Supreme Court No. _____
Court of Appeals No. 48473-1-II

IN THE SUPREME COURT OF THE STATE OF WASHINGTON

STATE OF WASHINGTON,

Respondent,

v.

BRADLEY KNOX,

Petitioner.

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

The Honorable Michael Evans, Judge

PETITION FOR REVIEW

LISA E. TABBUT
Attorney for Appellant
P. O. Box 1319
Winthrop, WA 98862
(509) 996-3959
ltabbbutlaw@gmail.com

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A. IDENTITY OF PETITIONER

Bradley Knox asks this Court to accept review of the Court of Appeals decision terminating review designated in part B of this petition.

B. COURT OF APPEALS DECISION

Under RAP 13.4(b), petitioner seeks review of the June 13, 2017, unpublished opinion of Division Two (Appendix A) and the July 17, 2017, Order Denying Motion for Reconsideration (Appendix B) of the Court of Appeals.

C. ISSUE PRESENTED FOR REVIEW

Under the First, Sixth, and Fourteenth Amendments to the United States Constitution and article I, section 22 of the Washington Constitution, a criminal trial must be administered openly and publicly. Violation of that right is a structural error which results in reversal of the defendant's conviction. Here the trial court closed the courtroom without conducting a *Bone-Club* analysis, while the jury heard, at its request, a replay of a bodywire recording only part of which had been played during trial in open court. Does the closure of the courtroom raise a significant issue under the United States and Washington Constitutions necessitating reversal of Knox's convictions?

D. STATEMENT OF THE CASE

Knox faced many charges at trial including three counts of solicitation to commit murder in the first degree. CP 1-6, 78-84; 149-51.

As evidence of the solicitation, the state played, in open court with the jury present, up to 15 minutes of a 2.5 hour body wire recording made in the Cowlitz County Jail. RP Vol. 5 at 580-82. The body wire recorded a discussion between inmates Otis Pippen and Brad Knox. RP Vol. 5 at 558, 577-82. The court admitted into evidence the disk on which the entire conversation was recorded. RP Vol. 5 at 582.

During its deliberation, the jury asked to hear the body wire recording. RP Vol. 7 at 1030. The state told the court the jury should hear the entire 2.5 hours despite only 15 minutes of it having been played in open court. RP Vol. 7 at 1031. Defense counsel agreed to permit the jury to hear the full 2.5 hours. RP Vol. 7 at 1038. Knox was not consulted. RP Vol. 7 1030-45.

The court moved the jury from the deliberation room into the courtroom, locked the door to prevent public access to the deliberating jury, and advised the jury they could only listen to the body wire recording one time. RP Vol. 7 at 1050-51.

The jury returned its verdict which included acquitting Knox of two of the three counts of solicitation to commit murder. RP Vol. 7 at 1052-1059; CP 78-84, 171-73.

Knox, age 60, received a 396 month sentence. RP Vol. 7 at 1123; CP 3.

Applying the test enunciated in *State v. Sublett,*[1] the Court of Appeals agreed with the trial court in affirming Knox's conviction. Decision at 4-7.

E. ARGUMENT WHY REVIEW SHOULD BE GRANTED

1. THE PUBLIC AND KNOX HAD A RIGHT TO OPEN COURT PROCEEDINGS WHEN THE JURY HEARD AN EXTENDED REPLAY OF A BODYWIRE RECORDING INCLUDING ADDITIONAL HOURS NOT PLAYED IN OPEN COURT.

Both the federal and state constitutions guarantee the accused the right to a public trial. U.S. Const. amend. VI ("In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial."); Wash., Const. article. I, section 22 ("In criminal prosecutions the accused shall have the right to . . . have a speedy public trial by an impartial jury…").

[1] *State v. Sublett*, 176 Wn.2d 58, 292 P.3d 715 (2012).

