

NO. 65859-0-1

IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON  
DIVISION ONE

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STATE OF WASHINGTON,

Respondent,

v.

MUNNIER QUASIM,

Appellant.

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

The Honorable Catherine Shaffer

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AMENDED BRIEF OF APPELLANT

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A. ASSIGNMENTS OF ERROR

1. The exclusion of jurors during the peremptory challenge process violated the right to a public trial guaranteed by the Sixth Amendment and article I, sections 10 and 22 of the Washington Constitution.

2. The trial court erred in concluding corpus delicti had been established for admission of Quasim's statements.

3. In violation of Quasim's Fourteenth Amendment and article I, section 3 right to due process of law, the State failed to prove the essential elements of the crime charged beyond a reasonable doubt.

B. ISSUES PERTAINING TO ASSIGNMENTS OF ERROR

1. The right to a public trial safeguarded by the Sixth Amendment and article I, sections 10 and 22 of the Washington Constitution creates a presumption that all trial proceedings will be open. The right extends to jury selection and applies not only to the accused and members of the public but to prospective jurors. Did the trial court violate the guarantee of a public trial when it excluded prospective jurors from the peremptory challenge phase of the proceedings without establishing that the closure order was

necessary to safeguard Quasim's right to a fair trial? (Assignment of Error 1)

2. The corpus delicti rule requires the State to present independent corroborating evidence of the crime charged before a defendant's statements may be admitted. If the evidence is as consistent with innocence as with guilt, corpus delicti has not been established. Where the State's evidence did not independently establish nonconsensual sexual intercourse, did the trial court err in concluding there was corpus delicti for the crime of rape in the second degree? (Assignment of Error 2)

3. The State bears the burden of proving the essential elements of a criminal charge beyond a reasonable doubt. Should this Court conclude the State did not present sufficient evidence to support Quasim's conviction for rape in the second degree? (Assignment of Error 3)

### C. STATEMENT OF THE CASE

Munnier Quasim and A.M. were neighbors in the Capitol Park Apartments, a Seattle Housing Authority building on Capitol Hill. 6/14/10 RP 130-31.<sup>1</sup> Shortly after A.M. moved in, in 2007,

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<sup>1</sup> The verbatim report of proceedings is referenced by date followed by page number, e.g., 6/14/10 RP 130-31. Where a volume contains multiple dates, both dates are indicated.

they became friendly with one another. 6/14/10 RP 132. Quasim enjoyed playing dominoes and A.M. would play with him. A.M. also liked the fact that Quasim usually had marijuana. Quasim sometimes smoked marijuana with A.M. in her apartment, and on several occasions she stopped by his apartment because he gave it to her for free. 6/14/10 RP 132-33; 6/15/10 RP 22; 6/21/10 RP 146. A.M. also went to Quasim's apartment to ask him for bottled water, as he kept it by the case. 6/15/10 RP 65. On at least one occasion Quasim loaned A.M. money to help her pay her bills. 6/14/10 RP 143; 6/21/10 RP 164-65.

Things changed after Quasim surprised A.M. in her apartment with another man. 6/21/10 RP 158-59. Quasim became hurt and upset, and wrote her two notes in which he freely expressed his feelings. Id. A.M. found the notes vulgar and scary and complained about Quasim to the building manager. 6/14/10 RP 135, 143. The manager referred A.M. to the police, but the liaison officer assigned to the matter determined that no crime had been committed. 6/14/10 RP 104. The officer advised Quasim that A.M. no longer wished to have contact with him. 6/14/10 RP 104-05.

A.M. and Quasim had little contact for 18 months; however, when A.M. was taken ill, Quasim extended an olive branch. 6/14/10 RP 144, 146. After A.M. was discharged from the hospital, Quasim came to her door with water and fruits. 6/14/10 RP 146. Their relationship swiftly resumed much as it was before. Although A.M. claimed she "felt tense" around Quasim, she did not hesitate to smoke marijuana with him whenever the situation presented itself. 6/14/10 RP 146-47.

On December 4, 2008, Quasim came to A.M.'s apartment with a bottle of tequila for her, some marijuana, and some beer in a mason jar for himself. 6/14/10 RP 147, 150-51. A.M. was a heavy drinker and tequila was her drink of choice. 6/14/10 RP 148-50. She was very happy to see Quasim with the bottle and invited him in. 6/14/10 RP 150.

Quasim asked if A.M. was watching Smallville, a television series which aired from 8:00 until 9:00 p.m. 6/14/10 RP 155. He came in, sat on her chaise longue, turned on Smallville, and lit up a marijuana cigarette. 6/14/10 RP 155-56. A.M. opened the bottle of tequila and had a few drinks. 6/14/10 RP 156, 159.

According to A.M., her last memory of the evening was watching Smallville. 6/14/10 RP 162. She claimed that she woke

up, naked, at about 4:00 or 5:00 the next morning on her chaise longue. 6/14/10 RP 163. She felt bruised and there was glass in her hair. 6/14/10 RP 163-65. Her vagina was sore. 6/14/10 RP 166. She had suffered a closed head injury. 6/16/10 55. She denied any knowledge of how she had arrived in this situation, stating that there was a period of time that night “when there was no more memory.” 6/14/10 RP 196.

