

NO. 69159-7-I

IN THE COURT OF APPEALS – STATE OF WASHINGTON
DIVISION ONE

STATE OF WASHINGTON
Respondent,

v.

JEANETTE MARIE HOPKINS,
Appellant.

ON APPEAL FROM THE SUPERIOR COURT OF THE
STATE OF WASHINGTON, FOR SKAGIT COUNTY

The Honorable Michael E. Rickert, Judge

RESPONDENT’S BRIEF

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COURT OF APPEALS DIVISION ONE
STATE OF WASHINGTON
JEANETTE MARIE HOPKINS

ORIGINAL

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I. SUMMARY OF ARGUMENT

Jeannette Hopkins was convicted of possession of stolen property in the second degree for a stolen cargo trailer located on her property. The trailer had been moved off her property the day after she was confronted for a truck stolen from the same victim which was located on her property.

Hopkins claims a new trial is merited by her failure to be present a side bar conference as a violation of her right to presence and her right to a public trial. However, the record does not show she was not present, she failed to raise the claim below and neither her right to presence or public trial would be implicated by her absence.

Hopkins also claims prosecutorial misconduct for asking a question pertaining to drug use and for a closing argument using the term “red herring.” However, defense did not move for mistrial for asking the questions and also failed to object during closing argument. Thus, the record of neither claim was developed below and Hopkins cannot establish impropriety. Any error from these claims is harmless beyond a reasonable doubt.

II. ISSUES

1. Does the record establish that Hopkins was not at the sidebar?

2. Is the right to presence violated by a defendant not being present at a side bar on legal matters?
3. Is the right to public trial implicated by a side bar regarding peremptory challenges?
4. Is a question posed but not answered, which is contended for the first time on appeal to be a violation of a motion in limine, an error meriting reversal?
5. Could a curative instruction have rectified any error?
6. Where a defendant fails to object to rebuttal argument using the term “red herring” was the argument so flagrant and ill-intentioned so as to merit reversal?
7. Were the claimed trial errors harmless?

III. STATEMENT OF THE CASE

1. Statement of Procedural History

On October 27, 2012, Jeannette Hopkins was charged with Possession of Stolen Property in the Second Degree for having a stolen sixteen foot cargo trailer on August 10, 2011. CP 1. Drag marks showed that the trailer had been taken from behind the residence of Hopkins after Hopkins had been contacted the day before when a stolen car had been recovered from her property. CP 3. The trailer had been covered by a

structure which had been concealing the trailer but had since been torn down.
CP 3.

On July 2, 2012, the case proceeded to trial.¹

On July 3, 2013, the jury began deliberations at 10:55 a.m., returning at 1:15 p.m. to return a verdict of guilty on the charge of Possession of Stolen Property in the Second Degree. 7/3/12 RP 169-70.

On August 3, 2012, the trial court sentenced Hopkins to 20 days of confinement to be served as work crew, work release or electronic home detention. 8/3/12 RP 7-8.

2. Summary of Trial Proceedings

i. Jury Selection

On July 2, 2012, the trial court held voir dire. 7/2/12 RP (Voir Dire) 1-2. At the close of the questioning of the jury, the trial court stated “All right. If Counsel, you want to take a few minutes and collect your notes.” 7/2/12 RP (Voir Dire) 77. Shortly thereafter the court reporter indicates “BENCH CONFERENCE OFF THE RECORDED; 11:28-11:31 A.M.” 7/2/12 RP (Voir Dire) 77. The trial court then next stated the jurors who would be seated on the case. 7/2/12 RP (Voir Dire) 77-8. The clerk’s

¹ The State will refer to the verbatim report of proceedings by using the date followed by “RP” and the page number. The report of proceedings in this case are as follows:

| | |
|-----------------------|-----------------------------------------------------------|
| 7/2/13 RP (Voir Dire) | Voir Dire |
| 7/2/13 RP | Testimony |
| 7/3/13 RP | Jury instruction, closing and verdict at end of 7/2/13 RP |
| 8/3/13 RP | Sentencing. |

minutes indicate which party exercised peremptory challenges against the jurors.

ii. Trial Testimony

Zack Zinter inherited property from his father in 2007 located in Rockport, Skagit County Washington. 7/2/12 RP 20-2. On the property was an old mobile home, a 1950 Dodge Truck, a shipping container and a cargo trailer. 7/2/12 RP 22. In 2011, when Zinter was out of the state on work, Zinter was contacted by someone who he had watching the property. 7/2/12 RP 23-4. Zinter made a report with the sheriff and returned in May to find everything of value was missing from the property. 7/2/12 RP 24-5. The cargo trailer and the Dodge pickup truck gone. 7/2/12 RP 25-7. Exhibit 2 at trial.

