NO. 43179-3

COURT OF APPEALS, DIVISION II
STATE OF WASHINGTON

STATE OF WASHINGTON, RESPONDENT

v.

LORENZO WEBB, APPELLANT

Appeal from the Superior Court of Pierce County
The Honorable Edmund Murphy, Presiding Judge

No. 10-1-02833-3

SUPPLEMENTAL BRIEF OF RESPONDENT

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A. ISSUES PERTAINING TO APPELLANT'S ASSIGNMENTS OF ERROR.

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2. Should this Court summarily dismiss defendant's argument that he was entitled to a jury determination of his prior convictions when there is controlling authority rejecting this claim?

3. Should this Court summarily dismiss defendant's argument that the procedure for proving criminal history for persistent offenders violates equal protection when there is controlling authority rejecting this claim?

4. Has defendant failed to show that the sentencing court exceeded its authority by imposing a term of community custody for a conviction of assault in the second degree when it is legislatively authorized by RCW 9.94A.701(2) and not precluded RCW 9.94A.570?

B. STATEMENT OF THE CASE.

A statement of the case is set forth in the State's initial response brief. To the extent that the new issues raised in Appellant's supplemental

brief require the discussion of additional facts, they have been set forth in the relevant argument sections below.

C. ARGUMENT.

1. AS VOIR DIRE WAS DONE IN OPEN COURT AND DEFENDANT FAILS TO SHOW ANY RULING OF THE COURT CLOSING THE COURTROOM, HE HAS FAILED TO SHOW THAT ANY CLOSURE OF THE COURTROOM OCCURRED.

A criminal defendant's right to a public trial is found in article I, section 22 of the Washington constitution, and the Sixth Amendment to the United States Constitution; both provide a criminal defendant the right to a "public trial by an impartial jury." The state constitution also provides that "[j]ustice in all cases shall be administered openly," which grants the public an interest in open, accessible proceedings, similar to rights granted in the First Amendment of the federal constitution. Wash. Const. article I, section 10; ***State v. Lormor***, 172 Wn.2d 85, 91, 257 P.3d 624 (2011); ***Seattle Times Co. v. Ishikawa***, 97 Wn.2d 30, 36, 640 P.2d 716 (1982); ***Press–Enter. Co. v. Superior Court***, 464 U.S. 501, 104 S. Ct. 819, 78 L.Ed.2d 629 (1984). The public trial right "serves 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." ***State v. Sublett***, 176 Wn.2d 58, 72, 292 P.3d 715 (2012). "There is a strong presumption that courts are to be open at

all trial stages." ***Lormor***, 172 Wn.2d at 90. The right to a public trial includes voir dire. ***Presley v. Georgia***, 558 U.S. 209, 130 S. Ct. 721, 175 L Ed.2d 675 (2010).

Whether the right to a public trial has been violated is a question of law reviewed de novo. ***State v. Momah***, 167 Wn.2d 140, 147, 217 P.3d 321 (2009). The right to a public trial is violated when: 1) the public is fully excluded from proceedings within a courtroom, ***State v. Bone–Club***, 128 Wn.2d 254, 257, 906 P.2d 325 (1995)(no spectators allowed in courtroom during a suppression hearing) and ***State v. Easterling***, 157 Wn.2d 167, 172, 137 P.3d 825 (2006) (all spectators, including codefendant and his counsel, excluded from the courtroom while codefendant plea-bargained); 2) the entire *voir dire* is closed to all spectators, ***State v. Brightman***, 155 Wn.2d 506, 511, 122 P.3d 150 (2005); 3) and is implicated when individual jurors are privately questioned in chambers, *see* ***State v. Momah***, 167 Wn.2d 140, 146, 217 P.3d 321 (2009) and ***State v. Strode***, 167 Wn.2d 222, 224, 217 P.3d 310 (2009) (jury selection is conducted in chambers rather than in an open courtroom without consideration of the *Bone–Club* factors). In contrast, conducting individual voir dire in an open courtroom without the rest of the venire present does not constitute a closure. ***State v. Erickson***, 146 Wn. App. 200, 189 P.3d 245 (2008).

