

NO. 70359-5-1

COURT OF APPEALS OF THE STATE OF WASHINGTON

DIVISION I

STATE OF WASHINGTON,

Respondent,

v.

JESUS GASPAR NAVARRO,

Appellant.

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COURT OF APPEALS DIV I
STATE OF WASHINGTON

APPEAL FROM THE SUPERIOR COURT FOR KING COUNTY

THE HONORABLE JEFFREY M. RAMSDELL, JUDGE

BRIEF OF RESPONDENT

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TABLE OF CONTENTS

| | Page |
|--|------|
| A. <u>ISSUES PRESENTED</u> | 1 |
| B. <u>STATEMENT OF THE CASE</u> | 2 |
| 1. PROCEDURAL FACTS | 2 |
| 2. SUBSTANTIVE FACTS | 3 |
| a. Facts Of The Case | 3 |
| C. <u>ARGUMENT</u> | 7 |
| 1. SUFFICIENT INDEPENDENT EVIDENCE CORROBORATES THE CRIME CHARGED | 7 |
| a. Additional Facts Relevant To Motion | 7 |
| b. The State Presented Sufficient Evidence, Independent Of Navarro's Admissions, To Prove The Corpus Delicti Of Trafficking Stolen Property | 8 |
| 2. THE TRIAL COURT'S PEREMPTORY CHALLENGE PROCESS PRESERVED THE FOUNDATIONAL PRINCIPLE OF AN OPEN JUSTICE SYSTEM | 19 |
| a. Additional Relevant Facts | 20 |
| b. Experience And Logic Show That Navarro's Public Trial Rights Were Not Implicated By The Peremptory Challenge Process Used | 21 |
| D. <u>CONCLUSION</u> | 34 |

TABLE OF AUTHORITIES

Page

Table of Cases

Federal:

Batson v. Kentucky, 476 U.S. 79,
106 S. Ct. 1712, 90 L. Ed. 2d 69 (1986) 28

Opper v. United States, 348 U.S. 84,
75 S. Ct. 158, 99 L. Ed. 101 (1954) 9

Press-Enterprise Co. v. Superior Court of California,
464 U.S. 501, 104 S. Ct. 819,
78 L. Ed. 2d 629 (1984) 23, 25

Press-Enterprise Co. v. Superior Court of California,
478 U.S. 1, 106 S. Ct. 2735, 92 L. Ed. 2d 1 (1986) 23

Richmond Newspapers, Inc. v. Virginia, 448 U.S. 555,
100 S. Ct. 2814, 65 L. Ed. 2d 973 (1980) 26

Washington State:

Burress v. Richens, 3 Wn. App. 63,
472 P.2d 396 (1970) 17

In re Pers. Restraint of Orange, 152 Wn.2d 795,
100 P.3d 291 (2004) 24, 25

Seattle Times Co. v. Ishikawa, 97 Wn.2d 30,
640 P.2d 716 (1982) 22

State v. Angulo, 148 Wn. App. 642,
200 P.3d 752 (2009) 13, 14

State v. Aten, 130 Wn.2d 640,
927 P.2d 210 (1996) 8, 9

State v. Bone-Club, 128 Wn.2d 254,
906 P.2d 325 (1995) 1, 19, 21, 24, 29, 33

| | |
|---|-------------------|
| <u>State v. Brightman</u> , 155 Wn.2d 506, 122 P.3d 150 (2005)..... | 22 |
| <u>State v. Brockob</u> , 159 Wn.2d 311, 150 P.3d 59 (2006)..... | 8, 9, 11, 14, 18 |
| <u>State v. Burch</u> , 65 Wn. App. 828, 830 P.2d 357 (1992)..... | 28 |
| <u>State v. Burnette</u> , 78 Wn. App. 952, 904 P.2d 776 (1995)..... | 13 |
| <u>State v. Davis</u> , 141 Wn.2d 798, 10 P.3d 977 (2000)..... | 23 |
| <u>State v. Dow</u> , 168 Wn.2d 243, 227 P.3d 1278 (2010)..... | 9, 15, 16, 17, 18 |
| <u>State v. Easterling</u> , 157 Wn.2d 167, 137 P.3d 825 (2006)..... | 24 |
| <u>State v. Gates</u> , 28 Wash. 689, 69 P. 385 (1902)..... | 18 |
| <u>State v. Hummel</u> , 165 Wn. App. 749, 266 P.3d 269 (2012)..... | 8, 15 |
| <u>State v. Irby</u> , 170 Wn.2d 874, 246 P.3d 796 (2011)..... | 31, 32 |
| <u>State v. Jones</u> , 175 Wn. App. 87, 303 P.3d 1084 (2013)..... | 29, 30 |
| <u>State v. Lormor</u> , 172 Wn.2d 85, 257 P.3d 624 (2011)..... | 23, 33 |
| <u>State v. Love</u> , 176 Wn. App. 911, 309 P.3d 1209 (2013)..... | 26 |
| <u>State v. Lung</u> , 70 Wn.2d 365, 423 P.2d 72 (1967)..... | 18 |

