

**FILED
SUPREME COURT
STATE OF WASHINGTON
10/31/2022 2:39 PM
BY ERIN L. LENNON
CLERK**

SUPREME COURT No. 101240-3
COA No. 55269-8-II
Cowlitz Co. Superior Court No. 19-1-00094-08

**SUPREME COURT OF THE STATE OF
WASHINGTON**

STATE OF WASHINGTON,

Respondent,

v.

D'ANTHONY LESLIE WILLIAMS,
Petitioner.

RESPONSE TO PETITION FOR REVIEW

ERIC BENTSON/WSBA#38471
Deputy Prosecuting Attorney
Attorney for Respondent

Cowlitz County Prosecuting Attorney's Office
Hall of Justice
312 SW First Avenue
Kelso, WA 98626
(360) 577-3080
Office ID No. 91166

TABLE OF CONTENTS

	Page
I. IDENTITY OF RESPONDENT	1
II. COURT OF APPEALS' DECISION	1
III. ISSUES PRESENTED FOR REVIEW	1
IV. STATEMENT OF THE CASE	2
V. THIS COURT SHOULD DENY REVIEW BECAUSE THE PETITION FAILS TO RAISE GROUNDS UNDER RAP 13.4(B)..	11
A. THE COURT OF APPEALS' HOLDING THAT WILLIAMS FAILED TO MEET HIS BURDEN OF SHOWING A CLOSURE DOES NOT INVOLVE A SIGNIFICANT QUESTION OF CONSTITUTIONAL LAW UNDER RAP 13.4(B)(3).	12
B. THE COURT OF APPEALS' HOLDING THAT EXPERT TESTIMONY WAS PROPERLY ADMITTED DOES NOT INVOLVE A SIGNIFICANT QUESTION OF CONSTITUTIONAL LAW UNDER RAP 13.4(B)(3).....	20
VI. CONCLUSION	29

TABLE OF AUTHORITIES

	Page
 CASES	
<i>City of Seattle v. Heatley</i> , 70 Wn. App. 573, 854 P.2d 658 (1993)	22
<i>Estes v. Texas</i> , 381 U.S. 532, 85 S.Ct. 1628, 14 L.Ed.2d 543 (1965)	15
<i>In re Pers. Restraint of Yates</i> , 177 Wn.2d 1, 296 P.3d 872 (2013)	15
<i>In re Pers. Restraint of Monschke</i> , 197 Wn.2d 305, 482, P.3d 276 (2021)	10, 30
<i>State v. Blake</i> , 197 Wn.2d 170, 481 P.3d 521 (2021)	10
<i>State v. Bone-Club</i> , 128 Wn.2d 254, 906 P.2d 325 (1995)	13, 14, 18
<i>State v. Cox</i> , 172 Minn. 226, 215 N.W. 189 (1927)	22
<i>State v. Jasper</i> , 174 Wn.2d 96, 271 P.3d 876 (2012)	15
<i>State v. Kirkman</i> , 159 Wn.2d 918, 155 P.3d 125 (2007)	21, 22, 29

<i>State v. Lormor</i> , 172 Wn.2d 85, 257 P.3d 624 (2011).....	12
<i>State v. Love</i> , 183 Wn.2d 598, 354 P.3d 841 (2015).....	16
<i>State v. Montgomery</i> , 163 Wn.2d 577, 183 P.3d 267 (2008).....	22, 23, 26
<i>State v. Nelson</i> , 152 Wn. App. 755, 219 P.3d 100 (2009).....	23, 24
<i>State v. Njonge</i> , 181 Wn.2d 546, 334 P.3d 1068 (2014).....	14, 15, 16
<i>State v. Parks</i> , 190 Wn. App. 859, 363 P.3d 599 (2015).....	14
<i>State v. Read</i> , 100 Wn. App. 776, 998 P.2d 897, <i>remanded on other grounds</i> , 142 Wn.2d 1007, 13 P.3d 1065 (2000).....	23, 25
<i>State v. Ring</i> , 54 Wn.2d 250, 339 P.2d 461 (1959).....	22
<i>State v. Slert</i> , 181 Wn.2d 598, 334 P.3d 1088 (2014).....	14
<i>State v. Stark</i> , 183 Wn. App. 893, 334 P.3d 1196 (2014).....	15
<i>State v. Sublett</i> , 176 Wn.2d 58, 292 P.3d 715 (2012).....	14

<i>State v. Wilber</i> , 55 Wn. App. 294, 298 n.1, 777 P.2d 36 (1989).....	23
---	----

<i>Terminiello v. City of Chicago</i> , 337 U.S. 1, 69 S.Ct. 894, 93 L.Ed. 1131 (1949).....	18
--	----

OTHER AUTHORITIES

Cowlitz County Superior Court Administrative Order 2020-003-08	13
---	----

Cowlitz County Superior Court Emergency Order No. 1-A.....	5
---	---

Cowlitz County Superior Court Emergency Order No. 2-A.....	5
---	---

Cowlitz County Superior Court Emergency Order No. 3-A.....	5
---	---

Cowlitz County Superior Court Emergency Order No. 4-A.....	5
---	---

Cowlitz County Superior Court Emergency Order No. 4-A Modification.....	5
--	---

Wash. Const. art. I § 22	13
--------------------------------	----

RULES

ER 403	22
--------------	----

ER 701	22
--------------	----

ER 401	22
--------------	----

ER 70221, 22
ER 70421, 22, 25, 26, 29
RAP 13.4(b)..... 1, 10, 11, 30
RAP 13.4(b) (3)11, 12, 20, 29

I. IDENTITY OF RESPONDENT

The Respondent is the State of Washington, represented by Eric H. Bentson, Deputy Prosecuting Attorney for Ryan P. Jurvakainen, Cowlitz County Prosecuting Attorney.

II. COURT OF APPEALS' DECISION

The Court of Appeals correctly held Williams' right to a public trial was not violated and that the trial court did not abuse its discretion in admitting expert testimony. The Respondent respectfully requests this Court deny review of *State of Washington v. D'Anthony Williams*, Court of Appeals No. 55269-8-II.

III. ISSUES PRESENTED FOR REVIEW

- (1) Does the Court of Appeals' decision that the record did not establish a closure involve a significant question of constitutional law?
- (2) Does the Court of Appeals' decision that expert opinion testimony was properly admitted involve a significant question of constitutional law?

IV. STATEMENT OF THE CASE

On January 22, 2019, Kayla Chapman was working the graveyard shift at Holt's Quik-Chek in Kelso, Washington. RP 407-10, 414-16. Wearing a bandana as a mask, Williams entered Holt's carrying his girlfriend's backpack, armed with a .9-millimeter handgun. Ex. 197.¹ Williams immediately attempted to shoot Chapman, but the gun did not fire. RP 416, 616-17, Ex. 197.