When faced with a claim that a trial court has improperly closed a courtroom, the Washington Supreme Court has held that the reviewing

court determines the nature of the closure by the presumptive effect of the plain language of the court's ruling, not by the ruling's actual effect. ***In re PRP of Orange***, 152 Wn.2d 795, 807-8, 100 P.3d 291 (2004). In the case now before the Court, defendant has failed to identify any ruling of the court that closed the courtroom to any person. Instead, defendant argues that the process used in exercising peremptory challenges constituted a "secret ballot" that is equivalent to a court room closure. The record indicates the following occurred just after the court excused a juror for cause and it was time for the parties to exercise their peremptory challenges.

> THE COURT: At this time, the attorneys are going to exercise their peremptory challenges which are the challenges they have by law for which they don't have to give a reason. They do it on paper. They pass a sheet of paper back and forth. While this happens, you are free to stand up and stretch if you want. You can have a quiet conversation with your neighbor. We do have a court next door that may be operating, so try to stay in the general area that you are so the attorneys can put a face to a number and a name in case they have some questions about who that particular juror was. They will pass that back and forth, and we should get the jury selected this afternoon.
>
> (Pause in proceedings.)
>
> THE COURT: Let me see the attorneys briefly.
>
> (Pause in proceedings.)
>
> THE COURT: We have the jury selected for this case.

RP 64. The court then read off the names of the jurors who would sit on the case and excused the remainder of the venire. RP 64-65

Defendant does not point to any ruling of the court that excluded spectators or any other person from the courtroom during voir dire proceedings. The record indicates that all voir dire was carried on in open court. Peremptory challenges were made by the attorneys in open court, albeit by a written process. Presumably, defendant could see the peremptory sheet and discuss the process with his attorney while it was going on. The written record of the process was reviewed by the court and filed, making it available for public inspection. CP 294. None of the peremptory challenges were contested and there was no need for the court to make any decisions on the peremptory challenges. The record offers no basis to assume that anything occurred during this process other than the written communication, between counsel and to the court, of the names of the prospective jurors each counsel had decided to excuse by the right of peremptory challenge. Defendant attaches a rather nefarious sobriquet to this process, calling it a "secret ballot", but that is a misnomer. Anyone can look at the peremptory challenge sheet and see exactly which party exercised which peremptory against which prospective juror and in what order. CP 294.

As the improper use of peremptory challenges can raise constitutional concerns, *see* ***Batson v. Kentucky***, 476 U.S. 79, 106 S. Ct. 1712, 90 L Ed.2d 69 (1986); ***Georgia v. McCollum***, 505 U.S. 42, 112 S.

Ct. 2348, 120 L Ed.2d 33 (1992), it is important to have a record of information as to how the peremptory challenges were exercised. Defendant fails to show had the written process used in open court in the trial below fails to serve such purpose. The parties carefully recorded the names of the prospective jurors who were removed by peremptory challenge, as well as the order in which each challenge was made and the party who made it. CP 294. This document is easily understood, and it was made part of the open court record, available for public scrutiny. This procedure satisfied the court's obligation to ensure the open administration of justice.

The only thing that did not occur was the vocal announcement of each peremptory challenge as it was made. There is no indication that our constitution requires that everything and anything that concerns a public trial be announced in open court.