In addition, the public also has a vital interest in access to the criminal justice system. U.S. Const. amend. I (the First Amendment's guarantees of free speech and a free press also protect the right of the public to attend a trial); Wash. Const. article I, section 10 ("Justice in all cases shall be administered openly, and without unnecessary delay."). These provisions provide the public and the press a right to open and accessible court proceedings. *State v. Easterling,* 157 Wn.2d 167, 174, 137 P.3d 825 (2006). "The public has a right to be present whether or not any party has asserted the right." *Presley v. Georgia,* 558 U.S. 209, 213-15, 130 S.Ct. 721, 175 L.Ed.3d 675 (2010).

Although the defendant's right to a public trial and the public's right to open access to the court system are different, they serve "complimentary and interdependent functions in assuring the fairness of our judicial system." *State v. Bone-Club*, 128 Wn.2d 254, 259, 906 P.2d 325 (1995).

The presumption of open, publicly accessible court hearings may be overcome "only by an overriding interest based on findings that closure is essential to preserve higher values and is narrowly tailored to preserve that interest." *Waller v. Georgia*, 467 U.S. 39, 45, 104 S.Ct. 2210, 81 L.Ed.2d 31 (1984), *citing Press-Enterprise Co. v. Superior Court*, 464

U.S. 501, 510, 104 S.Ct. 819, 78 L.Ed.2d 629 (1984) (*Press-Enterprise I*); *State v. Strode*, 167 Wn.2d 222, 227, 217 P.3d 310 (2009); *State v. Momah*, 167 Wn.2d 140, 148, 217 P.3d 321 (2009); *see also Presley*, 558 U.S. at 213 (circumstances in which the right to an open trial may be limited "will be rare," and "the balance of interests must be struck with special care").

The trial court must articulate an "overriding interest" justifying any limit on public access, "along with findings specific enough that a reviewing court can determine whether the closure order was properly entered." *Strode*, 167 Wn.2d at 227. To protect the defendant's constitutional right to a public trial, a trial court may not conduct secret or closed proceedings "without, first, applying and weighing five requirements as set forth in *Bone-Club* and, second, entering specific findings justifying the closure order." *Easterling*, 157 Wn.2d at 175. The five criteria are "*mandated* to protect a defendant's right to [a] public trial." *In re Personal Restraint of Orange*, 152 Wn.2d 795, 809, 100 P.3d 291 (2004) (emphasis in original).

Here, there was no question the courtroom was closed and no question that the trial court did not conduct the required *Bone-Club* analysis. *See State v. Lormor*, 172 Wn.2d 85, 93, 257 P.3d 624 (2011) ("[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."). The only remaining question is whether there is a public trial right to the closure of the courtroom for the jury to listen to the recording. Knox submits the trial court's closure violated the public trial right.

To determine whether the public trial right attaches to a particular trial proceeding, this Court applies the "experience and logic" test. *Sublett*, 176 Wn.2d at 72-73 (plurality). This test consists of two prongs: first, the experience prong asks "'whether the place and process have historically been open to the press and general public.'" *Id.* at 73, *quoting Press–Enterprise Co. v. Superior Court*, 478 U.S. 1, 8, 106 S.Ct. 2735, 92 L.Ed.2d 1 (1986) (*Press-Enterprise II)*. Second, the logic prong asks "'whether public access plays a significant positive role in the functioning of the particular process in question.'" *Id.* at 73, *quoting Press–Enterprise II*, 478 U.S. at 8. Unless the answer to both prongs is yes, the public trial right does not attach to the particular proceeding. *Id.* at 73.

Here, historically, preventing the jury from placing undue emphasis on a 911 recording admitted into evidence has established the

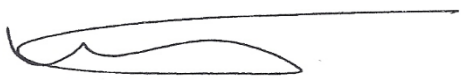
rule that the trial judge must control the jury's access to replays. *See State v. Frazier,* 99 Wn.2d 180, 188-91, 661 P.2d 126 (1983) (trial court's act of admitting audiotape but not playback machine assured that trial judge controlled number of times jury could rehear audiotape). In order to maintain control, courts have recommended the jury rehear the audiotape *in open court*. *See State v. Koontz*, 145 Wn.2d 650, 657, 41 P.3d 475 (2002); *State v. Clapp,* 67 Wn. App. 263, 273-74, 834 P.2d 1101 (1992) (court allowed jury to hear tape and review transcript three times in open court but did not allow tape or transcript to be taken to jury room).