Williams attempted to hand Chapman the empty backpack, but she refused to take it. Ex. 197. Williams then tried to fire the gun at Chapman again, but it did not fire. RP 618, Ex. 197. Williams pulled the slide, and nothing ejected from the gun. RP 618, Ex. 197. This indicated no round had been chambered. RP 619. Chapman turned her back to Williams and attempted to walk away. Ex. 197. Williams attempted to shoot Chapman

¹Ex. 197 contains Holt's surveillance from several different angles and Chapman's 911 call.

again, this time in the back, but the gun did not fire, indicating the gun's safety was on. RP 618, 620-21, Ex. 197.

Chapman tried to escape by walking toward the back of the store, but Williams ran and cut her off, keeping her behind the L-shaped counter. RP 453, Ex. 197. Williams forced Chapman to take the backpack. Ex. 197. Williams pulled the slide a second time. RP 619, Ex. 197. This time a live round was ejected onto the floor, indicating a round had been in the chamber. RP 619, 491. This would have been expected, because pulling the slide earlier would have pulled a round from the magazine and placed it in the chamber. RP 619-20. As before, pulling the slide caused another round to move from the magazine to the chamber. RP 619-20. Williams made a fourth attempt to shoot Chapman. RP 619, Ex. 197. The gun did not fire. Ex. 197. This again indicated the safety was on. RP 612, 621.

Unable to escape, Chapman complied and took the backpack to the cash register. Ex. 197. Williams returned to the

main counter where the cash register was. Ex. 197. As he headed to this location, he manipulated the gun in the vicinity of the safety. RP 620, Ex. 197. With the safety off and a round chambered, pulling the trigger would cause the gun to fire. RP 613. However, rather than fire the gun, Williams waited. Ex. 197.

Williams forced Chapman to empty cash from the cash register and cigarettes into the backpack. Ex. 197. Williams also placed Chapman's smart phone in the backpack. Ex. 197. After Williams had sole possession of the backpack, he reached across the counter with the gun, pointed it at Chapman's chest, and pulled the trigger. RP 620, Ex. 197. The gun fired a bullet that entered Chapman's chest/neck area. RP 436, Ex. 197.

After Williams exited the store, Chapman temporarily remained on her feet. Ex. 197. She walked to the store's cordless phone and used it to call 911. RP 410, Ex. 197. A few seconds into the call, she stopped talking, fell to the floor, and eventually stopped breathing. RP 416, Ex. 197. Police and emergency

medical technicians arrived and attempted to save her life. RP 434. However, due to her loss of blood, it was too late. RP 435. Chapman died. RP 435.

Williams was charged with aggravated murder in the first degree and several other crimes. RP 75-77, CP 76. Due to the outbreak of COVID-19, cases were unable to be tried for several months. *See* Cowlitz County Superior Court Emergency Order Nos. 1-A, 2-A, 3-A, 4-A, 4-A Modification.² Eventually, after consulting with the health department, the court set up several safety precautions, detailed in the Cowlitz County Superior Court Event Center Operations Manual, to allow cases to be tried, while also reducing the safety risk of those involved. App. 1, at 3.

Pursuant to Cowlitz County Superior Court Administrative Order No. 2020-003-08, trials were held in the Cowlitz Event Center. App. 2, at 2. All staff, jurors, and court

² *See* <https://cowlitzsuperiorcourt.us/covid-19>.

participants were required to wear masks. App. 1, at 3. Witnesses were permitted to remove their masks, only when testifying, behind a large clear shield that surrounded the witness stand. App. 1, at 10-11. All staff, jurors, and court participants were required to be socially distanced from one another. App. 1, at 3. Additionally, during voir dire, jurors were brought into the courtroom in groups of 25 to comply with health guidelines for how many people could be present in the courtroom. App. 1, at 5-6.

Reporters were permitted to sit in the courtroom, socially distanced with masks. RP 571, App. 1, at 3. All who attempted to enter the Cowlitz Event Center underwent health screening, including having their temperatures checked. App. 1, at 4-5. Each entrant was provided a surgical mask. App 1, at 3. Cases were streamed live on YouTube, Zoom, and where possible, on Kelso Longview Television (“KLTV”). App. 2, at 2.

Prior to trial, Williams’ attorney suggested jurors be brought in to fill out a questionnaire, and the parties be given an

opportunity to review the questionnaires before jury selection began the following day. RP 3. Both the State and the court agreed to proceed in this manner. RP 3.

On November 3, 2021, potential jurors arrived to fill out the questionnaire outside of the courtroom. RP 45. Prior to handing out the questionnaire, the bailiff notified the court a potential juror was “extremely distraught.” RP 59. Williams’ attorney desired more information about the degree to which she was distraught and suggested speaking to her the following day during voir dire. RP 60. The clerks became concerned the trial was not streaming on YouTube. RP 61. The distraught juror was brought into the courtroom and placed under oath. RP 61-62. She told the court she had two sons in prison and began crying. RP 63. Neither attorney asked her any questions nor objected to excusing her. RP 63-64. The court excused her because she was emotional “even before she knew the nature of the charges.” RP 64.

The court recessed. RP 65. When it reconvened, the court asked for someone to use a phone to ensure streaming was working. RP 65. Williams' attorney said, "I was able to pull it up." RP 66. The following day, on November 4, 2020, the jury panel was sworn and the trial began with voir dire of the jury panel in 25-person groups to comply with health department limitations. RP 71-72.

During trial, the jury observed video surveillance of the robbery and shooting of Chapman. RP 415-16. The State called Sergeant Kirk Wiper as an expert witness in the operation of firearms. RP 583, 591. Williams objected to Wiper testifying about his observations of the firearm operations on the surveillance. RP 584, 589. The court ruled that while Wiper could not testify to what the shooter was thinking, he could testify to movements of the gun consistent with anticipation of recoil, if there was proper foundation. RP 590.

That foundation was laid. RP 591-615. Wiper had extensive experience as the lead firearms instructor at the law

enforcement academy and later as the program coordinator for firearms training, ultimately overseeing the entire firearms program. RP 594-602. Wiper had given lectures on policing to associations of chiefs and sheriffs in several states, testified before the Washington State Legislature, and had testified as an expert in both state and federal trials. RP 594-95, 604.

Wiper testified to training many students with varied backgrounds, ranging from former Navy SEALs to students who had never fired a gun before. RP 599. He discussed some of the challenges faced when training students to fire semiautomatic handguns. RP 601. Wiper explained that recoil was the “disruption of the gun as it’s fired.” RP 602. Wiper explained that anticipation of recoil was a common occurrence of bracing when anticipating that explosion. RP 603. When anticipating recoil, a person would often move a gun down, and in the case of a right-handed shooter, to the left. RP 603.

Wiper tested the firearm that was used to kill Chapman and found it to function properly. RP 605-15. Wiper was

familiar with Holt's. RP 615. He had reviewed the surveillance and noted several things consistent with the operation of the firearm. RP 615. Wiper went through the surveillance and explained actions he observed in the operation of the gun. RP 615-20. Over Williams' objection, Wiper was permitted to testify to movements consistent with anticipation of recoil. RP 590, 616-21.