For example, seven years after statehood, the Washington Supreme Court issued its opinion in ***State v. Holedger***, 15 Wash. 443, 448, 46 Pac. 652 (1896). Holedger complained that his attorney was asked in open court and in front of the jury panel whether there was any objection to the jury being allowed to separate. The Supreme Court did not find any evidence that Holedger was prejudiced by this action, but did indicate that the better practice would be for the court to ask this question in a sidebar so as to avoid incurring the displeasure of juror who might be upset if there was an objection. The decision in ***Holedger*** was authored by Justice

Dunbar and concurred in by Chief Justice Hoyt. Chief Justice Hoyt was the president of the 1889 constitutional convention, and Justice Dunbar was a delegate to the constitutional convention. *See* B. Rosenow, The Journal of the Washington State Constitutional Convention, at 468 (1889; B. Rosenow ed. 1962); C. Sheldon, The Washington High Bench: A Biographical History of the State Supreme Court, 1889-1991, at 134-37 (1992). Thus, at least two of the justices signing this opinion had considerable expertise in the protections given under the state constitution, yet neither found certain trial functions being handled in a side bar to be inconsistent with the public's right to open proceedings. In 1904, the Court upheld the actions of trial court that utilized the "best-practice" recommended in ***Holedger***. *See* ***State v. Stockhammer***, 34 Wash. 262, 264, 75 P. 810 (1904) (noting that consent for the jury to separate was given by defense counsel at the bench out of the hearing of the defendant and the jury).

The right to a public trial serves 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. ***State v. Brightman***, 155 Wn.2d 506, 514, 122 P.3d 150 (2005) (citing ***Peterson v. Williams***, 85 F.3d 39, 43 (2d Cir. 1996)). But not every interaction between the court, counsel, and defendants will implicate the right to a public trial. ***Sublett***, 176 Wn.2d at 71. To decide whether a particular process must be open to the press and

the general public, the ***Sublett*** court adopted the "experience and logic" test formulated by the United States Supreme Court in ***Press–Enterprise Co. v. Superior Court***, 478 U.S. 1, 8, 106 S. Ct. 2735, 92 L.Ed.2d 1 (1986). ***Sublett***, 176 Wn.2d at 73.

> 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. We agree with this approach and adopt it in these circumstances.

Sublett, 176 Wn.2d at 73. Applying that test, the ***Sublett*** court held that no violation of the right to a public trial occurred when the court considered a jury question in chambers. ***Sublett***, 176 Wn.2d at 74–77. "None of the values served by the public trial right is violated under the facts of this case.... The appearance of fairness is satisfied by having the question, answer, and any objections placed on the record." ***Sublett***, 176 Wn.2d at 77.

There is some authority that the public announcement of a peremptory challenge in open court by the party exercising the challenge is not a widespread practice. When the United States Supreme Court decided that it was just as improper for a criminal defendant to excuse a potential juror for an improper reason as it was a prosecutor, the court commented that "it is common practice not to reveal the identity of the

challenging party to the jurors and potential jurors[.]" ***Georgia v. McCollum***, 505 U.S. 42, 53 n.8, 112 S. Ct. 2348 (1992), *citing* Underwood, *Ending Race Discrimination in Jury Selection: Whose Right Is It, Anyway?*, 92 Colum.L.Rev. 725, 751, n. 117 (1992).

Defendant has failed to show that any of the values served by the public trial right is violated by using a written peremptory challenge procedure in open court during the jury selection process when the written document created in the process is also made a public record. He relies upon a case from California to support his argument. ***People v. Harris***, 10 Cal. App. 4th 672, 12 Cal.Rptr.2d 758 (1992), but this is a case where the peremptory challenges were exercised in chambers then announced in open court so it is distinguishable from what happened here. The retreat of the parties and court into chambers and out of the public view and hearing leaves a public spectator with no assurance that matters which should be on the public record are not being discussed in chambers. In defendant's case, however, a spectator could observe how the process was being conducted and could later ascertain which party was excusing which juror. It should be noted that under ***McCollum,*** both the prosecution and defense are forbidden from removing a juror for an improper purpose. Thus, if there was a concern that a juror was being removed for an improper reason, it is immaterial which party exercised a peremptory against that juror. Any potential juror who felt that he or she was being improperly removed from the jury could raise his or her concern with the

trial court. Under the written process used here, the court would know who had exercised its peremptory against that person and could decide whether it was necessary for that party to explain its reasons for doing so. The procedure used below protects the values of the public trial right.

