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Court of Appeals
Division III
State of Washington

No. 33141-5-III

IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON

DIVISION THREE

STATE OF WASHINGTON,

Respondent,

v.

IAN ANDERSON,

Appellant.

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

APPELLANT'S REPLY BRIEF

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A. ARGUMENT IN REPLY

1. Mr. Anderson's right to a public trial was violated when the trial court ordered a potential juror be individually questioned outside of the courtroom.

a. Mr. Anderson did not invite the error.

The right to a public trial "is a core safeguard in our system of justice." *State v. Wise*, 176 Wn.2d 1, 5, 288 P.3d 1113 (2012). While a trial court may order the questioning of jurors outside of the public's presence, it may do so only after considering the *Bone-Club* factors on the record. *State v. Frawley*, 181 Wn.2d 452, 459, 334 P.3d 1022 (2014); *see also State v. Bone-Club*, 128 Wn.2d 254, 906 P.2d 325 (1995).

At the start of jury selection, the court directed a juror be questioned outside of the courtroom after the State indicated it had learned the juror had a prior felony conviction. 1 RP 5-6. The State argues review of this issue is precluded on appeal because Mr. Anderson invited this error. Resp. Br. at 4. However, while defense counsel declined to object to the error, the cases upon which the State relies do not support its claim that Mr. Anderson invited the error.

In *City of Seattle v. Patu*, the court notes that "[t]he original goal of the invited error doctrine was to 'prohibit a party from setting up an

error at trial and then complaining of it on appeal.'" 147 Wn.2d 717, 720, 58 P.3d 273 (2002) (quoting *State v. Pam*, 101 Wn.2d 507, 511, 680 P.2d 762 (1984), overruled on other grounds by *State v. Olson*, 126 Wn.2d 315, 893 P.2d 629 (1995)). In *Patu*, the court found the defendant had invited the error when the jury instruction he proposed omitted an essential element. 147 Wn.2d at 721.

Similarly, in *State v. Studd* and *State v. Henderson*, the defendants were found to have invited the error when they requested erroneous jury instructions. *State v. Studd*, 137 Wn.2d 533, 546, 973 P.2d 1049 (1999); *State v. Henderson*, 114 Wn.2d 867, 868, 792 P.2d 514 (1990). In *Henderson*, the court stated:

> [t]he law of this state is well settled that a defendant will not be allowed to request an instruction or instructions at trial, and then later, on appeal, seek reversal on the basis of claimed error in the instruction or instructions given at the defendant's request.

114 Wn.2d at 868.

Mr. Anderson did not make an erroneous request of the court. It was the State that indicated the juror should be questioned individually in order to determine if his civil rights had been restored pursuant to

RCW 2.36.070.[1] 1 RP 5. And it was the trial court that suggested having the individual questioned outside of the courtroom. 1 RP 6. Defense counsel simply failed to object to this erroneous closure. 1 RP 7.

Because public trial violations may be raised for the first time on appeal, review is not barred by defense counsel's failure to object. *State v. Slert*, 181 Wn.2d 598, 603, 334 P.3d 1088 (2014); *State v. Shearer*, 181 Wn.2d 564, 559, 334 P.3d 1078 (2014) ("Our precedent is clear that defendants can raise public trial rights on appeal even if they did not object to a courtroom closure at trial."). The responsibility to ensure that the *Bone-Club* factors are considered prior to a courtroom closure rests with the trial court, not the defendant. *Shearer*, 181 Wn.2d at 571. This Court should review the issue presented.

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[1] The State also accuses Mr. Anderson of improperly conflating the right to vote and the right to serve on a jury, claiming without citation to authority that "voting restoration under that statute does not restore juror competency." In doing so, the State ignores the plain language of RCW 2.36.070, which states that "[a] person shall be competent to serve as a juror in the state of Washington unless that person… Has been convicted of a felony and has not had his or her *civil rights* restored." RCW 2.36.070(5) (emphasis added). Determining whether Juror 31's right to vote had been restored would have provided useful, and relevant, information regarding whether the juror was qualified to serve under the statute.

b. The questioning and subsequent dismissal of Juror 31 implicated the public trial right.

Under the experience and logic test, jury selection implicates the public trial right. *State v. Sublett*, 176 Wn.2d 58, 71, 292 P.3d 715 (2012); *State v. Russell*, 183 Wn.2d 720, 730, 357 P.3d 38 (2015). The State argues the release of Juror 31 was not encompassed within jury selection, and the public trial right was not implicated, analogizing the facts here to those presented in *Russell* and *State v. Wilson*. 174 Wn. App. 328, 338, 298 P.3d 148 (2013).

In *Wilson*, this Court found a bailiff's excusal of two jurors for illness-related reasons before voir dire began did not implicate the defendant's right to a public trial. 174 Wn. App. at 331. In *Russell*, our Supreme Court reached the same conclusion when examining work sessions in which the trial court and the parties reviewed juror questionnaires for hardship issues. 183 Wn. App. at 732. The facts in these cases are not analogous to the facts presented here.