The cargo trailer was a twenty foot Wells Cargo twin axle trailer. 7/2/12 RP 25-6. The trailer was in perfect condition in 1982 when it was purchased by Zinter's father. 7/2/12 RP 26. It had been run down a little bit, but was it was in good condition. 7/2/12 RP 26. The trailer had been modified to add a battery tree on the front and spotlights on the top rear. 7/2/12 RP 32. Zinter valued the trailer at \$2,500. 7/2/12 RP 27. Zinter had experience with trailers having purchased and sold trailers over a number of years. 7/2/12 RP 27.

After the truck and trailer were reported missing, Zinter was traveling along the South Skagit highway and spotted the truck on a property. 7/2/12 RP 28. Zinter called the sheriff who arrived and a tow truck was called to remove the truck. 7/2/12 RP 29. The truck had been used to do some work and had bent a boom on the front of the truck. 7/2/12 RP 30. Zinter was not allowed on the property and could not see if there was anything else there that belonged to him. 7/2/12 RP 31.

The day after Zinter found his truck, the sheriff called to ask Zinter to come and see if he would recognize a trailer found at the side of the road. 7/2/12 RP 32. Zinter returned to the South Skagit highway and looked at the trailer. 7/2/12 RP 33. Zinter recognized the trailer as his, identifying the unique battery tree and the lights on at the top rear. 7/2/12 RP 33. The trailer had been pulled down the road and the tires had popped off. 7/2/12 RP 34. As a result, it was dented and scraped. 7/2/12 RP 34. Zinter tried to reattach a tire located a distance away, but it came off and he was unable to drive the trailer. 7/2/12 RP 34. As a result, Zinter had to leave the trailer and call a wrecking company to take the trailer getting no money for it. 7/2/12 RP 34-5, 48-9.

On cross examination, Hopkins' counsel asked questions suggesting that Zinter had not inherited the trailer from his father. 7/2/12 RP 38-9.

Zinter was also cross-examined about the value he placed on the trailer and it's condition. 7/2/12 RP 39-41, 46-8..

Brad Holmes was the patrol deputy at the Skagit County Sheriff's office who responded when Zinter had located his truck on August 9, 2011, at 26684 South Skagit highway. 7/2/12 RP 50-2, 54. Holmes was familiar with Zinter's stolen property issue. 7/2/12 RP 54. Holmes saw a number of makeshift buildings on the property where the truck was located. 7/2/12 RP 55. Holmes began walking around the outskirts of the property trying to observe things and took a picture of the area including a trailer or cargo container with a makeshift structure around it. 7/2/12 RP 55-9.

Holmes talked to the defendant, Jeannette Hopkins, that day. 7/2/12 RP 51-2, 62. Hopkins said she owned the property, specifically saying everything on there belonged to her. 7/2/12 RP 64. Holmes asked Hopkins if any more of Zinter's property including the cargo trailer were on her property. 7/2/12 RP 62. Hopkins told Holmes there was not. 7/2/12 RP 62.

The next day, August 10, 2011. Deputy Holmes was driving in the same area and saw a sixteen to twenty foot Wells Cargo trailer abandoned on the side of the road. 7/2/12 RP 66. Holmes found the trailer was missing wheels on one side and had been dragged on its axles. 7/2/12 RP 66. There were deep gouges in the roadway. 7/2/12 RP 66. Holmes backtracked following the drag marks and dirt trail back leading from the property across

the neighbor's field to the east of Hopkin's property. 7/2/12 RP 66-7, 79. Holmes could see where the trailer had been pulled from what was now an empty space on Hopkin's property, being drug across a muddy dirt field, out on to the road where it lost a wheel nearby. 7/2/12 RP 66-8. Holmes described the trailer had come from an area where it had a structure covering it the day before. 7/2/12 RP 68. That structure was destroyed and was now just debris on the ground. 7/2/12 RP 68.