Williams was convicted of several crimes, including aggravated murder in the first degree. RP 1095-97. With the exception of a possession of a controlled substance conviction, the Court of Appeals affirmed Williams' convictions but ordered resentencing pursuant to *In re Pers. Restraint of Monschke*, 197 Wn.2d 305, 482, P.3d 276 (2021) and *State v. Blake*, 197 Wn.2d 170, 481 P.3d 521 (2021). Slip Opinion 14. The Court of Appeals found Williams failed to meet his burden of showing a closure, because he did not show the trial was unavailable on Zoom or KLTV. Slip Opinion 8-10. The Court of Appeals also

found that Wiper's testimony was properly admitted. Slip Opinion 10-11.

V. THIS COURT SHOULD DENY REVIEW BECAUSE THE PETITION FAILS TO RAISE GROUNDS UNDER RAP 13.4(B).

Because Williams' petition fails to raise any of the grounds governing review under RAP 13.4(b), it should be denied. Under RAP 13.4(b), a petition for review will be accepted by the Supreme Court only:

- (1) If the decision of the Court of Appeals is in conflict with a decision of the Supreme Court; or
- (2) If the decision of the Court of Appeals is in conflict with another decision of the Court of Appeals; or
- (3) If a significant question of law under the Constitution of the State of Washington or of the United States is involved; or
- (4) If the petition involves an issue of substantial public interest that should be determined by the Supreme Court.

Williams maintains by finding he failed to meet his burden of showing a closure and that expert testimony was properly admitted, the Court of Appeals' decision involves a significant

question of constitutional law under RAP 13.4(b)(3). Williams does not claim any other grounds for review under RAP 13.4(b).

The findings challenged by Williams were evidentiary. Consequently, in finding Williams failed to meet his burden of showing a closure and that the expert witness was permitted to testify to movements consistent with anticipation of recoil, the Court of Appeals' decision does not involve a significant question of constitutional law. Because Williams fails to raise grounds under RAP 13.4(b)(3), review should not be granted.

A. THE COURT OF APPEALS' HOLDING THAT WILLIAMS FAILED TO MEET HIS BURDEN OF SHOWING A CLOSURE DOES NOT INVOLVE A SIGNIFICANT QUESTION OF CONSTITUTIONAL LAW UNDER RAP 13.4(B)(3).

Because Williams failed to meet his burden of showing the public was completely and purposefully excluded, the Court of Appeals' decision does not involve a significant question of constitutional law. “[A] ‘closure’ of a courtroom occurs when the courtroom is completely and purposefully closed to spectators so that no one may enter and no one may leave.” *State*

v. Lormor, 172 Wn.2d 85, 93, 257 P.3d 624 (2011). The Court of Appeals found that despite a temporary interruption in YouTube streaming, Williams did not meet his burden of showing a closure, because the record did not show the trial was unavailable to the public over Zoom or KLTv. Williams concedes the trial may have remained available to the public over Zoom and KLTv. However, he claims because YouTube was an avenue for observing, its temporary interruption constituted a closure and raises a constitutional issue. It does not.

“The trial court is generally in the best position to perceive and structure its own proceedings. Accordingly, a trial court has broad discretion to make a variety of trial management decisions[.]” *State v. Dye*, 178 Wn.2d 541, 547, 309 P.3d 1192 (2013). Art. I § 22 provides the right to a “speedy public trial,” however, that right is not absolute, and a courtroom may be closed when certain criteria are met. *See State v. Bone-Club*, 128 Wn.2d 254, 258-59, 906 P.2d 325 (1995). Under *Bone-Club*, courts consider five criteria prior to closing a courtroom:

- (1) The proponent of the closure or sealing must make some showing of a compelling interest;
- (2) Anyone present when the closure motion is made must be given an opportunity to object to the closure;
- (3) The proposed method for curtailing open access must be the least restrictive means available for protecting the threatened interests;
- (4) The court must weigh the competing interests of the proponent of the closure and the public; and
- (5) The order must be no broader in its application and duration than necessary to serve its purpose.

Id.

“Not all arguable courtroom closures require satisfaction of the five factor test established in *State v. Bone-Club*[.]” *State v. Slert*, 181 Wn.2d 598, 604, 334 P.3d 1088 (2014). “A defendant asserting a violation of his public trial rights must show that a closure occurred.” *State v. Njonge*, 181 Wn.2d 546, 556, 334 P.3d 1068 (2014). Further, “not every interaction between the court, counsel, and defendants will implicate the right to a public trial, or constitute a closure to the public.” *State v. Sublett*, 176 Wn.2d 58, 71, 292 P.3d 715 (2012).

“A defendant asserting a violation of his public trial rights bears the burden of showing a closure occurred.” *State v. Parks*, 190 Wn. App. 859, 363 P.3d 599 (2015) (citing *Njonge*, 181 Wn.2d at 556). A closure is not purposeful when the court did not intend to close the courtroom. *See State v. Stark*, 183 Wn. App. 893, 903, 334 P.3d 1196 (2014). Determining whether a closure occurred requires a “conclusive showing that spectators were totally excluded[,]” and to do so a court will not “presume the existence of facts to which the record is silent.” *Njonge*, 181 Wn.2d at 556 (citing *State v. Jasper*, 174 Wn.2d 96, 124, 271 P.3d 876 (2012)).

The absence of the public in a locked courtroom has been found insufficient to show members of the public desired to be present but were excluded. *See In re Pers. Restraint of Yates*, 177 Wn.2d 1, 28, 296 P.3d 872 (2013). Further, “the public-trial guarantee is not violated if an individual member of the public cannot gain admittance to a courtroom because there are no available seats.” *Njonge*, 181 Wn.2d at 558 (quoting *Estes*

v. Texas, 381 U.S. 532, 588-89, 85 S.Ct. 1628, 14 L.Ed.2d 543 (1965)). The public includes the press. *Id.* at 560. The press is not excluded simply because filming is disallowed for a portion of the trial. *Id.*

The mere fact of information not being contemporaneously known to the public is not a closure when that information is later made available. *See State v. Love*, 183 Wn.2d 598, 607, 354 P.3d 841 (2015). In *Love*, the attorneys exercised for cause challenges at the bench and peremptory challenges silently in the courtroom by exchanging a list of jurors between themselves. *Id.* at 602. However, this did not conceal information from the public, when later “[t]he transcript of the discussion about the for cause challenges and the struck juror sheet showing the peremptory challenges were both publicly available.” *Id.* at 607.

Here, the Court of Appeals correctly found it was Williams’ burden to show a closure, and he failed to meet that burden. To show a closure, Williams was required to make a

“conclusive showing that spectators were totally excluded.” *See Njonge*, 181 Wn.2d at 556. In addition to YouTube, the trial court made trials available to the public over Zoom and local television. Williams did not show the trial was unavailable on Zoom or television. Slip Opinion 9. Thus, Williams failed to conclusively show spectators were totally excluded.

Williams maintains that his failure to meet his burden of showing the trial was unavailable over Zoom and television is immaterial. He argues for a rule that a temporary interruption to any measure of public access constitutes a closure. There is no authority to support this position. To conclusively show members of the public were totally excluded, Williams was required to show the courtroom was completely and purposefully closed to spectators. By failing to show the court’s other means of showing the trial were unavailable, Williams failed to show the trial was completely and purposefully closed to spectators.

