70017-1

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NO. 70017-1-I

COURT OF APPEALS OF THE STATE OF WASHINGTON

DIVISION I

STATE OF WASHINGTON,

Respondent,

v.

MATTHEW MAGNANO,

Appellant.

APPEAL FROM THE SUPERIOR COURT FOR KING COUNTY

THE HONORABLE DEAN S. LUM

BRIEF OF RESPONDENT

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A. ISSUE PRESENTED

No "closure" occurs for public trial purposes unless the place and process have historically been open to the public and public access plays a significant positive role in the functioning of the process in question. Here, the trial court and counsel agreed in advance of deliberations on a procedure to allow the jury to replay the recorded 911 call in a closed courtroom upon their request. The jury made such a request, and the trial court and counsel again conferred and agreed to follow the plan. Where jury deliberations and requests by the jury to replay evidence have not historically been open to the public, and the public access to the courtroom during deliberations serves no useful purpose, did the trial court correctly conclude that the procedure did not implicate the public trial right?

B. STATEMENT OF THE CASE

The State charged Matthew Magnano with robbery in the second degree and felony hit and run. CP 12-13. During the trial,

the court admitted as an exhibit a recording of a 911 call, which was then played in open court. 4RP 102.[1]

Following closing arguments, the trial court and counsel reviewed the exhibits that would go back to the jury room. 5RP 169. The court asked counsel about their preferences, in the event that the jury asked to review the 911 tape. 5RP 169. The prosecutor opined that the jury should be allowed to review the exhibit, either by providing the equipment for the jurors to operate themselves or by having the bailiff do it for them. 5RP 170. Defense counsel stated he had "no objection. Obviously if they request it, I think they should be able to return to the courtroom and review it." 5RP 170. Defense counsel further indicated that neither he nor his client cared to be present for the playback and "would feel comfortable with having the bailiff display whatever exhibits that are requested." 5RP 170-71, 172.

[1] The verbatim report of proceedings consists of seven separately-paginated volumes. The State refers to this material as follows: 1RP – November 7, 2012; 2RP – November 20, 2012; 3RP – November 21, 2012; 4RP – November 26, 2012; 5RP – November 27, 2012; 6RP – November 28, 2012; 7RP – January 30, 2013.

As anticipated, the jury asked to replay the 911 tape during their deliberations. 6RP 5; CP 64. The trial court consulted the parties about the request. 6RP 6. Magnano's counsel represented that he had spoken with Magnano and "he has indicated to me that he has no objection, and I have no objection to the jury panel listening to the 911 tape. It was, I believe, played for them in court. But it can be played for them, and we discussed the procedure by [which] that will be done." 6RP 6.

The prosecutor raised the concern that people other than the jury might enter the courtroom during the replay, and asked that the jury be instructed not to have discussions in the courtroom and to confine their deliberations to the jury room. 6RP 7. The trial court responded, "Well, I'm not sure we need to leave the door open. It would just be a continuation of the deliberations." 6RP 7. The court further explained, "I'm not going to be here. Lawyers or the clients are not going to be here. Just the bailiff will just start it, and she will leave the room, and she will tell ... the jurors, she is coming back in when it's done." 6RP 7. The court indicated that the bailiff would stand at the door and make sure no one entered the room during the replay. 6RP 7. The court added, "So to be clear, it's not a violation of open court rule, essentially it's not open court, it's just

that they ... happen to be conducting deliberations ... in a different room." 6RP 7.

After posing and receiving answers to other unrelated questions, the jury returned its verdict, finding Magnano guilty of robbery in the second degree and not guilty of hit and run. 6RP 13-14. The court imposed a sentence of 50 months. CP 68-76; 7RP 14.

C. ARGUMENT

THE RIGHT TO A PUBLIC TRIAL IS NOT IMPLICATED BY THE JURY'S REHEARING OF ADMITTED EVIDENCE DURING DELIBERATIONS.

Magnano contends that both his right to a public trial and the public's right to open proceedings were violated when the 911 call was replayed for the jury in a closed courtroom.[2] Because the right to a public trial was not implicated by the jury's review of admitted evidence during its deliberations, his argument fails.