As defendant has failed to show that any improper closure of the courtroom occurred this issue is without merit.

2. CONTROLLING AUTHORITY HAS ALREADY REJECTED DEFENDANT'S ARGUMENT THAT HE IS ENTITLED TO A JURY DETERMINATION OF THE EXISTENCE OF HIS CRIMINAL HISTORY.

Other than the fact of a prior conviction, a jury must determine any fact which increases the penalty beyond what the legislature has set as standard maximum punishment that may be imposed based solely upon conviction of the crime itself. ***Blakely v. Washington***, 542 U.S. 296, 303–04, 124 S. Ct. 2531, 159 L. Ed. 2d 403 (2004). A prior conviction does not have to be presented to a jury and proved beyond a reasonable doubt. ***State v. Smith***, 150 Wn.2d 135, 141–43, 75 P.3d 934 (2003); ***Almendarez–Torres v. United States***, 523 U.S. 224, 239, 118 S. Ct. 1219, 140 L.Ed.2d 350 (1998). A sentencing court may use a prior conviction to determine the standard range if it finds that the prior conviction exists by a preponderance of the evidence. ***State v. Wheeler***, 145 Wn.2d 116, 121, 34 P.3d 799 (2001). If a prior conviction is proved by presentation of a certified copy of a prior judgment and sentence, which is highly reliable

evidence, then no additional safeguards are required. ***Smith***, 150 Wn.2d at 143.

Both the United States Supreme Court and the Washington Supreme Court have rejected defendants' arguments that prior convictions must be found by a jury and proved beyond a reasonable doubt. ***Apprendi v. New Jersey***, 530 U.S. 466, 490, 120 S. Ct. 2348, 147 L. Ed. 2d 435 (2000); ***Blakely***, 542 U.S. at 301(maintaining the ***Apprendi*** exception when it determined that most Washington aggravating factors must be submitted to a jury). The Washington Supreme Court recognizes that this exception also applies when prior felony convictions are used to support a persistent offender sentence; such convictions do not need to be proved to a jury beyond a reasonable doubt. ***State v. Wheeler***, 145 Wn.2d 116, 121, 34 P.3d 799 (2001); ***State v. Thiefault***, 160 Wn.2d 409, 418, 158 P.3d 580 (2007); ***State v. Roswell***, 165 Wn. 2d 186, at 193 n.5, 196 P.3d 705 (2008).

Until such time as the United States or Washington Supreme Court decides to overrule itself, this Court is bound by their holdings on this issue. ***State v. Hairston***, 133 Wn.2d 534, 539, 946 P.2d 397 (1997). Defendant's argument should be summarily rejected.

3. DEFENDANT HAS FAILED TO MEET HIS BURDEN OF SHOWING THE STATUTORY PROCESS FOR DETERMINING CRIMINAL HISTORY FOR PERSISTENT OFFENDERS IS NOT RATIONALLY RELATED TO A LEGITIMATE STATE INTEREST.

The equal protection clauses of the Fourteenth Amendment to the United States Constitution, and of article 1, section 12 of the Washington Constitution guarantee that persons similarly situated with respect to the legitimate purpose of the law must receive equal treatment. ***State v. Williams***, 156 Wn. App. 482, 496, 234 P.3d 1174 (2010). Equal protection claims are reviewed under one of three standards based on the level of scrutiny required for the statutory classification.

> Equal protection claims are reviewed under one of three standards based on the level of scrutiny required for the statutory classification: (1) strict scrutiny when a fundamental right is threatened; (2) intermediate or heightened scrutiny when important rights or semisuspect classifications are involved; and (3) rational basis scrutiny when none of the above rights or classes is threatened.