It is noteworthy that the trial was conducted during the height of the COVID-19 pandemic, and the court was attempting

to balance the need to protect public trial rights, speedy trial rights, and the lives of the participants.³ The courtroom had already been closed after the court appropriately applied the *Bone-Club* factors. The court published an order providing notice that anyone who objected was permitted to telephone into the virtual courtroom and request to be heard in court. App. 2, at 2. The court also found the means provided for the public to observe and listen to virtual court hearings were the least restrictive for protecting the public, parties, and court staff. App. 2, at 2.

The court intended to make trials available live on YouTube, Zoom, and KLTv. App. 2, at 2. Obviously with Internet streaming and television occasional interruptions are known to occur, creating small gaps in coverage. While such

³ In dissent, Justice Jackson once recognized: “[I]f the Court does not temper its doctrinaire logic with a little practical wisdom, it will convert the constitutional Bill of Rights into a suicide pact.” *Terminiello v. City of Chicago*, 337 U.S. 1, 37, 69 S.Ct. 894, 93 L.Ed. 1131 (1949) (Jackson, J., dissenting).

interruptions may be frustrating, the public understands they are inevitable. No objection to trial proceeding in this manner was ever raised by anyone, despite the court having provided a means for doing so. Thus, it is reasonable to conclude the public accepted the risk of small portions of the proceedings being missed for connectivity issues.

There was no purposeful closure when the court did not intend to prevent public access. The court made efforts to reestablish YouTube streaming that were ongoing as it addressed the juror. RP 65. The court confirmed YouTube was streaming inside the courtroom before continuing further. RP 65. This is distinguishable from cases where courts intentionally removed proceedings to chambers, where there was no record of what was actually said, and the press was necessarily excluded. Here, the court handled all of Williams' case in the courtroom with the intent of making it available over YouTube, Zoom, KLTV, through the press, and in the transcript.

Importantly, the proceeding occurred in a courtroom open to the press and on the record. The trial was attended by the local newspaper. RP 571. By allowing members of the press to be present in the courtroom, the court ensured the public had information regarding significant events that occurred in the trial shortly after they occurred. Further, by conducting the discussion with the juror in the courtroom, all statements were memorialized contemporaneously in the transcript. This ensured all that was said with regard to the potential juror was publicly available. Under these circumstances a complete and purposeful closure of the courtroom did not occur. Thus, the Court of Appeals' decision does not involve a significant question of constitutional law under RAP 13.4(b)(3).

B. THE COURT OF APPEALS' HOLDING THAT EXPERT TESTIMONY WAS PROPERLY ADMITTED DOES NOT INVOLVE A SIGNIFICANT QUESTION OF CONSTITUTIONAL LAW UNDER RAP 13.4(B)(3).

The Court of Appeals correctly held that a qualified expert in the operation of firearms was permitted to explain actions

observed on surveillance were consistent with a common occurrence in the operation of a firearm; this decision does not involve a significant question of constitutional law. “Testimony in the form of an opinion or inference otherwise admissible is not objectionable because it embraces an ultimate issue to be decided by the trier of fact.” ER 704. The Court of Appeals affirmed the trial court’s ruling that the State’s expert was permitted to explain what anticipation of recoil was and testify to observations of the gun’s operation on the surveillance that were “consistent with” the anticipation of recoil. Because this decision followed guidance provided by this Court for admitting such evidence, it does not raise a constitutional issue.

“A trial court’s decision to admit expert testimony is reviewed for abuse of discretion.” *State v. Kirkman*, 159 Wn.2d 918, 927, 155 P.3d 125 (2007). “If scientific, technical, or other specialized knowledge will assist the trier of fact to understand the evidence or to determine a fact in issue, a witness qualified as an expert by knowledge, skill, experience, training, or

education, may testify thereto in the form of an opinion or otherwise.” ER 702. “We allow experts to express opinions concerning their fields of expertise when those opinions will assist the trier of fact.” *State v. Montgomery*, 163 Wn.2d 577, 590, 183 P.3d 267 (2008).

“‘[T]he mere fact that the opinion of an expert covers the very issue which the jury has to pass upon does not call for its exclusion.’” *State v. Ring*, 54 Wn.2d 250, 255, 339 P.2d 461 (1959) (quoting *State v. Cox*, 172 Minn. 226, 215 N.W. 189 (1927)). The decision to admit or exclude opinion testimony under ER 401, 403, 701, 702, and 704 involves a “routine exercise of discretion by the trial court[.]” *City of Seattle v. Heatley*, 70 Wn. App. 573, 585, 854 P.2d 658 (1993). “These rules govern evidentiary questions that do not necessarily implicate constitutional rights.” *Id.* (citation omitted).

“The assertion that the province of the jury has been invaded may often be simple rhetoric.” *Kirkman*, 159 Wn.2d at 928. “Juries are presumed to have followed the trial court’s

instructions, absent evidence proving the contrary.” *Id.* Any risk of the jury believing itself unable to reject an expert opinion is avoided by properly instructing the jury it is “not bound to follow any opinion expressed by an expert witness.” *State v. Nelson*, 152 Wn. App. 755, 769, 219 P.3d 100 (2009).

“The fact that an opinion encompassing ultimate factual issues *supports* the conclusion that the defendant is guilty does not make the testimony an improper opinion on guilt.” *Heatley*, 70 Wn. App. at 580 (emphasis in original). “[I]t is the very fact that such opinions imply that the defendant is guilty which makes the evidence relevant and material.” *Id.* (quoting *State v. Wilber*, 55 Wn. App. 294, 298 n.1, 777 P.2d 36 (1989)). The phrase “consistent with” permits an expert to render an opinion as to why the evidence is consistent with a certain crime without expressing an opinion as to the guilt or innocence of the accused. *See Montgomery*, 163 Wn.2d at 594, n.8 (recommending a colloquy permitting an expert to give the opinion that evidence

found was “consistent with intent to manufacture methamphetamine.”).

It is not an improper expression of a defendant’s guilt for a qualified expert to testify to the defendant’s operation of a gun. *See State v. Read*, 100 Wn. App. 776, 782, 998 P.2d 897, *remanded on other grounds*, 142 Wn.2d 1007, 13 P.3d 1065 (2000) (not an improper expression of guilt for expert to testify defendant was “sighting right down the gun when it went off”). While an expert may not comment on a defendant’s guilt or innocence, an expert may render an opinion that evidence shows intent. *See Nelson*, 152 Wn. App. at 764 (admissible for expert to testify that dogs on the property “were possessed with intent that they be engaged in a dogfighting exhibition. That was their purpose.”).