The Sixth Amendment to the federal constitution and article I, section 22 of the Washington Constitution guarantee a

[2] Although Magnano assigns error based upon the public's right to open proceedings under article I, § 10 of the Washington Constitution, he offers no argument or authority to support the claim. Accordingly, he has waived that assignment of error. RAP 10.3(a)(5); State v. Dennison, 115 Wn.2d 609, 629, 801 P.2d 193 (1990) (appellate court need not consider arguments that a party has not developed in the briefs and for which the party has cited no authority).

defendant the right to a public trial. State v. Brightman, 155 Wn.2d 506, 514, 122 P.3d 150 (2005). Whether a defendant's right to a public trial has been violated is a question of law, reviewed de novo. Id.

There is no "closure" for public trial purposes if the proceeding at issue does not implicate the right to a public trial in the first place. State v. Sublett, 176 Wn.2d 58, 71, 292 P.3d 715 (2012). "[N]ot 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." Id. When a proceeding is subject to the public trial right, a court errs by closing the courtroom without first considering the five Bone-Club[3] factors on the record.[4]

To determine whether the public trial right applies to a particular proceeding, our supreme court has adopted the "experience and logic test." Sublett, 176 Wn.2d at 73.

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[3] State v. Bone-Club, 128 Wn.2d 254, 258-60, 906 P.2d 324 (1995).

[4] Before closing a proceeding to the public, Bone-Club requires the court to consider the following factors and enter specific findings on the record to justify any ensuing closure: (1) The proponent of closure must show a compelling interest, and if based on anything other than defendant's right to a fair trial, must show serious and imminent threat to that right; (2) anyone present when the motion is made must be given opportunity to object; (3) the least restrictive means must be used; (4) the court must weigh the competing interests of the proponent and the public; and (5) the order must be no broader in application or duration than necessary. Bone-Club, 128 Wn.2d at 258-59.

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

Id. (internal citations omitted).

In Sublett, the court addressed whether a trial court's response to jury questions regarding the jury instructions implicated the right to a public trial and concluded that such proceedings do not satisfy the experience prong of the experience and logic test. Id. at 76-77. The court explained that CrR 6.15(f)(1) governs this process and requires only that a trial court's responses to jury inquiries be made part of the record, not that responses must be put on the record in open court. Id. at 76-77. Since CrR 6.15 is the only authority governing the process, the court concluded that there was no historical requirement to address such inquiries in open court. Id. at 77. Accordingly, "no closure occurred because this proceeding did not implicate the public trial right, and therefore there was no violation of either petitioners' public trial right." Id.

In addition to responding to juror inquiries, CrR 6.15(f)(1) gives the trial court discretion in responding to requests to rehear evidence:

> Written questions from the jury, the court's response and any objections thereto shall be made a part of the record. The court shall respond to all questions from a deliberating jury in open court or in writing. *In its discretion, the court may grant a jury's request to rehear or replay evidence, but should do so in a way that is least likely to be seen as a comment on the evidence, in a way that is not unfairly prejudicial and in a way that minimizes the possibility that jurors will give undue weight to such evidence.*

CrR 6.15(f)(1) (emphasis added). Thus, the rule not only gives a trial court discretion as to how it puts its responses to a jury question on the record, it also gives the trial court discretion in how it permits the jury to rehear evidence. No other authority governs this process. As in Sublett, the jury's rehearing of evidence is not a process that has historically been open to the press and general public. The jury's review of the 911 tape in a closed courtroom thus fails the experience prong of the experience and logic test.

Nor is the process of replaying already-admitted evidence for a deliberating jury one that benefits from public access. The purposes of the public trial right are "to ensure a fair trial, to remind the prosecutor and judge of their responsibility to the accused and

the importance of their functions, to encourage witnesses to come forward, and to discourage perjury." Sublett, 176 Wn.2d at 72 (citing Brightman, 155 Wn.2d at 514). These purposes are served by offering the evidence, having it admitted, and playing it for the jury in open court. No more is gained by requiring the jury to review the already-admitted evidence in open court. On the contrary, to allow the public to participate in the jury's rehearing of admitted evidence is to invite the public's influence on the jury's deliberations.

