in a manner that negates another constitutional provision.

The defendants have not established that their public trial rights were violated. Indeed, they have not shown that the right to a public trial attached to the legal discussion at issue here. This case is controlled by *Smith* and, therefore, this issue is without merit. I would affirm.

Korsmo, J.

COURT OF APPEALS OF THE STATE OF WASHINGTON - DIVISION III

THE STATE OF WASHINGTON, Respondent, v. RALPH E. WHITLOCK and DAVID R. JOHNSON, Appellant.	Court of Appeals No: 330737 330745 **DECLARATION OF SERVICE**

DECLARATION

On September 20, 2016 I electronically mailed, with prior approval from Mr. Kato and Ms. Gasch, a copy of the PETITION FOR REVIEW in this matter to:

KENNETH H. KATO khkato@comcast.net	SUSAN M. GASCH gaschlaw@msn.com

I declare under penalty of perjury under the laws of the State of Washington the foregoing statement is true and correct.

Signed at Asotin, Washington on September 20, 2016.

Lisa M Webber

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