Here, the Court of Appeals held the trial court did not abuse its discretion in permitting the expert in the operation of firearms to testify to his observation that certain operations of the firearm were “consistent with” anticipation of recoil. Because

the jury observed several actions with the gun on the surveillance, expert testimony regarding the operation of the gun was helpful. These actions included movements consistent with deactivating the safety, pulling the slide, and anticipation of recoil. While testimony as to what these movements were consistent with permitted the jury to draw the inference that the shooter intended to fire the gun or make the gun capable of firing, the expert provided no direct testimony of the shooter's intent. That the shooter's intent could be inferred from this testimony is what made the testimony relevant.

Under ER 704, the court could have allowed the expert to reach the ultimate issue of the shooter's intent. Just as in an assault case, a witness may testify to observing a person attempt to strike another, a properly qualified expert could testify that a shooter attempted to fire a gun based on movements. As *Nelson* demonstrates, an expert does not express an opinion on guilt even when that expert's testimony reaches the ultimate issue of intent. Testimony as to intentional acts with a firearm are also permitted.

Just as testimony was admissible in *Read* that the defendant was “sighting” down the barrel of the gun when he fired it, testimony that the shooter attempted to fire the gun would have been admissible here.

Despite ER 704 permitting testimony as to the shooter’s intent with the gun, the court did not allow that here. Rather, the court limited the expert’s opinion to actions that were “consistent with” anticipation of recoil. As explained in *Montgomery*, the phrasing “consistent with” avoids an expert giving an opinion as to guilt. In fact, while in *Montgomery* this Court provided instructions for an expert to say evidence was consistent with the crime itself—intent to manufacture methamphetamine—here the expert merely testified to actions consistent with anticipation of recoil. This fell short of testimony that Williams acted with premeditated intent to kill Chapman. Yet, under *Montgomery*, even this would have been permitted when qualified by the phrase “consistent with.”

There were several issues the expert's opinion did not reach. Identity was the defense in the case, yet no testimony from the expert was elicited identifying Williams as the shooter. The expert never testified to the shooter's intent, but only that his movements were consistent with anticipation of recoil. Williams' attorney was still able to argue he was merely pointing the gun rather than attempting to fire it. RP 1069-70.

In his brief, Williams incorrectly asserts that the expert testified to a movement that "appeared to be anticipation of recoil," "looked like he was bracing himself," and that the court permitted testimony that a movement "was anticipation of recoil." Petitioner's Brief a 23-24, 26. Nowhere is this phrasing found in the record. Rather, when the expert rendered an opinion as to anticipation of recoil observed in the surveillance, it was in response to a question asking what the observed movement was "consistent with." RP 616-18. The phrasing was significant because testimony that an action was "consistent with anticipation of recoil" does not reach whether or not the shooter

was actually anticipating recoil. By using incorrect phrasing, Williams suggests the testimony permitted by the court was a statement of intent. This was not the case.

Further, even if the expert's opinion were taken to be an expression as to his intent to fire the gun, this would still fall short of whether he intended to kill Chapman by firing the gun. One can fire a gun without intending to shoot or kill another person. While the jury was free to draw the inference that Williams intended to shoot Chapman, the expert never rendered an opinion that he intended to shoot or kill Chapman. The jury was free to infer his intent had been to shoot over her shoulder or that he knew the gun would not fire so his intent was merely to frighten her. The expert's opinion never reached the issue of whether he intended to kill Chapman.

The expert was not simply a police officer. He had been the lead firearms instructor at the law enforcement academy and later became the program coordinator over all instructors in firearms training. Additionally, he had testified as an expert in

trials nationwide, including federal, criminal, and civil actions. Williams does not dispute his expertise. This is unsurprising, as it would be difficult to find a more qualified expert on firearm operations. The jury was much less likely to be impressed by the fact that he was a police officer, than the fact that he was an expert in the operation of firearms. Still, as in *Kirkman*, the jury was properly instructed that it was not required to accept the expert's opinion. CP 102. Because juries are presumed to follow the court's instructions, there was no prejudice.

Because the expert's opinion was limited to actions that were consistent with the operation of a firearm, he did not comment on guilt. Under ER 704, his opinion was properly admitted. Accordingly, the Court of Appeals' decision does not involve a significant question of constitutional law under RAP 13.4(b)(3).

VI. CONCLUSION

Because the petition does not meet any of the criteria governing acceptance of review under RAP 13.4(b), it should be

denied, permitting the trial court to resentence in accordance with this Court's decisions in *Blake* and *Monschke*.

CERTIFICATE OF COMPLIANCE

I certify under RAP 18.17(b) that excluding appendices, title sheet, table of contents, table of authorities, certificate of compliance, certificate of service, signature blocks, and pictorial images, the word count of this document is 4,989 words, as calculated by the word processing software used.

Respectfully submitted this 31st day of October 2022.



Eric H. Bentson, WSBA #38471
Deputy Prosecuting Attorney

APPENDIX 1



Cowlitz County Superior Court
Event Center
Operations Manual

TABLE OF CONTENTS:

	<u>Page:</u>
Introduction	3
Mitigation Strategies	3-4
Parking	4
Health Screening	4-5
Security Screening	5
Jury Check-in and Staging	5-6
Juror Questioning	6
Jury Rooms	6-7
Courtroom	7
Breaks	7
Use of Bathrooms	8
Lunch	8
Signage	8
Masks and Social Distancing	8
Supplies	9
Evidence/Exhibits	9
Evacuation	9
Emergency	10
Witnesses	10
Staffing Plan	10
Medical Screening	Attachment A
Evacuation Plan	Attachment B
Masking/Social Distancing Policy	Attachment C
Health screening and other stuff-checklist	Attachment D
Staging/Orientation checklist	Attachment E

INTRODUCTION:

This operations manual is intended to provide an overview as to the operational issues and directives consistent with the utilization of the Cowlitz County Regional Event Center for the purpose of conduction/resuming Superior Court Jury Trials.

This is intended to provide guidance to all Judicial Staff, Judicial Assistants, and Bailiffs, and any other persons that are responsible for supporting this operational plan.

This plan and the various objectives and operational directives were developed in conjunction with the Cowlitz County Health Department, Sheriff's Office, Clerk's Office, Corrections Department, legal community, court staff and other stakeholders.

The overall goal of this operations manual is to provide for the access to due process while at the same time providing for the healthiest and safest possible environment for all people participating in jury trials. As this pandemic has significantly impact our local community, state, and nation, court personnel have been planning all aspects of this process to emphasize the protection of the "right to a speedy trial", while protecting our community.

MITIGATION STRATEGIES:

Through all phases of a jury trial from getting jurors into the building to the jury verdict, the following mitigation strategies will be utilized.

- All staff, jurors, and court participants should at all times, wear a mask. Surgical or KN95 masks will be provided.
- All staff, jurors, and court participants should always keep whether sitting, standing, or waiting in a line a social distance of 6 or more feet separation between themselves and the person closest to them.
- Hand sanitizer stands are positioned throughout the event center. Additionally, restrooms and deliberation rooms have their own sinks for hygiene purposes.
- Regular cleaning of the courtrooms, restrooms, general spaces, and deliberation rooms will occur with EPA approved disinfectants.
- All potential jurors, staff and court participants will undergo medical screening to include, symptoms and temperature check. People with fevers of 100.4 or above or that have current covid-19 symptoms will be excluded from participating in the trial.
- Jurors will be given their own pen/pencil for the duration of the trial.
- Jurors and all court participants will handle evidence/exhibits with gloves.