A fair trial requires that jury deliberations remain private and free of outside influence. State v. Cuzick, 85 Wn.2d 146, 149, 530 P.2d 288 (1975). The secrecy of a jury's deliberations is a "cardinal principle" of the Sixth Amendment right to an impartial jury. State v. Elmore, 155 Wn.2d 758, 773, 123 P.3d 72 (2005). See also State v. Elmore, 121 Wn. App. 747, 758, 90 P.3d 1110 (2004) (among the broader constitutional problems implicated by dismissing a deliberating juror is "the guarantee that jury deliberations will remain secret"); People v. Cleveland, 25 Cal.4th 466, 475 (2001) (stressing the need to assure "the privacy of jury deliberations by foreclosing intrusive inquiry into the sanctity of the jurors' thought processes"); United States v. Thomas, 116 F.3d 606, 620 (2nd Cir.

1997) ("The mental processes of a deliberating juror with respect to the merits of the case at hand must remain largely beyond examination and second-guessing, shielded from scrutiny by the court as much as from the eyes and ears of the parties and the public."). Because exposing the jury's rehearing of evidence to the public would compromise the privacy and secrecy of deliberations, it fails the logic component of the experience and logic test. The trial court did not err.

Magnano argues that allowing the jury to rehear admitted evidence poses a danger that the jury will place undue emphasis on that evidence, and to prevent that from occurring, a trial judge must control the jury's access to the recorded evidence. Brief of Appellant at 11. He cites numerous decisions from Washington and other jurisdictions that address this concern, some of which recommend that any replay occur in "open court." But not one of these cases has anything to do with the right to public trial. Not one of them suggests that the public or press must be allowed access during the jury's rehearing of the recorded evidence or that such public access prevents the jury from placing undue emphasis on the evidence. Rather, the references in these cases to rehearing evidence in "open court" serve only to distinguish a controlled

environment from the jury's unrestricted review in the jury room. See, e.g., Martin v. State, 747 P.2d 316, 320 (Okla.Crim.App. 1987) (holding that videotaped testimony of victim in child sex case cannot be available to the jury for unrestricted viewing in jury room, but must be replayed "in open court or in other similarly controlled environment"). Moreover, our supreme court has emphatically rejected the notion that the jury may only rehear taped evidence in a controlled environment. See State v. Castellanos, 132 Wn.2d 94, 100, 935 P.2d 1353 (1997) (tape recorded exhibits and playback equipment may be sent to the jury room if, "in the sound discretion of the trial court, the exhibits are found to bear directly on the charge and are not unduly prejudicial") (quoting State v. Frazier, 99 Wn.2d 180, 189, 661 P.2d 126 (1983)).

Magnano's argument as to the logic component of the experience and logic test is also unpersuasive. Magnano offers only the generic and conclusory argument that having the jury rehear the 911 tape in open court "provides greater transparency and appearance of fairness and furthers the goals of the First Amendment and article I, section 22 regarding the openness of criminal trials." Brief of Appellant at 13. Presumably, the same could be said of allowing the public to view the rest of the jury's

deliberations. But the right to a public trial does not require that every part of the trial be on display. Sublett, 176 Wn.2d at 71. The jury's deliberations must remain private. The jury's review of the 911 tape, like any other exhibit, was part of its deliberations. The trial court properly concluded that excluding the press and public from jury deliberations is not a "closure" for public trial purposes.

Magnano has not established that the right to a public trial is implicated by allowing the jury to rehear the 911 tape in a closed courtroom. Accordingly, there was no "closure" and no violation of the public trial right.

D. CONCLUSION

For all the foregoing reasons, the State respectfully asks this Court to affirm Magnano's conviction for second degree robbery.

DATED this 14th day of January, 2014.

Respectfully submitted,

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Certificate of Service by Mail

Today I deposited in the mail of the United States of America, postage prepaid, a properly stamped and addressed envelope directed to Thomas M. Kummerow, the attorney for the appellant, at Washington Appellate Project, 701 Melbourne Tower, 1511 Third Avenue, Seattle, WA 98101, containing a copy of the BRIEF OF RESPONDENT, in STATE V. MATTHEW MAGNANO, Cause No. 70017-1-I, in the Court of Appeals, Division I, for the State of Washington.

I certify under penalty of perjury of the laws of the State of Washington that the foregoing is true and correct.

Dated this 14th day of January, 2014

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Name
Done in Seattle, Washington