This Court should accept review of Knox's petition, find that the right to an open courtroom applies anytime the jury is in the courtroom to hear audio evidence replayed, and reverse his conviction.

F. <u>CONCLUSION</u>

For the reasons stated, Knox asks this Court to grant review and reverse his convictions.

Respectfully submitted August 16, 2017.



LISA E. TABBUT/WSBA 21344
Attorney for Bradley Knox

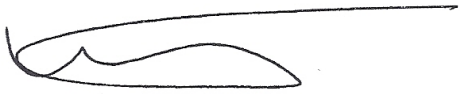
CERTIFICATE OF SERVICE

Lisa E. Tabbut declares:

On today's date, I efiled the Petition for Review to (1) Cowlitz County Prosecutor's Office, at appeals@co.cowlitz.wa.us and brittains@co.cowlitz.wa.us; (2) the Court of Appeals, Division II; and (3) I mailed it to Bradley Knox/DOC#266401, Clallam Bay Corrections Center, 1830 Eagle Crest Way, Clallam Bay, WA 98326.

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

Signed August 16, 2017, in Winthrop, Washington.



Lisa E. Tabbut, WSBA No. 21344
Attorney for Bradley Knox, Petitioner

APPENDIX A

Filed
Washington State
Court of Appeals
Division Two

June 13, 2017

IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON

DIVISION II

STATE OF WASHINGTON, Respondent, v. BRADLEY DAVID KNOX, Appellant.	No. 48473-1-II Consolidated with No. 48476-5-II UNPUBLISHED OPINION

WORSWICK, J. — Bradley Knox appeals from his convictions of solicitation to commit first degree murder, unlawful possession of a controlled substance with intent to deliver, two counts of first degree unlawful possession of a firearm, and bail jumping. Knox asserts that the trial court violated his public trial right by allowing the jury to hear and view during its deliberations audio and video exhibits that had been admitted at trial.[1] We affirm.

FACTS

The State charged Knox with three counts of solicitation to commit first degree murder, unlawful imprisonment, unlawful possession of a controlled substance (methamphetamine) with intent to deliver, two counts of first degree unlawful possession of a firearm, and bail jumping.[2] The State also alleged a school zone sentence enhancement and two firearm sentence

[1] Knox also requests that we exercise our discretion to waive appellate costs in this matter. Because the State has indicated that it will not seek appellate costs, we need not address Knox's request.

[2] The State charged Knox under three separate causes, which were later consolidated for trial.

enhancements with respect to the unlawful possession of a controlled substance with intent to deliver charge. The matter proceeded to jury trial.

At trial, the trial court admitted without objection an audio recording of a conversation between inmates Knox and Otis Pippen at the Cowlitz County Jail, which had been recorded through a body wire worn by Pippen. The trial court also admitted without objection a video recording showing Knox and Pippen engaged in the conversation. The State played portions of the audio and video recordings during a witness's testimony.

Before the start of jury deliberations, the trial court discussed with counsel the proper procedure for the jury to view the admitted audio and video exhibits if they requested to do so. After the jury requested to view the audio and video exhibits during deliberations, the trial court again engaged in a discussion regarding the proper procedure for the jury to view the admitted exhibits.

The State requested that the jury be permitted to have access to a laptop computer to review the exhibits in the jury room, noting that the combined length of the exhibits was approximately five hours. Defense counsel requested that the jury review the entirety of the audio and video exhibits, noting the defense had argued at closing that the jury should listen to the entire audio recording. The trial court ruled that the jury would view the entirety of the exhibits in the courtroom, which would be locked and treated as an extension of the jury deliberation room during the jury's viewing of the exhibits. The trial court also discussed with counsel a proposed cautionary instruction that it would read to the jury prior to their viewing of the exhibits; counsel agreed with the trial court's proposed cautionary instruction.