Subsequent DNA testing of swabs from A.M.’s vagina and perineal area revealed the presence of P30, a protein associated with semen. 6/15/10 RP 177. A condom that A.M. later discovered under a chair in her living room was determined to contain Quasim’s sperm. 6/15/10 RP 183, 186.

According to Quasim, A.M. initiated sexual intercourse with him. 6/17/10 RP 113; 6/21/10 RP 135-36. Before December 4, 2008, they had been sexually intimate on four occasions. 6/21/08 RP 143, 149-55. On December 4, 2008, A.M. left a note under his door inviting him over. Id. When he arrived she was dressed provocatively in a white hooded sweatshirt and plaid panties. 6/21/10 RP 171.

At some point, A.M. removed her panties and exposed herself. 6/21/10 RP 174, 176. Quasim felt uncomfortable and

attempted to leave, but through a combination of physical force and sexual persuasion, A.M. induced him to stay. 6/21/10 RP 174, 178-80. They had intercourse on the chaise in the living room and in A.M.'s bedroom. 6/21/10 RP 185-88. The sex was rough and A.M. fell down several times. 6/17/10 RP 113; 6/21/10 RP 188-89, 195-96. At one point, while Quasim was holding his glass jar, A.M. fell and Quasim attempted to catch her. 6/21/10 RP 195-96. The jar fell to the floor and shattered, and Quasim cut his hand. Id.

Quasim was prosecuted for rape in the second degree by forcible compulsion and alternatively on the basis that A.M. was incapable of consent by reason of being physically helpless and mentally incapacitated. CP 22-23. A jury convicted Quasim as charged. CP 80-81. Quasim appeals. CP 95-109.

D. ARGUMENT

1. THE TRIAL COURT'S ORDER EXCLUDING THE JURY DURING PEREMPTORY CHALLENGES VIOLATED THE RIGHT TO A PUBLIC TRIAL GUARANTEED BY THE SIXTH AMENDMENT AND ARTICLE I, SECTIONS 10 AND 22.

a. The trial court excluded the venire during the peremptory challenge phase of jury selection over Quasim's objection. Prior to trial, the court outlined its customary procedure in connection with voir dire. 6/2-3/10 RP 152-57. With regard to peremptory challenges by the parties, the court stated, "[B]e aware that when we do peremptories, the jury won't be here." 6/2-3/10 RP 156. She emphasized, "They won't be in the courtroom." 6/2-3/10 RP 157.

Defense counsel objected. 6/2-3/10 RP 158. He stated:

I would object to the peremptory challenges not being made with the jurors in the courtroom, as it defeats one of the purposes of voir dire, which is to assess the composition and the relationship between the jurors who are being selected. And one of the important features for me is to identify by their physical presence and their nonverbal responses how they associate with each other and whether there is any feature there that is useful to me.

Id.

The court responded, "I've yet to meet an attorney who likes this procedure when they first hear about it." 6/2-3/10 RP 158. The

court explained that there were three reasons why it implemented this procedure: first, “because it’s really embarrassing to [the jurors] to be excused;” second, “because they speculate forever about why you kept them and [why] you struck somebody else [which] . . . is not the kind of discussion that you want jurors to be engaged in;” and third, because the court believed it was not possible to “really bring back the challenge with the jurors here” and difficult to “make a decent record that way either.” 6/2-3/10 RP 158-59. The court stated,

I take Batson<sup>[2]</sup> very seriously, more seriously than the U.S. Supreme Court does [these] days. So, I don’t want to have, say, both of the African-American jurors walk out of our courtroom and then have a challenge and the inability to bring them back. Okay? I think that’s an important enough purpose to excuse jurors.

6/2-3/10 RP 159.

Defense counsel interjected,

The only other issue, the Court, I hope, has considered is the jurors’ right to participate in the open court proceedings. As the Supreme Court has recently suggested, it’s an issue to be concerned about.

6/2-3/10 RP 160-61.

The court responded,

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<sup>2</sup> Batson v. Kentucky, 476 U.S. 79, 106 S.Ct. 1712, 90 L.Ed.2d 69 (1986).

Oh don't worry. We never close the courtroom when we're doing jury selection. We just send the jurors off to wait for the outcome. But they're here for the whole proceeding, and any audience person who wants to be here gets to be here. We never close our court.

6/2-3/10 RP 161.

b. The right to a public trial is safeguarded by the federal and state constitutions. The right to a public trial is guaranteed by both the Sixth Amendment and article I, sections 10 and 22 of the Washington Constitution. U.S. Const. amend. VI; Const. art. I, §§ 10, 22. The right provides the accused a public trial and also provides the public a right of access to trial proceedings. Waller v. Georgia, 467 U.S. 39, 47, 104 S.Ct. 2210, 81 L.Ed.2d 31 (1984); State v. Bone-Club, 128 Wn.2d 254, 259, 906 P.2d 325 (1995).