- The HVAC system has been evaluated to operate in the most effective and efficient manner to reduce the spread of the virus.
- The Cowlitz County Superior Court will not allow the general public to attend the jury trials. They will be streamed via YouTube. This will limit the number of people in the Event Center, thus reducing the possible exposure and infection.
- Staff will work to cohort judicial staff, jurors/bailiffs, and other court participant to reduce the exposure.
- Court participants should not cluster at choke points in the event center and should always socially distance.
- Traffic flow has been identified to reduce choke points and arrows are on the ground to guide those in the building.
- Jurors will be provided a copy of their own jury instructions.
- Jurors will be brought into the courtroom in smaller sub-groups and questioned to reduce the number of people in one location.
- Jurors will be given a jury instruction video that will include some health/mitigation information.
- Court will take as many breaks as possible so as to allow jurors to go outside or into large staging area and take their masks off etc.
- Food that is provided will be boxed. No buffets or shared food/drink.
- There will be no coffee etc. and magazines provided.

Parking:

Jurors will be informed that they are to park in the North Parking lot of the Cowlitz County Event Center. Other areas will be restricted. This information will be provided to the jurors via the Jury Management Clerk-website and call in number. This information will also be on the Superior Court's website.

Initial Health Screening:

When the jurors first arrive at the Cowlitz Event Center, they should be greeted by a bailiff at the front of the facility (outside). They should be asked to line-up outside on the hash marks placed on the side-walk denoting 6 feet for social distancing purposes. One at a time, the bailiff will have a potential juror come to the front door by the screening table (still outside) and take their temperature (want to give them as much privacy as possible) and have them review and respond to the symptom list (SEE ATTACHMENT A-Medical Screening Jurors). If the juror has a 100.4 or above temperature or indicates they have any of the symptoms (they don't need to tell which one), you should write their name down and write next to their name-"excused for medical reasons". After you have screened all jurors, the list should be provided to the jury clerk who will provide to the judge after all jurors are checked in.

After a potential juror successfully completes the health screening, they will proceed to security screening inside the Event Center.

A separate marked line is dedicated for court staff and participants in the trial so as to expedite their entry into the building. Bailiffs will screen these people as well.

COMMENT: All health screening is to occur outside of the facility, during good weather. It is at this point that potential jurors will be given their surgical masks. They need to stow their cloth masks. It is also important to note that this health screening will need to occur each day of the trial. Should use two bailiffs for screening to speed up the health screening wait time.

Bailiffs should encourage potential jurors as they go into building and staging area to use hand sanitizer. This should be done throughout each day. Bailiffs should wear latex gloves. Need to remind people that they should not bring bags or purses into the Event Center during initial stages of trial. Once Jury is seated, they will be allowed to bring in bags or purses. All subject to security screening/search.

Security Screening:

At the time of security screening, the potential juror will not be allowed to bring their bags through security screening (bailiffs can mention during health screening). We have a walk through metal detector and wand for screening. We do not have a scanner at the event center, so limiting the number of bags to be searched will save time. Once a person is seated as a juror, they will be allowed to bring their bags into the building subject to standard searching protocols. After a potential juror passes through screening, they will be moved into the large "St. Helen's Room" for jury check in with the jury clerk.

COMMENT: After seated on the jury, the juror will head straight to their deliberation/jury room after completing security screening. Bailiffs will be there to greet them and move them into their jury room each morning prior to trial.

Jury Check-In and Staging:

After security screening, potential jurors will be checked in with the jury management clerk, get their assigned juror number and receive their number card. The staging area (Mt. St. Helen's room) will have 100 or more chairs set up socially distanced apart. The 100 chairs will be organized into four groups of 25 chairs. These groups will be 1-25, 26-50, 51-75, and 76-100. A juror will need to sit in their assigned seat number. If their number is 27, they will need to sit seat number 27.

Once all jurors are seated in the staging area, they will be shown a short video that provides some general jury orientation materials as well as information reminding them of key COVID-19 mitigation strategies. Bailiffs are responsible for playing the orientation video on the large screen in the staging room. Bailiffs will also provide general COVID information and jury

process as part of standard orientation. Bailiffs should make sure to use the wireless mic to speak to the group.

Once this is completed and the court is ready, the first group of jurors will be taken into the courtroom i.e. 1-25, then 26-50.....

No more than 25 jurors will be taken into the courtroom at one time.

When there are potential jurors in this room, a bailiff must remain with them. Jurors shouldn't talk with people in other groups ex. My juror number is 2. I will only talk with people in group 1-25.

Based on the type of case, the judge will make the determination as to the number of jurors that should be called in for jury duty. Judges are encouraged to call jurors in increments of 25 to accommodate our courtroom capacity for voir dire.

For cases requiring more than 50 jurors, the judge will call in 75, 100, 125 etc. For any juror pools over 50, the judge will instruct the bailiffs and jury clerk to check in all jurors and go through orientation procedures including video orientation. After the orientation has been completed, some jurors will stay for voir dire and some will be excused and told to report another time. For example, a trial requiring 100 jurors, all 100 jurors will be checked in and given the orientation, 50 will be sent home until the PM. 1-50 will proceed to voir dire. During the PM, jurors 1-50 will be sent home until the following day. Jurors 51-100 will proceed to voir dire (this should reduce wait time and possible COVID exposure issues). The judge may modify this based on a number of issues and circumstances as they are unique to a particular trial. (NOTE: Prior to any jurors being excused to return later, bailiffs should receive instruction from the judges)

COMMENT:

Bailiffs should make sure to use the wireless mic to speak to the group. This will assure hearing impaired people will hear. While in the staging area, bailiffs should move around and inquire if people would like water. If so, bailiffs should individually hand juror a clean bottle of water. Need to remember to use gloves when handling food, water or other items to jurors.

Juror Questioning

The first group of 25 jurors will be taken into the courtroom for questioning. 14 of the jurors will be assigned to sit in the jury box. The other 11 jurors will sit in the, socially distanced chairs behind the jury box. After all have been questioned, they will be taken back to the staging area and the next 25 jurors-group 26-50 will be brought in for questioning and so on until done.

COMMENT: *Due to sound quality issues, the judge may ask the bailiff to hold the mic up for the juror to talk into. You will need to put on gloves and stand as far away from juror while holding the mic. In some cases, the judge may have a juror go to a microphone and speak into it. The*

Court may also allow the juror to remove their mask to answer questions. Unknown how this will go. Need to be flexible as a bailiff. Should keep a couple pair of gloves on you at all times.

Jurors may be given a wireless mic as well. They should wear gloves prior to being handed the gloves.

Jury Rooms

When jurors are in the jury room, they should be reminded to socially distance at all times and wear their masks. Chairs are set up 6 feet apart. Additionally, bailiffs need to make sure to remind jurors when heading into the jury room, they should wash their hands either in the sink or use the provided hand sanitizer. Jurors should sit in their assigned seat throughout the duration of the trial.