Holmes described that the trailer had been extremely beat up, was dented inside, where shelves were broken, and that the axles had been damaged. 7/2/12 RP 69. Where there would normally been a VIN plate on the trailer, it appeared to have been scrapped off or removed. 7/2/12 RP 69-70. There was also no license plate on the trailer. 7/2/12 RP 70.

Zinter arrived to identify the trailer and was able to do so from the unique features of the battery boxes and spotlights. 7/2/12 RP 71. The trailer was released to Zinter. 7/2/12 RP 72.

Holmes tried to locate someone on Hopkin's property. 7/2/12 RP 72. Holmes also left several phone messages for Hopkins which were not returned. 7/2/12 RP 72.

Holmes was cross examined regarding fingerprinting of the trailer hitch which was not done. 7/2/12 RP 73-5. Holmes was also questioned

about whether the marks left on the ground came from the trailer being moved. 7/2/12 RP 81-4

Defense recalled Zack Zinter to question him about a value he placed on a victim loss statement requesting restitution of \$1,900 for the trailer, tires and wheels. 7/2/12 RP 86-8.

The defendant testified on her own behalf. 7/2/12 RP 89. Hopkins testified she was in the process of purchasing the property at 26684 South Skagit highway. 7/2/12 RP 89-90. Hopkins did chain saw carvings. 7/2/12 RP 90. Hopkins claimed that Zinter's truck had been brought to her property by a friend of her husband's. 7/2/12 RP 91.

Hopkins claimed that she had a horse trailer on he property and that a structure had been built around it. 7/2/12 RP 92. Hopkins claimed that it was still on the property. 7/2/12 RP 92. Hopkins claimed that contrary to Holmes' testimony, there had not been any structure removed from the property. 7/2/12 RP 92. Hopkins denied that she had ever seen the trailer Zinter's described. 7/2/12 RP 93. Hopkins also denied ever getting a phone call from Deputy Holmes. 7/2/12 RP 93. Hopkins denied ever seeking the gouges along the roud. 7/2/12 RP 94.

Hopkins' counsel asked if she was telling the truth. 7/2/12 RP 96. Over objection she was allowed to testify that she was. 7/2/12 RP 96.

Hopkins's counsel also asked if she wanted to change anything about what she said and she said she did not. 7/2/12 RP 96.

Hopkins admitted to having a misdemeanor theft conviction from federal court. 7/2/12 RP 93.

On cross examination, Hopkins was asked if she had a methamphetamine abuse issue in August of 2011. 7/2/12 RP 97. Defense objected and it was sustained. 7/2/12 RP 97. Prosecutor then asked "Were you using that day?" 7/2/12 RP 97. The defense objected. 7/2/12 RP 97. The trial court ruled: "Sustained - - overruled." 7/2/12 RP 97. Hopkins did not answer the question. 7/2/12 RP 97.

The prosecutor then asked Hopkins if she had been convicted of two crimes of dishonesty. 7/2/12 RP 97. Hopkins admitted she had been. 7/2/12 RP 97.

iii. Closing Argument

In defense closing argument, defense focused significantly on Zinter's valuation of the trailer. 7/2/12 RP 136-42.

Hopkins' counsel suggested that the trailer may not have been stolen because there was no receipt for its purchase, no title and no license plates and there was no proof that Zinter was the legal owner. 7/2/12 RP 147-8. It was suggested there may have been a dispute among family members, there may have been a probate. 7/2/12 RP 148-9. It was also suggested that the

VIN number had been scrapped off the vehicle long before. 7/2/12 RP 149.

Defense argued there was no evidence.

So no evidence that she had the trailer on her property, no evidence that she moved the trailer, no evidence that she knew of this trailer that they found 1.6 miles from her house -- from her property was stolen.

7/2/12 RP 152.