To protect these rights, the trial court seeking to close all or part of a trial must weigh five requirements<sup>3</sup> and enter specific

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<sup>3</sup> The test requires:

1. The proponent of closure or sealing must make some showing [of a compelling state interest], and where that need is based on a right other than an accused's right to a fair trial, the proponent must show a "serious and imminent threat" to that right;
2. Anyone present when the closure motion is made must be given an opportunity to object to the closure.

findings justifying the closure order. “The purpose of the Bone-Club inquiry is to ensure that trial courts will carefully and vigorously safeguard the public trial right.” State v. Strode, 167 Wn.2d 222, 233, 217 P.3d 310 (2009); State v. Momah, 167 Wn.2d 140, 148, 217 P.3d 321 (2009). The presumption in favor of openness may only be overcome by “an overriding interest based on findings that closure is essential to preserve higher values and narrowly tailored to serve that interest.” Momah, 167 Wn.2d at 148.

c. The trial court closed a portion of jury selection without engaging in an analysis of the *Bone-Club* factors. “It is well-settled that the right to a public trial also extends to jury selection.” State v. Brightman, 155 Wn.2d 506, 515, 122 P.3d 150 (2005); In re Orange, 152 Wn.2d 795, 804, 100 P.3d 291 (2004). “The process of juror selection is itself a matter of importance, not simply to the adversaries but to the criminal justice system.” Press

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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 closure and the public;

5. The order must be no broader in its application or duration than necessary to serve its purpose.

Bone-Club, 128 Wn.2d at 258-59 (citation omitted).

Enterprise v. Superior Court, 464 U.S. 501, 505, 104 S.Ct. 819, 78 L.Ed.2d 629 (1984).

Jury service preserves the democratic element of the law, as it guards the rights of the parties and ensures continued acceptance of the laws by all of the people... It “affords ordinary citizens a valuable opportunity to participate in a process of government, an experience fostering, one hopes, a respect for law.”... Indeed, with the exception of voting, for most citizens the honor and privilege of jury duty is their most significant opportunity to participate in the democratic process.

Powers v. Ohio, 499 U.S. 400, 407, 111 S.Ct. 1364, 113 L.Ed.2d 411 (1991) (internal citations omitted).

Prospective jurors have the same right to open proceedings as other members of the public. Momah, 167 Wn.2d at 152 (“Momah had a right to have openness where the public and jurors could hear every part of the proceedings”) (emphasis added). The closure of a portion of jury selection in “unexceptional circumstances” is a structural error that requires reversal of the conviction. State v. Strode, 167 Wn.2d 222, 223, 217 P.3d 310 (2009).

In Strode, the Supreme Court concluded a closure order during voir dire necessitated reversal of the conviction. 167 Wn.2d at 223. Strode was prosecuted for three sex offenses against a

child. Based on the jurors' answers to confidential questionnaires regarding prior history of sex abuse, the court questioned at least 11 jurors in chambers. Id. at 224-25. The court did not conduct a Bone-Club analysis. Id.

Although the trial court stated the reasons for individual questioning were "obvious", intimating that closure was justified by the interest of protecting the jurors' confidentiality and the need to ensure the jurors' answers were not "broadcast" to the rest of the panel, the Supreme Court disagreed. Id. at 228. The Court noted that the record was "devoid of any showing that the trial court engaged in the detailed review that is required in order to protect the public trial right." Id.

The first two reasons for the trial court's exclusion of the venire members during the peremptory challenges were its perception that (1) for the jury members to be present during the peremptory strikes would be "embarrassing" to them, and (2) they would "speculate forever" about why they had been selected to serve while someone else was struck. 6/2-3/10 RP 158-59. Both of these reasons were not rooted in concerns about the fairness of the proceedings but about the jurors' convenience. Cf., Strode, 167 Wn.2d at 228; Orange, 152 Wn.2d at 810.

More importantly, the trial court's reasons were unsubstantiated by any data or factual record. The trial court may well have been speaking from prior experience, but it is hard to imagine that the court's assumption that all or even most prospective jurors find the peremptory challenge process – which, after all, is the process whereby the petit jury is selected – embarrassing. It is equally likely that prospective jurors, summoned from their everyday lives to perform their civic duty, would find this essential part of the system whereby justice is administered fascinating and educational. See Powers, 499 U.S. at 406 (“The opportunity for ordinary citizens to participate in the administration of justice has long been recognized as one of the principal justifications for retaining the jury system”); see also id. (“The jury system postulates a conscious duty of participation in the machinery of justice.... One of its greatest benefits is in the security it gives the people that they, as jurors actual or possible, being part of the judicial system of the country can prevent its arbitrary use or abuse.”) (quoting Balzac v. Puerto Rico, 258 U.S. 298, 310, 42 S.Ct. 343, 66 L.Ed. 222 (1922)).

The trial court's second reason fails to survive logical scrutiny. It makes no sense to presume that the jurors would be

less likely to speculate about the reasons why they were kept on the jury instead of their peers if they were prevented from physically observing and participating in the peremptory challenge process. They would still be aware that they, and not the qualified prospective juror sitting behind or in front of them, had been impaneled to serve.