Id. at 496–97. Here, defendant asserts a liberty interest in the persistent offender classification process- an issue to which the Washington Supreme Court applies the rational basis test. ***State v. Manussier***, 129 Wn.2d 652, 673, 921 P.2d 473 (1996); ***State v. Thorne***, 129 Wn.2d 736, 771, 921 P.2d 514 (1996). Defendant's arguments that he is entitled to strict scrutiny should be rejected as contrary to controlling authority. To

succeed on his claim under the rational basis test, defendant must show that the statutory classification here rests on "grounds wholly irrelevant to the achievement of legitimate state objectives," and that the law is purely arbitrary. ***Thorne***, 129 Wn.2d at 771.

The Washington Supreme Court has rejected equal protection challenges to the Persistent Offender Accountability Act (POAA) that argue the State should be required to submit a defendant's prior convictions to a jury and to prove them beyond a reasonable doubt. ***State v. Thiefault***, 160 Wn.2d 409, 418, 158 P.3d 580 (2007). All three divisions of the Court of Appeals have rejected similar equal protection challenges to the statutory procedure used to classify persistent offenders. ***State v. Langstead***, 155 Wn. App. 448, 228 P.3d 799, *rev. denied*, 170 Wn.2d 1009, 249 P.3d 624 (2010); ***State v. Williams*** 156 Wn. App. 482, 234 P.3d 1174, *rev. denied*, 170 Wn.2d 1011, 245 P.3d 773 (2010); ***State v. McKague***, 159 Wn. App. 489, 517-19, 246 P.3d 558 (2011), *affirmed on other grounds*, 172 Wn.2d 802, 262 P.3d 1225 (2011); ***State v. Reyes Brooks***, 165 Wn. App. 193, 267 P.3d 465 (2011), *review granted and remanded (on other grounds)*, 175 Wn.2d 1020, 289 P.3d 625 (2012); ***State v. Witherspoon***, 171 Wn. App. 271, 286 P.3d 996 (2012), *review granted*, 177 Wn.2d 1007, 300 P.3d 416 (2013).

The purpose of the POAA was "to protect public safety by putting the most dangerous criminals in prison, to reduce the number of serious repeat offenders, to provide simplified sentencing, and to restore the

public trust in the criminal justice system." ***Williams,*** 156 Wn. App. at 498. As the Washington Supreme Court noted in ***Thorne***, a "state is justified in punishing a recidivist more severely than it punishes a first offender." 129 Wn.2d at 772. Similarly, Divisions I and II of this Court have rejected equal protection challenges to the POAA based upon ***State v. Roswell***, 165 Wn. 2d 186, 196 P.3d 705 (2008) -arguments nearly identical to the one raised by defendant here - holding "recidivists whose conduct is inherently culpable enough to incur a felony sanction are, as a group, rationally distinguishable from persons whose conduct is felonious only if preceded by a prior conviction for the same or a similar offense." ***State v. Langstead***, 155 Wn. App. 448, 456–57, 228 P.3d 799 (2010), *see also* ***State v. McKague***, 159 Wn. App. at 517-19.

In view of this precedent showing a rational basis for the advancement of a legitimate state interest, defendant's equal protection challenge to the POAA must fail.

4. DEFNDANT HAS FAILED TO SHOW THAT THE COURT DID NOT HAVE THE AUTHORITY TO IMPOSE A TERM OF COMMUNITY CUSTODY.

The legislature determines the punishment for crimes and a trial court only possesses the power to impose sentences provided by law. ***State v. Varga***, 151 Wn.2d 179, 193, 86 P.3d 139 (2004); ***In re Personal Restraint of Carle***, 93 Wn.2d 31, 33–34, 604 P.2d 1293 (1980).

Defendant contends that "[b]y statute, a persistent offender is not eligible for community custody" then cites to RCW 9.94A.570. As will be discussed below, that statute does not preclude a sentencing court from imposing a term of community custody authorized by RCW 9.94A.701(2) for a conviction for assault in the second degree.