In rebuttal, the prosecutor noted that the defense closing was based significantly on speculation. 7/2/12 RP 153. The prosecutor noted it applied to many issues. 7/2/12 RP 153-4 (ownership of truck), 7/2/12 RP 155 (personal interest in case), 7/2/12 RP (market value of trailer). Partway through the rebuttal, the prosecutor began characterizing the arguments as red herrings. 7/2/12 RP 158 (applying first to need to have expert come in to testify as to value). The prosecutor also characterized the argument that there as no value left at the time of the claiming of the trailer as a red herring as to its' earlier value. 7/2/12 RP 160. The prosecutor also noted that Hopkins testimony that the property behind the structure was also a red herring as it conflicted with Holmes testimony and the prosecution was not in a position to refute the testimony given its timing. 7/2/12 RP 160-1. The prosecutor also noted the fingerprint questioning was another red herring, because even if fingerprints were available, it was known the trailer came from Hopkins' property. 7/2/12 RP 161.

IV. ARGUMENT

1. Hopkins failed to establish she was not present at the side bar and the right to presence is not violated by presence during voire dire and in court at the time of the side bar for peremptory challenges.

Hopkins argues that excluding her from the sidebar violated her constitutional right to be present at a critical stage of the trial.

However, at the outset the record does not establish the defendant was not present. The alleged violation is not manifest and as such it may not be considered for the first time on appeal.

RAP 2.5(a) expresses the “nearly universal rule that an appellate court may refuse to review a claim of error that was not raised in the trial court.” 2A Karl B. Tegland, *Washington Practice: Rules Practice* RAP 2.5(a) author's cmts. at 192 (6th ed. 2004). In part, the rule “arose out of solicitude for the sensibilities of the trial court -- that the trial court should be given an opportunity to correct errors and omissions” as they occur. *Id.* The more substantive rationale, however, recognizes that “the opposing parties should have an opportunity at trial to respond to possible claims of error, and to shape their cases to issues and theories, at the trial level, rather than facing newly-asserted errors or new theories and issues for the first time on appeal.” *Id.* In essence, RAP 2.5 (a) is “designed to eliminate the time and expense of

unnecessary appeals by encouraging the resolution of issues at the trial court level — a policy that benefits the parties and the appellate courts alike.” Id.

RAP 2.5 (a)(3) creates an exception to the rule that a party must object to error in the trial court, but review is appropriate only as to “manifest error affecting a constitutional right.” State v. Scott, 110 Wn.2d 682, 686-87, 757 P.2d 492 (1988) (failure to instruct on “knowledge” was not manifest error); State v. Lynn, 67 Wn. App. 339, 342, 835 P.2d 251 (1992) (failure to establish unavailability of witness was not manifest error). RAP 2.5(a)(3) is not intended to afford defendants a means for obtaining new trials whenever they can identify a constitutional issue not raised before the trial court. Scott, 110 Wn.2d at 688.

Hopkins failure to raise the issue below precludes review.

Even if the court were to consider the claim, the exercise of peremptory challenges after the defendant had a chance to view the entire *voire dire* and consult with counsel did not violate Hopkin’s right to presence.

The question of whether a trial court violated a defendant's constitutional right to be present during his trial is reviewed *de novo*. State v. Irby, 170 Wn.2d 874, 880, 246 P.3d 796 (2011), *see also* State v. Slert, 169 Wn. App. 766, 775, 282 P.3d 101 (2012). The Sixth Amendment and the Due Process Clause of the Fourth Amendment to the United States

Constitution and article I, section 22 of the Washington Constitution guarantee a defendant the “fundamental right to be present at all critical stages of a trial.” Irby, 170 Wn.2d at 880; *see also* United States v. Gagnon, 470 U.S. 522, 526, 105 S.Ct. 1482, 84 L.Ed.2d 486 (1985); U.S. Const. amend. VI; Const. art. I, § 22.

In Snyder v. Massachusetts, a defendant claimed that his failure to be present at a view of the scene by jurors violated his right to be present at trial. In evaluating the extent of the right to presence, the Snyder court set forth the following test.

We assume in aid of the petitioner that in a prosecution for a felony the defendant has the privilege under the Fourteenth Amendment **to be present in his own person whenever his presence has a relation, reasonably substantial, to the fullness of his opportunity to defend against the charge.**

Snyder v. Massachusetts, 291 U.S. at 105-6 (emphasis added). This test from Snyder is the test Washington courts apply.

In In Re Personal Restraint of Lord, 123 Wn.2d 296, 868 P.2d 835 (1994), the defendant claimed that he did not waive his presence at numerous unspecified in-chambers hearings and sidebar conferences. In Re Personal Restraint of Lord, 123 Wn.2d at 305-6. But the Lord court indicated that prejudice cannot be presumed and that “Lord does not explain how his absence affected the outcome of any of the challenged proceedings

or conferences, nor can we find any prejudice.” In Re Personal Restraint of Lord, 123 Wn.2d at 307 *citing*, Rushen v. Spain, 464 U.S. at 117-20.