The court's final reason is self-defeating. The trial court asserted, "I take Batson very seriously, more seriously than the U.S. Supreme Court does [these] days." 6/2-3/10 RP 159. However the nexus between the court's method of complying with Batson and Batson's objectives is far from clear. It is axiomatic that the Equal Protection Clause's guarantee of a jury selection process that is free from discrimination protects not only the rights of the defendant but those of the struck juror and society as a whole. U.S. Const. amend. XIV. "Racial discrimination in the selection of jurors 'casts doubt on the integrity of the judicial process,' and places the fairness of a criminal proceeding in doubt." Powers, 499 U.S. at 411 (quoting Rose v. Mitchell, 443 U.S. 545, 556, 99 S.Ct. 2993, 61 L.Ed.2d 739 (1979)).

The peremptory challenge process is presumptively conducted in an open courtroom in order to assure that the process is free from discrimination:

A prosecutor's wrongful exclusion of a juror by a race-based peremptory challenge is a constitutional violation committed in open court at the outset of the proceedings. The overt wrong, often apparent to the entire jury panel, casts doubt over the obligation of the parties, the jury, and indeed the court to adhere to the law throughout the trial of the cause.

Powers, 499 U.S. at 412; see also id. at 413-14 (noting defendant's role in safeguarding prospective juror's equal protection rights in public proceedings: "A venireperson excluded from jury service because of race suffers a profound personal humiliation heightened by its public character. . . And there can be no doubt that petitioner will be a motivated, effective advocate for the excluded venirepersons' rights.").

The crux of the trial court's rationale was that accused persons will not have an incentive to make a complete record on a Batson objection in the presence of the struck juror. But the Supreme Court contemplates that the very public nature of the proceeding – conducted, importantly, not merely in a courtroom open to members of the public but before the venire itself – operates as a safeguard against unwanted discrimination.

Had the court applied the five Bone-Club factors, the defects in its reasoning would have been evident. The first Bone-Club factor requires the proponent of the closure to show a compelling state interest. 128 Wn.2d at 258. If that interest is not the defendant's right to a fair trial, then the proponent must show a "serious and imminent threat" to that interest. Id. Here, the trial court was motivated both by a concern unrelated to Quasim's right to a fair trial – the desire to save the jurors from embarrassment – and its desire to ensure that any potential Batson claim be thoroughly litigated.

The first rationale does not survive a Bone-Club analysis because it is not a compelling interest, and in any event, the court did not establish a "serious and imminent threat" to that interest. Although the second reason ostensibly was geared toward ensuring a fair trial, Quasim himself objected to the order on the basis that it would hamstring his ability to effectively make peremptory challenges. 6/2-3/10 RP 158-59; 6/10/10 RP 104-05.

The second Bone-Club factor required the court to give anyone present an opportunity to object to the closure. Id. Quasim's counsel did voice an objection, 6/2-3/10 RP 160-61, however the prospective jurors were not given this opportunity.

The third Bone-Club factor required a showing that the closure was the least restrictive means to attain the objective. 128 Wn.2d at 258-59. As discussed in argument 1.a.c. below, the court's closure order did not satisfy this standard.

The fourth Bone-Club factor required the proponent of the closure – here, the court – to weigh the competing interests of the proponent and the public. 128 Wn.2d at 259. The relevant “public” in this instance was the venire. The trial court did not balance their interests, or did so only in the most perfunctory manner.

The fifth Bone-Club factor required the court's order be “no broader in its application or duration than necessary to serve its purpose.” Id. The order was limited in its application or duration to the peremptory strike process, and thus satisfied this factor. However as established below, the purpose of the order was not legitimately correlated to a compelling state interest.

d. The closure order was not narrowly tailored or the least restrictive means of achieving the trial court's objectives.

When a trial court closes a portion of a trial, the “better practice” is to apply the five Bone-Club factors and make specific findings before a closure. Momah, 167 Wn.2d at 152 n. 2. The presumption in favor of openness may only be overcome by “an

overriding interest based on findings that closure is essential to preserve higher values and narrowly tailored to serve that interest.” Momah, 167 Wn.2d at 148. In all circumstances, the trial court is required to give “due consideration” to a defendant’s constitutional rights before closing a courtroom. Id. at 152. The trial court did not do this here.

i. The closure order was not necessary to achieve a compelling government interest. “[T]he potential for jeopardizing a defendant’s right to an impartial jury does not necessitate closure; it necessitates a weighing of the competing interests by the trial court.” Strode, 167 Wn.2d at 236 (emphasis in original). The trial court excluded the jurors from the peremptory challenge phase based on its perception that a better record of an unconstitutional peremptory strike of a potential juror would be made with the jurors out of the courtroom. But the court’s belief was based on two false premises.

First, the court believed that it would not be possible to “bring . . . back” the juror once he or she was struck. 6/2-3/10 RP 159. However this difficulty could easily be overcome by a slight modification to the court’s procedures. For example, the court

could simply ask jurors to remain in the courtroom until a jury was impaneled, rather than permitting them to leave once struck.