Jurors should be provided one pencil/pen each day at the beginning of the trial. There shouldn't be any sharing of pens/pencils or paper.

Jurors will be provided one tablet of paper for the duration of the trial. They will be locked up after each court day. They should write their names on the tablet and not share with others during the trial. They will be allowed to keep the unused portion of the tablet at the end of the trial or they should be thrown away.

Whenever the jurors leave the jury room to head back to court or for breaks, one of the designated bailiffs should remain in the jury room to wipe down all the tables, counter-tops, and door knobs. When doing so, the bailiff should have their masks on, rubber gloves, and make sure to use the spray correctly.

COMMENT:

Bailiffs should make sure that each jury room is stocked with enough hand sanitizer, Clorox wipes, paper-towels, rubber gloves, and paper/pencils. Both sides of the windows from the jury room to hallway are blacked out. It is important that the bailiff make sure that the windows remain blacked out. Bailiffs will need to make sure that signage asking others in the building to be quiet are prominently displayed outside the jury rooms. Bailiffs may need to remind people to respect the signs and remain quiet while the jury is deliberating.

Pencils/Pens will be issued per juror for the duration of the trial. They can keep when done. The same goes for the note-pads. The note-pads should be secured in an approved location at the end of each daily court session.

After a jury is seated, the bailiffs should provide individual goodie bags to seated jurors. The bags will consist of 1 hand sanitizer, snacks, and a pen. Throughout jury service, the bailiff should provide additional snacks as needed. All items placed in the bag or handed to jurors should be sanitized. We will not provide new goodies bags each day but will provide additional snacks each day as needed.

Courtroom:

While the jurors are in the courtroom, the role of the bailiff should be very similar to operations when at the hall, with the exception that the jury is in a much larger jury box. Things to be aware of when in the courtroom: make sure jurors are socially distanced, masked (unless told otherwise by the Court), and are able to be heard by the participants (particularly during Voir Dire). Bailiff may need to assist with holding a microphone for them to speak into.

COMMENT: We should have a number of microphones to meet the need. If you have to hold a mic. or a potential juror, you need to stand as far away from them as possible, wear your gloves and mask. During each break in court, one of the bailiffs should clean any microphones or surfaces that may have been touched during the court session. WEAR: gloves, mask, proper use of spray/Clorox wipes.

Mics and witness stand should be cleaned in between each witness.

Breaks:

At designated times, the court will allow jurors to take breaks. If the weather is good, the bailiff's are encouraged to take the jurors outside to the front parking lot. If the weather is not good, they can take their break in the Mt. St. Helens room. Jurors may remove their masks during these times but are required to socially distance during this time (6 feet or more). A bailiff should be with the jury at all times to make sure they don't wander around the building and come in contact w/ the defendant or other witnesses.

Use of Bathrooms:

The only restrooms in the facility for jurors are the bathrooms at the west end of the facility. The jurors will need to be escorted to the restrooms by a bailiff. The bailiff should check to make sure that no one else is in the restroom while jurors are using it. No one else shall enter except for other jurors. Once all are done using the restroom, the bailiff will escort them back to their jury room.

The Event Center staff have placed signs on the outside of the Women's and Men's restrooms indicating no more than 5 people in the restrooms at a time. This is to promote social distancing. Every other sink in all bathrooms and urinals in the men's bathrooms have been blocked off, again to promote social distancing. Bailiffs should remind jurors of this but during the voir dire process, you are not required to monitor this. When a jury is seated, bailiffs will need to make monitor these rules.

COMMENT: Careful attention should be given to assure that jurors do not have encounters with other court participants and witnesses. At no time, shall a juror be allowed to move throughout the Event Center without escort.

Lunch:

The Court will either excuse the jurors to go out to lunch or the court will have them stay in and a box lunch will be provided to them. If the lunches are provided to the jurors, we will need to order individual box lunches (jurors should have all food delivered to them in box-including their drink) so as to reduce potential for virus exposure. We will have water bottles on hand that we will provide.

Jurors will be provided individual packaged lunches from local restaurants such as Panera, Subway, and/or Jimmy Johns. Contact information/menus will be available. Bailiffs should take order of jurors and contact court administration to place the order and pay for the food. Food will be delivered to the Event Center.

COMMENT: After meals, all jury rooms should have tables, surfaces, door knobs washed down. Bailiffs should encourage all jurors to wash up prior to eating and after. This should be constant. When handing out food/water-gloves should be worn at all times.

Signage:

Signs indicating the requirement to socially distance and wear masks is prominently displayed throughout the facility. If a bailiff feels we need more signs, please ask Emily Harvey and if she isn't available, please contact any of the JA's so more signs can be ordered.

Masks and Social Distancing:

All people entering court facilities shall wear a face mask. The court will require people to wear a procedural/surgical mask. Additionally, all are required to socially distance at all times. Bailiffs and staff should refer to "Court Masking and Social Distancing Policy" for guidance. SEE ATTACHMENT C.

Supplies:

The facility should be provided with plenty of hand sanitizer, paper-towels, Kleenex, rubber gloves (medium, large, and extra large), face-masks, paper and pencils/pens. If we are running low on supplies, bailiffs should restock the supplies. If more supplies need to be ordered, please contact Emily Harvey.

All supplies are stored in the chamber's cabinets. . Need gloves, hand sanitizer, kleenex on witness stand, counsel tables, clerks bench and judges bench.

COMMENT: May need to find a more secure location to store supplies.

Evidence/Exhibits:

In the event the jury requests evidence/exhibits to review in the jury room, they should be instructed to handle any exhibits/evidence 1 person at a time and remain socially distanced.

They should be instructed to put rubber gloves on when handling the evidence and dispose of gloves when done.

All people handling exhibits and evidence during the trial should wear latex gloves.

Evacuation:

The Department of Emergency Management has worked up an evacuation plan in the event the building needs to be evacuated. During the building evacuation, the bailiff should remain with the jurors and assure all are successfully evacuated from the building. All evacuees should remain outside until the proper authority i.e. police or fire give the "all clear" to return to the building. SEE ATTACHMENT B.

COMMENT: Once all jurors are in the staging area (St. Helen's Room), the bailiff should inform them that any time an emergency occurs including fire alarm etc, prior to being seated as a juror, they should exit the building through the set of doors they entered and wait in the front of the building. May take masks off as long as socially distanced of 6'feet or more. Bailiffs will monitor them. If one set of jurors example 1-25 has already been questioned, the bailiff should make sure to keep that group separate and from talking w/ other groups. Potential jurors should be instructed to follow the instructions of the bailiffs.

Once a jury is seated, the jurors should be informed that they will be using the emergency exit door in their jury room for any emergency evacuation. They should follow instructions of the bailiff. Bailiff review ATTACHMENT B for clarification. Jury should wait in the front of the building, socially distanced under supervision of bailiffs. They may take off masks if outside and socially distanced.