In State v. Wilson, 141 Wn. App. 597, 171 P.3d 501 (2007), the defendant was not present for an in-chambers conference regarding a seated juror. The court presented the question as whether the defendant “has demonstrated that his presence at the in-chambers conference bore a reasonably substantial relation to the fullness of his opportunity to defend against the charge, or whether a fair and just hearing was thwarted by his absence.” State v. Wilson, 141 Wn. App. at 604. The court held the right to presence extends to jury voir dire, though the defendant's presence at this stage is only required because it is substantially related to the defense and allows the defendant “to give advice or suggestion. The court concluded: “However, Mr. Wilson must demonstrate how his presence was necessary to secure his due process rights; **prejudice will not be presumed.**” State v. Wilson, 141 Wn. App. at 604 (emphasis added), *citing* In Re Personal Restraint of Lord, 123 Wn.2d 296, 307, 868 P.2d 835 (1994).

In Irby, the defendant was to be tried for murder. Prospective jurors were asked to fill out a questionnaire, with voir dire set to begin the next day. Some members of the jury panel indicated in their responses to the questionnaire that a three week trial would be a hardship for them, or that a parent had been murdered. That same day, the trial judge exchanged e-mails

with counsel about the possibility of reaching agreement about excusing those jurors so they would not have to appear for voir dire. Irby had no opportunity to participate in the e-mail exchange. Counsel stipulated to the dismissal of seven potential jurors for cause without Irby ever seeing them. The Supreme Court found a constitutional violation because in the e-mail exchange, jurors were “being evaluated individually,” and Irby missed the opportunity to give advice and suggestions to defense counsel in this process. Irby, 170 Wn.2d at 882, 883; *see also* Slert, 169 Wn. App. at 771 (after an unreported in-chambers conference, four jurors were excused for cause based on questionnaire answers indicating they had some knowledge about the defendant's prior trials.).

This case is not like either Irby or Slert. Hopkins was present during all the voir dire proceedings, including the proceeding where the four prospective jurors were questioned separately in open court. After voir dire was completed and before the peremptory challenges were exercised, Hopkins and counsel had an opportunity to review their notes. Unlike Irby, who had no opportunity to provide input on the e-mail exchange, Hopkins had the opportunity to consult with his lawyer voir dire and before and after the sidebar conference. Assuming her claims that she was not at the sidebar conference, she was still present in the courtroom at the time. The sidebar involved peremptory challenges, not challenges for cause. And there were

no contested issues and no decision-making by the judge. There was no violation of Hopkins' right to be present.

2. Hopkins right to public trial was not violated by receipt of the peremptory challenges at side bar.

Hopkins also contends the sidebar conference where counsel exercised peremptory challenges was a courtroom closure resulting in a violation of the right to public trial and constituting structural error

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). The right to a public trial is violated when jury selection is conducted in chambers rather than in an open courtroom without consideration of the *Bone-Club* factors. *See, e.g., State v. Strode*, 167 Wn.2d 222, 227, 217 P.3d 310 (2009) (Alexander, C.J. plurality opinion); 167 Wn.2d at 235–36 (Fairhurst, J. concurring).

Hopkins contends the sidebar conference was a violation of the public trial right akin to voir dire conducted in chambers.

A criminal defendant has the right to a "speedy and public trial." Art. 1, § 22. The constitution also requires that justice be administered openly. Art. 1, § 10.