Second, the court stated that it took Batson “more seriously” than the United States Supreme Court, 6/2-3/10 RP 160, implying that closure would enhance any determination regarding unlawful discrimination in peremptory strikes. Again, this is a false premise. If the court’s concern was the possible embarrassment or humiliation to the potential juror, the court could require the parties to make their record at sidebar – if necessary, utilizing a court reporter or a tape recorder. Judging from the extensive litigation of Batson claims in appellate courts, parties have had little difficulty making adequate records without employing the draconian measure of excluding the entire venire from the peremptory challenge process.

In Orange the Court admonished, “it was the trial court’s affirmative duty, not the duty of the superior court in a reference hearing more than eight years later, to identify the compelling interest justifying the encroachment on Orange’s constitutional right to a public trial.” Orange, 152 Wn.2d at 810. As in Orange, the trial court here did not establish that the closure was necessary to

achieve a compelling interest and did not show a “serious and imminent threat” to that interest.<sup>4</sup> Id.

ii. Quasim objected to the closure and his objection was entitled to deference from the court. Finally, of key importance is the fact that Quasim objected to the closure on the basis that it would adversely impact his ability to select a jury. 6/2-3/10 RP 157-58, 160-61; 6/10/10 RP 105. “[T]o ensure that a criminal defendant receives a fundamentally fair trial, [the Supreme Court] permit[s] the accused to make tactical choices to advance his own interests and ensure what he perceives as the fairest result.” Momah, 167 Wn.2d at 153. Even if the court correctly perceived that the closure would enhance the likelihood of achieving a fair result, deference was due Quasim’s tactical decision.

Contrast Momah, a “heavily publicized” case involving multiple allegations that Momah, a gynecologist, had sexually abused his patients. The trial court conducted individual voir dire in the court’s chambers on the basis that the closure was necessary to ensure that the jury panel was not tainted and Momah’s right to

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<sup>4</sup> This conclusion is inescapable in light of the fact that the trial court employed this procedure in every case. See 6/2-3/10 RP 158 (court states, “I’ve yet to meet an attorney who likes this procedure when they first hear about it.”)

trial by an impartial jury was safeguarded. 167 Wn.2d at 145, 156; see also Strode, 167 Wn.2d at 233-34 (discussing Momah) (Fairhurst, J., concurring in result). Momah's counsel concurred in the closure: he "made a deliberate choice to pursue in-chambers voir dire to avoid 'contamination' of the jury pool by jurors with prior knowledge of Momah's case." Momah, 167 Wn.2d at 155. In fact, Momah's counsel not only affirmatively acquiesced to the closure, he argued for its expansion. Id. at 145-46.

Quasim, however, objected to the closure both before and during jury selection. 6/2-3/10 RP 158; 6/10/10 RP 104-05. Prior to jury selection Quasim's counsel explained that physical cues from the jurors were an important factor in how he selected a jury. 6/2-3/10 RP 158. During jury selection he stated,

Your honor . . . because I now have the panel in front of me and I have the dynamics of the process, I'm even more inclined to request that the court permit the jury to remain in the courtroom while we do the selection, as it will be significantly detrimental to my choices to not see who is being replaced.

6/10/10 RP 104-05. Deference was due Quasim's objection to the closure order.

d. Quasim's conviction must be reversed. In most circumstances, a violation of the public trial right is a structural error

that requires reversal of the conviction. See Strode, 167 Wn.2d at 223 (concluding that conducting jury selection in the trial judge's chambers in unexceptional circumstances without engaging in a Bone-Club analysis is a structural error); Brightman, 155 Wn.2d at 517 (rejecting State's suggestion that closure during jury selection was de minimis, and reversing conviction); Orange, 152 Wn.2d at 814 (remedy for "presumptively prejudicial" violation of public trial right raised on direct appeal is reversal of conviction).

However where the trial court has plainly balanced the right to public proceedings against the defendant's right to a fair trial, the failure to engage in the Bone-Club analysis, although error, may not necessitate reversal. Momah, 167 Wn.2d at 153-54. Here, the trial court acknowledged Quasim's objection but did not engage in the requisite balancing. Thus this Court should hold the error was structural.

Even if the Court applies a constitutional harmless error standard, Quasim is entitled to reversal of his conviction. A constitutional error is prejudicial unless the State proves beyond a reasonable doubt the error did not affect the outcome of the case. Chapman v. California, 386 U.S. 18, 24, 87 S.Ct. 824, 17 L.Ed.2d 705 (1967).

Again Momah – the only case in which the Supreme Court has utilized this standard with respect to closure of jury selection – is instructive. The Court in Momah presumed that “Momah [had] made tactical choices to achieve what he perceived as the fairest result.” 167 Wn.2d at 155. The Court also noted that although he was given the opportunity to object to the closure, Momah did not interpose any objection. Id. Finally the Court evaluated the reason for the closure and concluded it “occurred to protect Momah’s rights and did not actually prejudice him.” Id. at 156.