RCW 9.94A.570 provides:

> Notwithstanding the statutory maximum sentence or any other provision of this chapter, a persistent offender shall be sentenced to a term of total confinement for life without the possibility of release or, when authorized by RCW 10.95.030 for the crime of aggravated murder in the first degree, sentenced to death. In addition, no offender subject to this section may be eligible for community custody, earned release time, furlough, home detention, partial confinement, work crew, work release, or any other form of release as defined under *RCW 9.94A.728(1), (2), (3), (4), (6), (8), or (9), or any other form of authorized leave from a correctional facility while not in the direct custody of a corrections officer or officers, except: (1) In the case of an offender in need of emergency medical treatment; or (2) for the purpose of commitment to an inpatient treatment facility in the case of an offender convicted of the crime of rape in the first degree.

Even a casual reading of this statute reveals that its two sentences are aimed at different entities: the sentencing court and the department of corrections. The first sentence, which directs that a persistent offender in a non-capital case "shall be sentenced to a term of total confinement for life without the possibility of release," is clearly aimed at the sentencing court. While this statutory language controls the term of confinement

imposed on a persistent offender, it places no other restrictions or limitations on what the sentencing court may or may not do as part of its sentence. The legislature has not precluded a sentencing court from imposing a term of community custody under this portion of the statute.

The second sentence of RCW 9.94A.570 articulates that no persistent offender "may be eligible for" -among other things - community custody, earned early release time, furloughs, work crews, "or any other form of authorized leave from a correctional facility while not in the direct custody of a corrections officer." This sentence is not aimed at putting restrictions on the sentencing court, but instead addresses the offender's *ineligibility* for various forms of release from the department of corrections; as such it is clearly aimed at prohibiting the department of corrections from releasing a persistent offender from its custody. This second sentence cannot fairly be read as placing restrictions on the sentencing court as defendant argues.

Under RCW 9.94A.701(2), a "court shall, in addition to the other terms of the sentence, sentence an offender to community custody for eighteen months when the court sentences the person to the custody of the department for a violent offense that is not considered a serious violent offense." Defendant was sentenced on the crime of assault in the second degree which is a violent offense. RCW 9.94A.030(54); CP 240-253. Defendant fails to identify any provision in the POAA which relieves the sentencing court of its duty to comply with this statutory provision.

It should be noted that under the second sentence of RCW 9.94A.570, there is one circumstance where the department of corrections may release a persistent offender convicted of assault in the second degree: when the offender is in need of emergency medical treatment. Thus, while the community custody provision is unlikely to be utilized in the majority of persistent offender sentences, it is conceivable that a persistent offender could be released from the department of corrections before the expiration of his term of his confinement. The fact that a portion of a statutorily authorized sentence is unlikely to take effect does not make it improper for the sentencing court to impose the condition. It may be unlikely that persistent offenders will ever pay restitution to their victims, but the unlikelihood of an event ever coming to fruition does not affect the authority of the court to impose restitution as a condition of its sentence. The same may be said of a term of community custody imposed upon a persistent offender - it is unlikely to ever to be served, but not unauthorized. Defendant failed to show that the trial court lacked the authority to impose a term of community custody when it was legislatively authorized in RCW 9.94A.701(2).

But even if the court were to disagree with the above argument, defendant cannot show that he is aggrieved by this condition or that he would be entitled to a resentencing because of it. The term of community custody easily could be stricken by entry of an order amending the judgment.

D. CONCLUSION.

For the foregoing reasons, this Court should affirm the judgment and sentence below.

DATED: October 25, 2013

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The undersigned certifies that on this day she delivered by ~~U.S. mail or~~ ABC-LMI delivery to the attorney of record for the ~~appellant and~~ appellant c/o his attorney true and correct copies of the document to which this certificate is attached. This statement is certified to be true and correct under penalty of perjury of the laws of the State of Washington. Signed at Tacoma, Washington, on the date below.

10-25-13
Date Signature

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