The Washington Supreme Court has held that where a courtroom is closed during significant portions of trial, these constitutional rights are violated. In State v. Marsh, 126 Wn. 142, 145, 217 P. 705 (1923), the

superior court tried an adult as if he were a juvenile, closing the entire proceeding and failing to provide counsel. In State v. Bone-Club, 128 Wn.2d 254, 256-57, 906 P.2d 325 (1995), the trial court summarily granted the State's request to clear the courtroom for the pretrial testimony of an undercover detective. In State v. Brightman, 155 Wn.2d 506, 511, 122 P.3d 150 (2005) the trial court ordered -- sua sponte -- that the courtroom be closed for the entire 2 ½ days of voir dire, excluding the defendant's family and friends. In In re Pers. Restraint of Orange, 152 Wn.2d 795, 100 P.3d 291 (2004), the trial court summarily ordered the defendant's family and friends excluded from *all* voir dire proceedings. And, in State v. Easterling, 157 Wn.2d 167, 172-73, 137 P.3d 825 (2006), the trial court ordered the defendant and his attorney excluded from pretrial motions regarding the co-defendant. Most recently, in State v. Strobe, 167 Wn.2d 222, 217 P.3d 310 (2009), the court held private questioning of a subset of jurors violated the right to a public trial where the court failed to balance the Bone-Club factors before holding voir dire in chambers. In State v. Momah, 167 Wn.2d 140, 217 P.3d 321 (2009), the court held that, even if there was error, Momah had invited the error by his conduct and thus was not entitled to a new trial.

In each of the cases above, however, a courtroom closure was either directly ordered or indirectly effectuated by the trial court's action. In this case, the courtroom was never closed at all, nor was anyone excluded and all

substantive matters were discussed in open court.

Moreover, the sidebar conference at issue here is a not a "proceedings" that implicate the public trial right. In the cases cited above, all or part of an important substantive proceeding was shielded from public view.² In this case, the exercise of peremptory challenges was done in the courtroom, but just communicated between counsel and the trial court. There was no challenge to any of the exercises of peremptory challenges and thus no need to make a further record.

In context of the defendant's right to presence, the Washington Supreme Court has recognized that sidebars are not truly trial proceedings to which the defendant or the public must be granted access. For example, in In re Personal Restraint of Lord, 123 Wn.2d 296, 306, 868 P.2d 835 (1994), the supreme court considered an argument that the defendant had a right to be present at numerous conferences between the lawyers and the judge. The court held that Lord had a right to be present at none of these purely legal discussions between the court and counsel.

The core of the constitutional right to be present is the right to be present when evidence is being presented. United States v. Gagnon, 470 U.S. 522, 526, 105 S.Ct. 1482, 84 L.Ed.2d 486 (1985) (per curiam). Beyond that, the defendant has a "right to be present at a proceeding 'whenever his presence has a relation, reasonably substantial, to the fulness

² Bone-Club (pretrial testimony); Orange, (voir dire); Brightman (voir dire); Easterling (pretrial hearing); Strode (voir dire of selected jurors); Momah (voir dire of selected jurors).

of his opportunity to defend against the charge....’ ” Gagnon, 470 U.S. at 526 (*quoting Snyder v. Massachusetts*, 291 U.S. 97, 54 S.Ct. 330, 78 L.Ed. 674, 90 A.L.R. 575 (1934)). The defendant therefore does not have a right to be present during in-chambers or bench conferences between the court and counsel on legal matters, United States v. Williams, 455 F.2d 361 (9th Cir.), *cert. denied*, 409 U.S. 857 (1972), at least where those matters do not require a resolution of disputed facts. People v. Dokes, 79 N.Y.2d 656, 584 N.Y.S.2d 761, 595 N.E.2d 836 (1992) (right to be present during hearing on admissibility of prior conviction).

Id. Similarly, in In re Personal Restraint of Pirtle, 136 Wn.2d 467, 484, 965 P.2d 593 (1998), the court held that the defendant need not be present for discussions about the wording of jury instructions, ministerial matters, and whether the jury should be sequestered.

Decisions from the Court of Appeals are similar. In State v. Rivera, 108 Wn. App. 645, 32 P.3d 292 (2001), the court held that the defendant had no right to be present at a chambers conference where jurors complained about the hygiene of another juror, because the matter was purely ministerial. In State v. Bremer, 98 Wn. App. 832, 835, 991 P.2d 118 (2000), the court held a defendant had no right to be present at a chambers conference regarding proposed jury instructions because the inquiry was legal and did not involve resolution of questions of fact.

Here, the defendant was present throughout the jury selection process, he had the ability to consult with his counsel who then was present for the exercise of the peremptory challenges. “The essential nature of the

peremptory challenge is that it is one exercised without a reason stated, without inquiry and without being subject to the court's control.” State v. Salinas, 87 Wn.2d 112, 549 P.2d 712 (1976) *citing* State v. Thompson, 68 Ariz. 386, 206 P.2d 1037 (1949); Lewis v. United States, 146 U.S. 370, 13 S.Ct. 136, 36 L.Ed. 1011 (1892).