By contrast, the closure in this case was partly motivated by a misguided desire to make the jury selection process comfortable for the jurors, an impermissible basis to abridge the constitutional guaranty of a public trial. Orange, 152 Wn.2d at 809-10. To the extent that the closure order also purported to take into consideration Quasim’s rights under Batson, Quasim overtly and expressly objected to the order, indicating his willingness to waive the right. 6/2-3/10 RP 158; 6/10/10 RP 104-05. Finally, Quasim demonstrated that he was prejudiced by the order, stating that it would be “significantly detrimental to [his] choices to not see who is being replaced,” 6/10/10 RP 105, and noting during the peremptory challenge process that he had forgotten who a prospective juror

was, and struck her solely on the basis of his notes. 6/10/10 RP 117-19. Reversal is required under the constitutional harmless error standard as well.

2. THE STATE FAILED TO ESTABLISH THE CORPUS DELICTI OF THE CRIME, PRECLUDING ADMISSION OF QUASIM'S STATEMENTS.

a. The State must present independent corroborating evidence of the crime charged before a defendant's statements may be admitted. "A defendant's incriminating statement alone is not sufficient to establish that a crime took place." State v. Brockob, 159 Wn.2d 311, 328, 150 P.3d 59 (2006). Before a defendant's statement may be admitted, "the State must present evidence independent of the incriminating statement that the crime . . . described in the statement actually occurred." Id. (emphasis in original).

The Legislature has codified a version of the corpus delicti rule in cases where the alleged victim is dead or incompetent to testify. RCW 10.58.035. The statute provides,

In criminal and juvenile offense proceedings where independent proof of the corpus delicti is absent, and the alleged victim of the crime is dead or incompetent to testify, a lawfully obtained and otherwise admissible confession, admission, or other statement of the defendant shall be admissible into evidence if

there is substantial independent evidence that would tend to establish the trustworthiness of the confession, admission, or other statement of the defendant.

RCW 10.58.035(1).<sup>5</sup>

In its recent decision in State v. Dow, 168 Wn.2d 243, 227 P.3d 1278 (2010), the Supreme Court rejected the contention that the statute represented a legislative effort to codify the federal

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<sup>5</sup> The statute further instructs:

(2) In determining whether there is substantial independent evidence that the confession, admission, or other statement of the defendant is trustworthy, the court shall consider, but is not limited to:

a) Whether there is any evidence corroborating or contradicting the facts set out in the statement, including the elements of the offense;

(b) The character of the witness reporting the statement and the number of witnesses to the statement;

(c) Whether a record of the statement was made and the timing of the making of the record in relation to the making of the statement; and/or

(d) The relationship between the witness and the defendant.

(3) Where the court finds that the confession, admission, or other statement of the defendant is sufficiently trustworthy to be admitted, the court shall issue a written order setting forth the rationale for admission.

(4) Nothing in this section may be construed to prevent the defendant from arguing to the jury or judge in a bench trial that the statement is not trustworthy or that the evidence is otherwise insufficient to convict.

corpus delicti standard<sup>6</sup> in lieu of Washington's more stringent common law rule. 168 Wn.2d at 252-53. The Court instead adhered to its prior decisions in Brockob and State v. Aten, 130 Wn.2d 640, 927 P.2d 210 (1996), which set forth the requirements of the corpus delicti rule in Washington. Under this standard, the evidence "must independently corroborate, or confirm, a defendant's incriminating statement." Brockob, 159 Wn.2d at 328-29 (emphasis in original).

The Court held in Dow that to the extent the statute modified the common law doctrine, it was to establish the criteria for admissibility, not trustworthiness. 168 Wn.2d at 253. Further, the Court held that it did not alter the rules regarding sufficiency of the evidence. Id. at 253-54.

b. The State failed to establish the corpus delicti for admission of Quasim's statements. Quasim moved to suppress statements he made at a hearing concerning his eviction from the Capitol Park apartments and to police officers during their investigation of A.M.'s allegations, on the basis that the State's independent evidence failed to establish the corpus delicti for the

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<sup>6</sup> See Opper v. United States, 348 U.S. 84, 93, 75 S.Ct. 158, 99 L.Ed. 101 (1954).

crime charged. 6/17/10 RP 11-14, 17-18; CP 52-54. The court rejected Quasim's argument, finding (1) that the statement the State sought to admit was not being offered for its truth, (2) A.M. was neither dead nor incompetent to testify, and (3) there was independent proof of corpus delicti. 6/17/10 RP 8-9. The trial court's ruling was erroneous and should be reversed.

First, the court incorrectly attributed significance to the fact that Quasim's statement was not an admission of guilt. 6/17/10 RP 8. However the Washington Supreme Court has rejected this narrow formulation. See Brockob, 158 Wn.2d at 328 n. 11 ("Courts use a variety of terms to describe a defendant's statement when analyzing corpus delicti claims [such as] "admissions," "confessions," "statements," "incriminating statements," "inculpatory statements," "exculpatory statements," and "facially neutral" statements[]]. We refer to them uniformly as incriminating statements.") (internal citation omitted); see also Aten, 130 Wn.2d at 657 (approving Court of Appeals holding "that the rule required corroboration of not just confessions and admissions, but any statement made by the defendant, whether inculpatory, exculpatory or facially neutral"). Thus, a statement does not have to be an admission of guilt in order to fall within the purview of the corpus

delicti rule. Here, for example, the State sought to introduce Quasim's putatively exculpatory statements because it believed they were so incredible as to bolster the State's case. 6/17/10 RP 15-17.