> After counsel exited the courtroom, the trial court noted on the record:
>
> Our plan now is to bring the jury in and make the courtroom an extension of the deliberation room. The video—or the audio recording is set up. [The bailiff] has locked the front door to the courtroom so it will be safe and secure for them to view that. So we'll bring the jury in and I'll read the cautionary instruction.

Report of Proceedings (RP) at 1050.

> When the jury entered the locked courtroom, the trial court instructed them as follows:
>
> So you've asked to rehear the audio recording. After consulting with the attorneys, I'm granting your request. In making this decision, I want to emphasize that I am making no comment on the value or weight to be given to any particular testimony and/or evidence in this case.
>
> The audio recording you requested will be replayed for you here in the courtroom. You will hear it only one time.
>
> After you have heard the audio recording, you will return to the jury room and resume your deliberations. When you do, remember that your deliberations must take into account all the evidence in the case, not just the audio recording that you've asked to rehear.

RP at 1050-51.[3] The trial court judge then exited the courtroom before the jury viewed the exhibits and recommenced its deliberations.

The jury returned verdicts finding Knox not guilty of unlawful imprisonment and not guilty of two counts of solicitation to commit first degree murder; the jury returned verdicts finding Knox guilty of all the remaining charges. The jury also returned special verdicts finding that Knox was within one thousand feet of a school bus stop and was armed with two firearms

[3] Although the trial court discussed with counsel the jury's request to hear and view both the video and audio exhibits, it appears from the trial court's instruction to the jury that they had requested only to hear the audio exhibit. Our analysis does not depend on whether the jury had heard only the audio exhibit or, instead, whether they had heard and viewed both the audio and video exhibits. For purposes of this appeal, we assume that they had heard and viewed both exhibits.

during his commission of unlawful possession of a controlled substance with intent to deliver. Knox appeals.

ANALYSIS

Knox contends that the trial court violated his public trial right by permitting the jury to hear and view in a closed courtroom audio and video exhibits, which had been admitted at trial but not played in their entirety, without first conducting a *Bone-Club*[4] analysis. We disagree and affirm Knox's convictions.

The United States Constitution and the Washington State Constitution guarantee a criminal defendant the right to a public trial. U.S. CONST. amends. VI, XIV; WASH. CONST. art. I, § 22. Whether a criminal defendant's right to a public trial was violated is a question of law that we review de novo. *State v. Paumier*, 176 Wn.2d 29, 34, 288 P.3d 1126 (2012). When determining whether a defendant's public trial right was violated, we apply a three-part analysis, in which we

> "[(1)] begin by examining . . . whether the public trial right is implicated at all . . . then [(2)] turn to the question whether, if the public trial right is implicated, there is in fact a closure of the courtroom; and [(3)] if there is a closure, whether . . . the closure was justified."

State v. Smith, 181 Wn.2d 508, 513-14, 334 P.3d 1049 (2014) (some alterations in original) (quoting *State v. Sublett*, 176 Wn.2d 58, 92, 292 P.3d 715 (2012) (Madsen, C.J., concurring)).

Not every interaction between the court, counsel, and defendants implicates the public trial right. *Sublett*, 176 Wn.2d at 71 (lead opinion). Our Supreme Court has established that

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

certain proceedings implicate the public trial right; for other proceedings, we apply the "experience and logic" test announced in *Sublett* to determine whether a courtroom closure implicating the public trial right has occurred. 176 Wn.2d at 75-78. Under this test, the experience prong asks '"whether the place and process have historically been open to the press and general public.'" and "[t]he logic prong asks 'whether public access plays a significant positive role in the functioning of the particular process in question.'" *Sublett*, 176 Wn.2d at 73 (quoting *Press-Enter. Co. v. Superior Court*, 478 U.S. 1, 8, 106 S. Ct. 2735, 92 L. Ed. 2d 1 (1986)). The public trial right attaches to the proceedings at issue only if the answer to both prongs of the experience and logic test is yes. *Sublett*, 176 Wn.2d at 73.