The courtroom itself was not closed. All voir dire was carried on in open court. Challenges for cause were made and decided in open court. None of the peremptory challenges were contested. There was no need for the court to make any decisions on the peremptory challenges unless there is a contest. There is no basis to assume that anything occurred other than the verbal communication, by counsel to the court, of the names of the prospective jurors each counsel had decided to excuse by the right of peremptory challenge—a communication that just as easily could have been accomplished by counsel writing the names on slips of paper and handing them to the judge.

Not every interaction between the court, counsel, and defendants will implicate the right to a public trial, or constitute a closure if closed to the public. 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. 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.

Applying the experience and logic test in connection with the issue of whether a closure occurs when a court conducts a sidebar to allow counsel to exercise peremptory challenges there was no closure consistent with Sublett. Cf. People v. Willis, 27 Cal.App. 4th 811, 821–22, 43 P.3d 130 (2002) (courts may use sidebar conferences followed by appropriate disclosure in open court of successful challenges). Because the sidebar was not a closure, the court was not required to conduct a Bone–Club analysis.

A record of information about how peremptory challenges were exercised is important, for example, in assessing whether there was a pattern of race-based peremptory challenges. 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). The practice adopted by the trial court served the purpose. The court 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. This document is easily understood, and it was made part of the open court record, available for public scrutiny. This procedure satisfies the court's obligation to ensure the open administration of justice.

3. Hopkins failed to move for mistrial or object below and there was no prosecutorial misconduct such that a new trial is not merited.

i. There was no motion for mistrial for the questions by the prosecutor.

Hopkins did not move for a mistrial. The trial court was therefore denied the ability to rule up a motion and no ruling for this court to review. Denial of a motion for a mistrial is reviewed for an abuse of discretion, finding abuse only when no reasonable judge would have reached the same conclusion. State v. Hopson, 113 Wn.2d 273, 284, 778 P.2d 1014 (1989). A trial court should grant a mistrial only when the defendant has been so prejudiced that nothing short of a new trial can ensure a fair trial. Ony errors which affect the outcome are deemed prejudicial. Hopson, 113 Wn.2d at 284, 778 P.2d 1014.

Hopkins' failure to move for mistrial or seek a curative instruction suggests that Hopkins' trial counsel felt the precluding the question was adequate to protect his client. Furthermore by failing to make the motion, the prosecutor was precluded from providing an explanation as to why the question was

permitted. 'It is only when the prosecutor is unable or unwilling to substantiate his accusations in the face of defendant's sworn denial that error is committed.' State v. Martz 8 Wn. App. at 196.

Prosecutorial misconduct does not constitute prejudicial error unless the appellate court determines there is a substantial likelihood the misconduct affected the jury's verdict. State v. Brett, 126 Wn.2d 136, 175, 892 P.2d 29 (1995).

Since there was no answer to the question, and the jury was instructed not to consider any questions asked, there as no prejudice.

ii. There was no objection to the prosecutor's closing argument.

Hopkins trial counsel did not object to the prosecutor's use of the term red herrings below. Pursuant to RAP 2.5(a), Hopkins is precluded from raising the issue from the first time on appeal. See RAP 2.5 argument above.

Hopkins' failure to timely object or move for mistrial precludes reversal unless it was 'so flagrant and ill-intentioned that no curative instructions could have obviated the prejudice engendered by the misconduct.' See State v. Belgarde, 110 Wn.2d 504, 507, 755 P.2d 174 (1988). Hopkins fails to meet this standard.

Furthermore, as explained below the argument was not improper.

iii. The argument using the term “red herring” was appropriate in light of defense counsel’s arguments regarding sufficiency of the evidence.

A prosecutor has wide latitude in closing argument to draw reasonable inferences from the evidence. *State v. Stenson*, 132 Wash.2d 668, 727, 940 P.2d 1239 (1997). The prosecutor is permitted to respond to the arguments of defense counsel. *State v. Russell*, 125 Wash.2d 24, 87, 882 P.2d 747 (1994). Where the defense fails to object to allegedly improper remarks during closing argument, error is waived unless the remark is “so flagrant and ill-intentioned that it causes an enduring and resulting prejudice that could not have been neutralized by a curative instruction to the jury.” *State v. Brown*, 132 Wash.2d 529, 561, 940 P.2d 546 (1997).