The court's second reason for finding the statements admissible was that A.M. was not dead or incompetent to testify, so RCW 10.58.035 was not "in play" in the case. 6/17/10 RP 7-8. To the extent that the court was correct that the case did not involve a dead or incompetent victim, however, then the common law corpus delicti rule should have been applied. Brockob, for example, involved three consolidated cases in which the crimes charged were violations of the uniform controlled substances act and robbery in the second degree. 159 Wn.2d at 329-30. Although Brockob was decided three years after the enactment of RCW 10.58.035, the court applied the common law corpus delicti rule without reference to the statute. Id. at 328-35.

The court's third reason for finding the statements admissible was that the court believed there was independent corroboration of the crime. But the court misapplied the pertinent standard. The court noted,

There is medical evidence of penetration and of a serious number of injuries to the alleged victim in this case, not to mention the little details like the evidence of broken glass in her apartment, [tufts] of hair and similar evidence of what appears to be something like a struggle that took place around the time of the sexual assault, thanks to the corroborating evidence from the witness next door.<sup>[7]</sup> I'm not leaning on these things to say that the jury's going to accept all those things as worthy of sufficient weight that it's going to believe the State's case is proved but to say there's plenty of independent proof of a violent rape, whether or not the jury subsequently concludes that that's what occurred here.

6/17/10 RP 7-8.

As is evident from the court's oral ruling, the court construed the "independent evidence" in the light most favorable to the State. But the corpus delicti rule imposes a greater burden on the State with regard to the proof that must be adduced. Under the corpus delicti rule,

[I]f the evidence supports both a hypothesis of guilt and a hypothesis of innocence, it is insufficient to corroborate the defendant's statement . . . In other words, if the State's evidence supports the reasonable inference of a criminal explanation of what caused the event and one that does not involve

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<sup>7</sup> Jordan Attenborough, A.M.'s next door neighbor, testified that on the night of December 4-5, 2008, he heard a lot of "commotion" from A.M.'s apartment. 6/14/10 RP 68. He stated it sounded like things were getting thrown against the wall and that A.M.'s dog was barking more than usual. *Id.* Although A.M. was frequently noisy, that night Attenborough heard the sound of glass breaking and A.M.'s voice saying "get off" or "get out" repeatedly. 6/14/10 RP 70, 89.

criminal agency, the evidence is not sufficient to corroborate the defendant's statement.

Brockob, 159 Wn.2d at 330.

Thus in Aten, a prosecution for second degree manslaughter based on the death of an infant, the Court held that medical testimony, which established the child could have died either from a criminal act or by natural causes, did not provide sufficient independent evidence to prove the corpus delicti for the crime. 130 Wn.2d at 661-62. In so holding, the Court rejected the State's contention that sufficient independent evidence existed because one logical and reasonable inference from the evidence was that the child died from a criminal act. Id. at 659.

Similarly, in one of the consolidated cases considered in Brockob, a prosecution for attempted robbery in the second degree, there was evidence supporting the inference that the property was taken against the owner's will and evidence supporting the inference that the defendant had the owner's permission to take the item. Brockob, 159 Wn.2d at 334. The Court held that because the evidence was consistent with both guilt and innocence, it was insufficient to establish corpus delicti for the crime. Id. at 334-35.

The same conclusion is compelled here. The testimony at trial established that Quasim was in A.M.'s apartment with her permission. 6/14/10 RP 150. A.M. testified that she drank some tequila, smoked some marijuana, and then did not remember anything until she woke up the next morning. 6/14/10 RP 162-63. Although A.M. was bruised, she had no recollection of Quasim striking or hitting her. 6/14/10 RP 162. No controlled substances or legend drugs were found on the pieces of glass recovered from the scene. 6/15/10 RP 103-04. A.M.'s urine was also tested but only cannabinoids, ethanol, and morphine, which A.M. had been given at the hospital, was found. 6/15/10 RP 148-52.

A.M. asserted that she did not have sex with men and so would not have had sex with Quasim, 6/14/10 RP 66, but this testimony was impeached by three witnesses who either overheard A.M. claim she was "bisexual" or observed her acting in a flirtatious manner with men. 6/21/10 RP 56, 65, 102-03. Although there was evidence that sexual intercourse had occurred, there was no physical evidence that the intercourse had occurred forcibly. 6/15/10 RP 177; 6/16/10 RP 104. Finally, A.M. conceded that if she had had consensual sex with Quasim, she would have wanted him to wear a condom. 6/15/10 RP 79. This evidence, considered

together, failed to establish the corpus delicti for the crime because it was equally as consistent with innocence as guilt.