As discussed in Mr. Anderson's opening brief, the analysis is different when a juror is questioned about his criminal history. Op. Br. at 11. Where there is a question as to whether a juror is disqualified from jury service due to a criminal conviction, *Shearer*, 181 Wn.2d at 574, and *State v. Palmer*, 176 Wn.2d 29, 34, 288 P.3d 1126 (2012),

control. The State ignores these cases in its response, but Mr. Anderson's case cannot be distinguished from the facts in *Shearer*, in which the court found the defendant's public trial rights were violated after the court questioned a juror about his prior conviction in chambers in order to determine whether he was qualified to serve. 181 Wn.2d at 568, 574. Faced with these facts, the court specifically rejected the State's claim that the closure was merely for a "ministerial or administrative matter." *Id*. at 574.

The State claims Mr. Anderson failed to engage in the three-step inquiry for analyzing a public trial right claim, but no such inquiry is necessary when controlling precedent exists. Resp. Br. at 5, n.2; *Russell*, 183 Wn.2d at 729. Here, *Shearer* controls. Because the court's error was structural, this Court should reverse. *Shearer*, 181 Wn.2d at 573.

2. The trial court violated Mr. Anderson's right to be present during a critical stage of his trial.

a. <u>Mr. Anderson had a right to be present during the questioning of Juror 31, regardless of when the State elected to raise the possibility of the juror's unfitness.</u>

A criminal defendant has a fundamental right to be present at all critical stages of his trial. *State v. Irby*, 170 Wn.2d 874, 880-81, 246 P.3d 796 (2011); U.S. Const. amends. VI, XIV; Const. art. I, § 22.

When the court directed a staff member to question Juror 31 outside the presence of the parties, this fundamental right was violated. *Id*. at 883 (the right to be present attaches "at least from the time when the work of empaneling the jury begins").

Similar to the claims it makes regarding Mr. Anderson's public trial right, the State argues the facts of this case do not involve "the type of juror selection" at issue in *Irby*. Resp. Br. at 8. But the State's distinction ignores the substance of the inquiry made of the juror, instead focusing only on the timing of when the issue was raised.

The deputy prosecuting attorney made the decision to raise the issue immediately before the jurors were brought into the courtroom. 1 RP 5. Under the State's reasoning, had it elected to identify the issue after the jurors had been sworn in, *Irby* would apply. This analysis is flawed and inconsistent with *Irby*, as it bases a defendant's right to be present on the whims of the prosecutor.

Regardless of when the issue was raised, Juror 31 was evaluated individually and ultimately dismissed for cause, just as in *Irby*. 170 Wn.2d at 882; Op. Br. at 14. As discussed in the opening brief, the trial court's order, which directed that this evaluation be conducted outside

the presence of Mr. Anderson, violated his constitutional right to be present. Op. Br. at 14-17.

b. Mr. Anderson has satisfied RAP 2.5.

In addition, the State's claim that Mr. Anderson has not satisfied RAP 2.5 is without merit, as it assumes Juror 31 was statutorily disqualified from serving on the jury. Resp. Br. at 10. As explained in Mr. Anderson's opening brief, no such assumption can be made, given the length of time that had passed since the apparent conviction and the provisional restoration of the right to vote once the individual is no longer under the authority of the Department of Corrections. Op. Br. at 15-16; RCW 29A.08.520(1). Based on the court's instructions, Juror 31 was subject to dismissal even if he was merely unsure whether his civil rights had been restored. 1 RP 7. The State is not entitled to the benefit of a presumption that he was, in fact, disqualified from serving. This Court should review this issue on appeal and reverse.

3. The trial court improperly admitted evidence of flight and the force used by officers to subdue Mr. Anderson.

a. Mr. Anderson's ER 403 objection properly preserved the issue for appeal.

Prior to trial, Mr. Anderson moved to exclude all evidence that he resisted arrest, arguing it was unfairly prejudicial. 1 RP 123. The court denied this motion. 1 RP 129.

In its response, the State claims Mr. Anderson is barred from analyzing the erroneous admission of this evidence under *State v. McDaniel*, 155 Wn. App. 829, 230 P.3d 245 (2010), and *State v. Freeburg*, 105 Wn. App. 492, 20 P.3d 984 (2001), because he objected on different grounds below. Resp. Br. at 11-12. This argument is meritless. Mr. Anderson objected on the basis that the evidence presented a danger of unfair prejudice under ER 403. 1 RP 123. In *McDaniel* and *Freeburg*, this Court examined the factors that must be considered to determine the probative value of the evidence of flight. *McDaniel*, 155 Wn. App. at 854; *Freeburg*, 105 Wn. App. at 498. Mr. Anderson's argument is not "new," as the State claims, but simply analyzes the erroneous admission of the evidence under ER 403 in accordance with the relevant law. *See* Op. Br. at 21-23.