State v. Clark, 170 Wn. App. 166, 194, 283 P.3d 1116, 1130 (2012) review denied, 176 Wn.2d 1028, 301 P.3d 1048 (2013).

Here the prosecutor’s rebuttal argument properly critiqued the defense closing argument which focused on issues other than addressing the true issue in the case which was the defendant’s knowledge. The prosecutor noted that the defense closing was based significantly on speculation of many issues. 7/2/12 RP 153-4 (ownership of truck), 7/2/12 RP 155 (personal interest in case), 7/2/12 RP (market value of trailer). The prosecutor began characterizing the arguments as red herrings. 7/2/12 RP 158 (applying first to need to have expert come in to testify as to value), 7/2/12 RP 160 (residual value of trailer), 7/2/12 RP 160-1 (location of structure where trailer had been and conflict with deputy’s testimony), 7/2/12 RP 161 (fingerprint evidence).

The prosecutor's argument fell within permissible latitude for argument. Using the term "red herring" is not impropriety.

During closing argument, the State argued that the defense used "red herrings" to divert the jury's attention from the real issue in the case. Report of Proceedings (RP) (May 14, 2003) at 838. Fredrick did not object to the State's argument. In the State's rebuttal argument, the deputy prosecutor commented that the job of defense attorneys is to divert the jury's attention from the evidence. Again, Fredrick did not object to the State's comments. The jury found Fredrick guilty on all seven counts.

State v. Fredrick, 123 Wn. App. 347, 351, 97 P.3d 47(2004) (affirming conviction where there was "red herring" argument but analysis regarding the objection was contained in the unpublished portion of the opinion.).

iv. Error, if any, was harmless.

To determine whether error is harmless, this court utilizes "the 'overwhelming untainted evidence' test." Smith, 148 Wn.2d at 139, 59 P.3d 74. Under that test, where the untainted evidence admitted is so overwhelming as to necessarily lead to a finding of guilt, the error is harmless. *Id.* (citing State v. Guloy, 104 Wn.2d 412, 426, 705 P.2d 1182 (1985)).

State v. Davis, 154 Wn.2d 291, 304-05, 111 P.3d 844, 851 (2005) aff'd, 547 U.S. 813, 126 S. Ct. 2266, 165 L. Ed. 2d 224 (2006).

Where an error violates an evidentiary rule rather than a constitutional mandate, the error is not prejudicial unless it is reasonably likely that the outcome of the trial would have been materially affected had the error not occurred. State v. Thomas, 150 Wn.2d 821, 871, 83 P.3d 970 (2004).

State v. Price, 126 Wn. App. 617, 638, 109 P.3d 27 (2005).

Any error here was harmless.

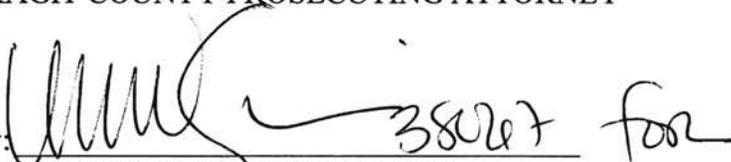
V. CONCLUSION

For the foregoing reasons, Hopkins conviction must be affirmed.

DATED this 27th day of July, 2013.

SKAGIT COUNTY PROSECUTING ATTORNEY

By:

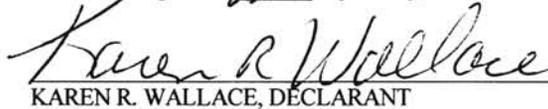


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DECLARATION OF DELIVERY

I, Karen R. Wallace, declare as follows:

I sent for delivery by; United States Postal Service; ABC Legal Messenger Service, a true and correct copy of the document to which this declaration is attached, to: Andrew P. Zinner, addressed as Nielsen Broman Koch Plc, 1908 E. Madison Street, Seattle, WA 98122-2840 . I certify under penalty of perjury under the laws of the State of Washington that the foregoing is true and correct. Executed at Mount Vernon, Washington this 22nd day of July, 2013.



KAREN R. WALLACE, DECLARANT