Contrary to the trial court's oral ruling, this conclusion is not undermined by consideration of Attenborough's testimony. The "commotion" overheard by Attenborough could have occurred during consensual, but rough, sex. See 6/14/10 RP 68. Attenborough also heard A.M. saying "get off" or "get out" but he was not sure which. 6/14/10 RP 70. The first could be consistent with nonconsensual intercourse; the second consistent with an argument or ill temper. Importantly, Attenborough also heard these comments at approximately 1:30 a.m., several hours after A.M. first admitted Quasim to her apartment. 6/14/10 RP 84. Up until midnight, Attenborough heard music being played in A.M.'s apartment more or less continuously. Id.

With regard to the evidence that A.M. was bruised, this at most is consistent with an assault, not rape. None of the evidence relating to the sexual intercourse suggested that the intercourse was nonconsensual. There was no evidence to connect A.M.'s injuries to the sex. In short, the State's independent evidence was equally consistent with a hypothesis of innocence as of guilt. This

Court should conclude that the trial court erred in finding that corpus delicti had been established for Quasim's statements.

c. The admission of the statements prejudiced Quasim. This Court should also conclude that the erroneous admission of Quasim's statements was prejudicial. The State sought to introduce the statements because the State believed they were substantively not credible and that they were inconsistent with one another. 6/17/10 RP 15-17. The State attacked Quasim's statements on these bases in closing argument, contending that the inconsistency was probative of guilt, and also contended that the alterations in Quasim's story established that he was tailoring his testimony to the evidence. 6/24, 8/13/09 RP 59-61, 114-16.

Absent Quasim's statements, the allegation of rape in the second degree otherwise depended on the jury convicting Quasim despite A.M.'s absence of memory and the many inconsistencies in her testimony. As the prosecutor recognized, Quasim's inconsistent statements were a necessary piece in discrediting any conclusion that the sex was consensual. This Court should conclude that the ruling finding corpus delicti for the crime had been established was prejudicial.

3. THE REMAINING EVIDENCE WAS  
INSUFFICIENT TO SUPPORT CONVICTION.

The State bears the burden of proving the essential elements of a criminal charge beyond a reasonable doubt. In re Winship, 397 U.S. 358, 364, 90 S.Ct. 1068, 25 L.Ed.2d 368 (1970). U.S. Const. amend. XIV. A challenge to the sufficiency of the evidence requires the appellate court to view the evidence in the light most favorable to the prosecution and decide whether any rational trier of fact could have found the elements of the crime beyond a reasonable doubt. State v Green, 94 Wn.2d 216, 220-22, 616 P.2d 628 (1980). A claim of insufficiency admits the truth of the State's evidence and all inferences that can reasonably be drawn therefrom. State v. Salinas, 119 Wn.2d 192, 201, 829 P.2d 1068 (1992).

The State failed to present sufficient evidence that Quasim committed the crime of rape in the second degree. This Court should reverse his conviction and dismiss the information.

First, with regard to the mental incapacity prong of the offense, although A.M. professed that she lacked a memory of what had happened between the evening of December 4, 2008 and when she awoke in the early morning of December 5, 2008,

Attenborough's testimony suggested that A.M. was conscious during these critical hours. Further, as noted, there was no evidence that A.M. had been drugged. Instead, the evidence suggested that she was drinking and partying with Quasim. In short, although A.M. evidently suffered some amnesia, there simply was no evidence presented that she was incapable of consenting to sexual intercourse.

With regard to the allegation of sex by forcible compulsion, as noted in argument 2, there was no evidence to connect the allegations of force to the sexual intercourse. There was nothing to suggest that the force was employed to overcome A.M.'s resistance. A.M. did not suffer any defensive injuries and Quasim himself only had a small cut on his hand. This Court should conclude that the evidence was insufficient to support Quasim's conviction. The conviction should be reversed.

#### E. CONCLUSION

This Court should conclude that the trial court violated the constitutional guarantee of a public trial when it closed a portion of jury selection and reverse Quasim's conviction. This Court should also conclude that the trial court erred in finding corpus delicti for

the admission of his statements, and that the evidence was otherwise insufficient to support conviction.

DATED this 6<sup>th</sup> day of September, 2011.

Respectfully submitted:

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IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON  
DIVISION I

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STATE OF WASHINGTON,	)	
	)	NO. 65859-0
Respondent,	)	
	)	
v.	)	
	)	
MUNNIER QUASIM,	)	
	)	
Appellant.	)	

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**DECLARATION OF SERVICE**

I, ANN JOYCE, DECLARE UNDER PENALTY OF PERJURY UNDER THE LAWS OF THE STATE OF WASHINGTON THAT THE FOLLOWING IS TRUE AND CORRECT:

1. THAT ON THE 6TH DAY OF SEPTEMBER, 2011, A COPY OF **AMENDED BRIEF OF APPELLANT** WAS SERVED ON THE PARTIES DESIGNATED BELOW BY DEPOSITING SAID DOCUMENT IN THE UNITED STATES MAIL TO THE ADDRESSES INDICATED:

- Prosecuting Atty King County  
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- Munnier Quasim  
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COURT OF APPEALS DIV I  
STATE OF WASHINGTON  
2011 SEP - 6 PM 4: 06

SIGNED IN SEATTLE, WASHINGTON THIS 6th DAY OF SEPTEMBER, 2011

x. *Ann Joyce*