A trial court abuses its discretion when its decision is manifestly unreasonable or based upon untenable grounds or reasons. *State v. Dobbs*, 180 Wn.2d 1, 10, 320 P.3d 705 (2014). As explained in Mr. Anderson's opening brief, the trial court failed to evaluate the strength of the evidence of the consciousness of guilt, which under *McDaniel*, must be "substantial and real." 155 Wn. App. at 854; Op. Br. at 21. The trial court's reliance on "Tegland" and general considerations about the admissibility of flight evidence, rather than the factors adopted in *Freeburg*, led the court to conduct an inadequate analysis of the probative value of the evidence at issue under ER 403. 1 RP 128-29. This constitutes an abuse of discretion.

b. <u>Evidence that the officer tased Mr. Anderson was irrelevant.</u>

Over Mr. Anderson's objection, the trial court also admitted evidence that Mr. Anderson was tased, including evidence about the tasing itself, how tasing works, and a photograph showing the taser darts embedded in Mr. Anderson's back. 1 RP 132; 2 RP 215; Ex. 10. The State relies on the court's ruling that this evidence was relevant "because it showed the attempted flight and resistance was extreme and continuing." Resp. Br. at 15. However, it fails to offer an explanation

as to why this evidence – that the resistance was "extreme and continuing" – is relevant.

This evidence did not meet the minimal standard of relevance because whether the resistance to arrest was "extreme and continuing" did not tend to prove or disprove the existence of a fact which was of consequence to the outcome of the case. *State v. Weaville*, 162 Wn. App. 801, 818, 256 P.3d 426 (2011). Particularly given the amount of evidence admitted about the tasing, this evidence was unfairly prejudicial. The trial court's ruling to the contrary was error.

c. <u>Reversal is required.</u>

The trial court's error was not harmless. *State v. Thomas*, 35 Wn. App. 598, 609, 668 P.2d 1294 (1983) (evidentiary errors require reversal if, "within reasonable probabilities, the outcome of the trial would have been materially affected had the error not occurred"). The State claims reversal is not required because the witness who testified she lent Mr. Anderson the vehicle actually assisted the State's case after it appeared she was either mistaken or lying when she indicated she still had the bill of sale in her possession. Resp. Br. at 16.

This witness's one questionable answer does not demonstrate the court's error was harmless. Where there is a risk of prejudice and

no way to know what value the jury placed on the improperly admitted evidence, a new trial is required. *Salas v. Hi-Tech Erectors*, 168 Wn.2d 664, 673, 230 P.3d 583 (2010). Here, evidence was presented that Mr. Anderson had unknowingly borrowed a stolen car and it is impossible to know what value the jury placed on the irrelevant and highly inflammatory evidence improperly admitted by the trial court. Reversal is required.

4. The legal financial obligations should be stricken because Mr. Anderson lacks the ability to pay.

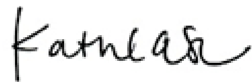
The trial court did not wish to impose any legal financial obligations (LFOs) against Mr. Anderson, and they should be stricken. 2 RP 330. Although *Blazina* does not require this Court to consider the imposition of LFOs that were not objected to at sentencing, our Supreme Court has repeatedly granted review and remanded to the trial court just as to this issue. *See*, *e.g.*, *State v. Youell*, 184 Wn.2d 1018, 361 P.3d 744 (2015); *State v. Thomas*, 184 Wn.2d 1018, 361 P.3d 745 (2015); *State v. Licon*, 184 Wn.2d 1010, 359 P.3d 791 (2015). Given our Supreme Court's actions since *Blazina*, and for the reasons expressed in the appellant's opening brief, this Court should strike the LFOs.

B. CONCLUSION

For the reasons stated above and in his opening brief, this Court should reverse Mr. Anderson's conviction.

DATED this 5th day of February, 2016.

Respectfully submitted,



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DIVISION THREE

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	)	
IAN ANDERSON,	)	
	)	
APPELLANT.	)	

DECLARATION OF DOCUMENT FILING AND SERVICE

I, MARIA ARRANZA RILEY, STATE THAT ON THE 5TH DAY OF FEBRUARY, 2016, I CAUSED THE ORIGINAL **REPLY BRIEF OF APPELLANT** TO BE FILED IN THE **COURT OF APPEALS – DIVISION THREE** AND A TRUE COPY OF THE SAME TO BE SERVED ON THE FOLLOWING IN THE MANNER INDICATED BELOW:

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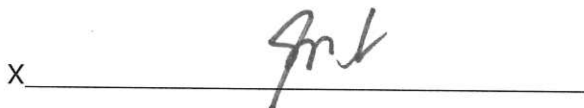

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