If the public trial right attaches to a proceeding, the trial court must consider the *Bone-Club* factors and make specific findings on the record before closing the proceeding to the public. 128 Wn.2d at 258-59. Because violation of the public trial right is a structural error, the remedy is reversal and remand for a new trial. *State v. Wise*, 176 Wn.2d 1, 19-20, 288 P.3d 1113 (2012).

In *State v. Magnano*, 181 Wn. App. 689, 691, 326 P.3d 845, *review denied*, 181 Wn.2d 1024 (2014), Division One of this court addressed whether the defendant's public trial right was implicated by the jury rehearing a properly admitted 911 audio recording in a closed courtroom during its deliberations. After applying the experience and logic test, the *Magnano* court held that the public trial right did not attach to the proceeding at issue. 181 Wn. App. at 696-700. With respect to the experience prong, the *Magnano* court determined that the jury's rehearing of an admitted audio exhibit during its deliberations was "not a process that has 'historically been

open to the press and general public.'" 181 Wn. App. at 696 (internal quotation marks omitted) (quoting *Sublett*, 176 Wn.2d at 73). The *Magnano* court also held that the defendant could not establish that the public trial right attached to the proceeding under the logic prong, reasoning:

> To allow the public to participate in the jury's review of admitted evidence invites the public to influence jury deliberations. "[T]here can be no question that [the jury] must reach its decision in private, free from outside influence." *State v. Cuzick*, 85 Wn.2d 146, 149, 530 P.2d 288 (1975). The secrecy of jury 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). The purpose of restricting access to the jury room is to insulate the jury from any out-of-court communications that may prejudice its verdict. *State v. Christensen*, 17 Wn. App. 922, 924, 567 P.2d 654 (1977). Here, the trial court properly allowed the jury to rehear a 911 recording that was properly admitted and played in open court during trial.

181 Wn. App. at 699-700. We agree with Division One's reasoning in *Magnano* and adopt it here.

Knox acknowledges the holding in *Magnano* but contends that it is distinguishable from the present case because, here, only a portion of the audio and video exhibits were played for the jury during the evidentiary phase of trial, and the jury was permitted to hear and view the entirety of the audio and video exhibits during its deliberations. Knox thus argues that the proceeding at issue concerned the presentation of evidence rather than jury deliberations. We reject this argument.

Knox fails to cite any authority supporting the proposition that a jury may review during deliberations only the portions of admitted exhibits that were published during the evidentiary phase of trial. CrR 6.15(e) expressly provides that during deliberations "the jury shall take with it . . . all exhibits received in evidence." And our Supreme Court has held that "once admitted into evidence, an exhibit may be used by the trier of fact in whatever fashion it chooses under

CrR 6.15(e)." *State v. Elmore*, 139 Wn.2d 250, 296, 985 P.2d 289 (1999). Here the audio and video exhibits were admitted as evidence without objection and, thus, the jury was entitled to consider the entirety of the exhibits during their deliberations. Therefore, we reject Knox's contention that *Magnano* is materially distinguishable on that basis.

We hold that Knox's public trial right was not implicated by the jury's review of properly admitted trial exhibits in a closed courtroom during its deliberations. Accordingly, Knox's public trial right claim fails, and we affirm his convictions.

A majority of the panel having determined that this opinion will not be printed in the Washington Appellate Reports, but will be filed for public record in accordance with RCW 2.06.040, it is so ordered.

Worswick, J.

We concur:

Bjorgen, C.J.

Johanson, J.

APPENDIX B

Filed
Washington State
Court of Appeals
Division Two

July 17, 2017

IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON

DIVISION II

STATE OF WASHINGTON, Respondent, v. BRADLEY DAVID KNOX, Appellant.	No. 48473-1-II Consolidated with No. 48476-5-II ORDER DENYING MOTION FOR RECONSIDERATION

Appellant, Bradley David Knox, moves for reconsideration of our unpublished opinion filed on June 13, 2017. After consideration, it is hereby

ORDERED that appellant's motion for reconsideration is denied.

Panel: Jj. Worswick, Johanson, Bjorgen

FOR THE COURT:

Worswick, J.

LAW OFFICE OF LISA E TABBUT

August 16, 2017 - 10:33 AM

Transmittal Information

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