In the event of a serious emergency such as active shooter, the key is to get out safely regardless of ATTACHMENT B.

Emergency:

In the event of an emergency, the judge will hit the cell phone app. large button on bench and request assistance from the Sheriff's Department. Additionally, staff will have access to a phone line to dial 911. Additionally, any staff can get help from a security officer if it can be done safely.

COMMENT: In an emergency, don't rely on one person to call 911 or radio for help. Multiple people calling 911 assures help will be on the way.

Witnesses:

Witnesses testifying in a trial should not intermingle with jurors. Witnesses should not arrive to the facility until after Voir Dire. If there is only one trial, any potential witnesses may stage in the in the jury staging room, assuming no jurors remain in that room.

Witnesses will be allowed to take off their masks when testifying. When they are walking to the witness stand and leaving the witness stand, they must wear their masks.

Bailiffs should follow witness protocol and sign in/out sheet as per ATTACHMENT F

COMMENT: *Very important that bailiffs keep jurors away from witnesses and other participants of the trial.*

Staffing Plan

During the course of the trial, we will deploy many resources to assure we are able to resume trials at the event center. Besides the event center staff such as tech, janitorial, jail staff, and attorneys etc, the following staff will be provided by the County to support the trials:

3 phoenix security staff and possible one sheriff's deputy to act as a rover

1 judicial officer per trial

1 Judicial Assistant as needed

1 clerk per trial

4 bailiffs per trial depending on the stage of the trial. See trial staffing plan 1-2 temp employees to help with monitoring of jury, providing additional cleaning etc.

APPENDIX 2

7/27/2020

Filed Electronically
Superior Court
Cowlitz County Clerk
Staci Myklebust by Sheryl M.

1
2
3
4
5
6
7
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25
26
27
28

SUPERIOR COURT OF WASHINGTON FOR COWLITZ COUNTY

In re:

**SUPERIOR COURT COURTROOM
PROCEEDINGS HELD IN A VIRTUAL
COURTROOM**

**ADMINISTRATIVE ORDER
NO. 2020-003-08**

Governor Inslee declared a statewide State of Emergency on February 29, 2020, and has issued several updates, based on the significant risks of the COVID-19 pandemic. Chief Justice Debra Stephens, on March 4, 2020, issued the first, of several, orders of the Washington Supreme Court, to provide direction to the courts of the State of Washington in response to the pandemic. On March 4, 2020, the Board of Cowlitz County Commissioners declared an emergency also related to the significant health threat caused by COVID-19. The health and safety risks presented by the pandemic continue.

To reflect the public health emergency, Cowlitz County Superior Court has issued Emergency Orders to provide access to justice in a manner to ensure the safety of court personnel, litigants and the public. In furtherance of safety, the Court has invoked the holding of hearings by telephone, video or other means that do not require in-person attendance, unless impossible. Where the Court matters must be heard in person, social distancing, and other recommendations of the CDC and Cowlitz County Health



1 Department shall be followed. For the matters scheduled today before this Court, the
2 Court finds as follows:

3 1. A compelling interest has been demonstrated by the ongoing health crisis
4 that requires the Court to conduct hearings by virtual technology (ZOOM platform) and to
5 limit physical public interaction between the parties, public and staff in accordance with
6 the guidelines of the CDC and local health department.

7 2. Any person that objects to a currently scheduled matter being heard in this
8 manner may telephone into the virtual courtroom hearing and request to be heard by the
9 Court. Contact information can be found on the Cowlitz County Superior Court website
10 (<http://cowlitzsuperiorcourt.us/>). When the Court grants permission to speak, the person
11 shall then state their objection.

12 3. No one has authority or permission to record virtual court proceedings
13 except the Cowlitz County Superior Court Clerk, or her designees(s).

14 4. The Court finds the means provided for the public to observe and listen to
15 virtual court hearings is the least restrictive means available for protecting the public, the
16 parties, and the court staff. Specifically, any party can hear and observe the
17 proceedings by logging into the ZOOM hearing; the information to log in to Superior
18 Court ZOOM hearings can be found on the Cowlitz County Superior Court website
19 (<https://cowlitzsuperiorcourt.us/>). All Superior Court hearings, unless prohibited by law,
20 will be live streamed on YouTube for the general public to observe any and all
21 proceedings pursuant to *State v. Bone-Club*, 128 Wash.2d 254, 906 P.2d 325 (1995).
22 This order will also extend to jury trials held at the Cowlitz County Expo Center. Links to
23 every courtroom, except Juvenile Court, and including the Expo Center can be found on
24 the Cowlitz County Superior Court website (<https://cowlitzsuperiorcourt.us/>). Where
25 possible, jury trials held when this Order is in effect will also be televised through Kelso
26 Longview Television (KLTV).

27 5. The Court has weighed the importance of open proceedings against the
28 present health risks and has determined that it is appropriate to defer to the guidance of

1 the public health experts during this pandemic. The risk of further spread of COVID-19
2 outweighs the public's interest to be physically present in an open court at this time.

3 6. This Order is in place for the scheduled proceedings and will be
4 reconsidered daily as public health data, directives, and advice are issued. This Order is
5 narrowly tailored as to address present health risks. No less restrictive alternative is
6 available that will sufficiently protect the health of all present.

7
8 DATED: July 27, 2020

9
10 DocuSigned by:

Gary Bashor

461C59E3145840D...

11 PRESIDING JUDGE GARY BASHOR
12
13
14
15
16
17
18
19
20
21
22
23
24
25
26
27
28

CERTIFICATE OF SERVICE

I, Michelle Sasser, do hereby certify that the Response to Petition for Review was filed electronically through the Supreme Court Portal and which will automatically cause such filing to be served on the opposing counsel listed below:

Catherine E. Gliniski
Gliniski Law Firm PLLC
P.O. Box 761
Manchester, WA 98353
glinskilaw@wavecable.com

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

Signed at Kelso, Washington on October 31st, 2022.



Michelle Sasser

COWLITZ COUNTY PROSECUTING ATTORNEY'S OFFICE

October 31, 2022 - 2:39 PM

Transmittal Information

Filed with Court: Supreme Court
Appellate Court Case Number: 101,240-3
Appellate Court Case Title: State of Washington v. D'Anthony Leslie Williams
Superior Court Case Number: 19-1-00094-2

The following documents have been uploaded:

- 1012403_Answer_Reply_20221031143756SC754533_9312.pdf
This File Contains:
Answer/Reply - Answer to Petition for Review
The Original File Name was 20221031143618355.pdf

A copy of the uploaded files will be sent to:

- Jurvakainen.ryan@co.cowlitz.wa.us
- glinskilaw@wavecable.com

Comments:

Sender Name: Michelle Sasser - Email: sasserm@co.cowlitz.wa.us

Filing on Behalf of: Eric H Bentson - Email: bentsone@co.cowlitz.wa.us (Alternate Email: appeals@co.cowlitz.wa.us)

Address:

312 SW 1St Avenue

Kelso, WA, 98626

Phone: (360) 577-3080 EXT 2318

Note: The Filing Id is 20221031143756SC754533