| | |
|---|------------|
| <u>State v. Mason</u> , 31 Wn. App. 41, 639 P.2d 800 (1982)..... | 18 |
| <u>State v. Momah</u> , 167 Wn.2d 140, 217 P.3d 321 (2009)..... | 22, 25 |
| <u>State v. Richardson</u> , 197 Wash. 157, 84 P. 699 (1938)..... | 18 |
| <u>State v. Rooks</u> , 130 Wn. App. 787, 125 P.3d 192 (2005)..... | 18 |
| <u>State v. Slerf</u> , 169 Wn. App. 766, 282 P.3d 101 (2012), <u>review granted in part</u> , 176 Wn.2d 1031 (2013)..... | 30, 31, 32 |
| <u>State v. Smith</u> , 115 Wn.2d 775, 801 P.2d 975 (1990)..... | 13 |
| <u>State v. Strode</u> , 167 Wn.2d 222, 217 P.3d 310 (2009)..... | 22 |
| <u>State v. Sublett</u> , 176 Wn.2d 58, 292 P.3d 715 (2012)..... | 22, 23 |

Constitutional Provisions

Federal:

| | |
|-----------------------------|----|
| U.S. Const. amend. VI | 22 |
|-----------------------------|----|

Washington State:

| | |
|--------------------------|--------|
| Const. art. I, § 10..... | 22 |
| Const. art. I, § 22..... | 22, 25 |

Statutes

Washington State:

RCW 2.28.010..... 33
RCW 2.28.020..... 33
RCW 2.36.080..... 28
RCW 9A.82.010 10
RCW 9A.82.050 10, 12
RCW 10.58.035..... 15, 16

Rules and Regulations

Washington State:

CrR 3.5..... 3
CrR 6.4..... 25

A. ISSUES PRESENTED

1. Before a defendant's remarks can be considered by the finder of fact, the State must first establish the *corpus delicti* of the crime, or, rather, evidence sufficient to support a logical and reasonable inference of the facts sought to be proved, independent of the defendant's admissions. Electronics and other valuables were stolen from the Ayres' home and were discovered at Navarro's home. The room these valuables were found in was small, chaotic, detached from the main house and contained other stolen property. Should this Court reject the defendant's claim that there was insufficient evidence to establish the *corpus delicti* for the charge of trafficking in stolen property? Did the trial court properly deny Navarro's half-time motion to dismiss?

2. To establish a violation of public trial rights, a defendant must show: 1) that experience and logic illustrate that the challenged event implicated the core values of the public trial right, and 2) if so, that the trial court failed to conduct a Bone-Club analysis and make findings on the record before closing the courtroom. During jury selection, each counsel wrote one peremptory challenge on paper, the court then read aloud the challenged jurors in numerical order, filled those spots with

non-challenged jurors, and continued the process until all the peremptory challenges had been exercised. Is the public trial right satisfied when the entire jury selection process, including the exercise of peremptory challenges, occurred in open court with Navarro, counsels, the jury, and any spectators present?

B. STATEMENT OF THE CASE

1. PROCEDURAL FACTS.

The State charged Jesus Navarro with first-degree trafficking in stolen property on October 2, 2012, and later added a count of second-degree identity theft. CP 1-13, 15-16; 1RP 6-7.¹ The Honorable Jeffrey Ramsdell received the case for trial on March 27, 2013. 1RP 4. On April 3, 2013, a jury did not reach verdicts on the charged crimes, but found Navarro guilty of the lesser included offense of second-degree trafficking in stolen property. CP 43-45; 5RP 10-11.

On April 12, 2013, the trial court sentenced Navarro to 196 days in custody with credit for time served, restitution, and a

¹ The Verbatim Report of Proceedings will be referred to as follows: 1RP (March 27, 2013); 2RP (March 28, 2013); 3RP (April 1, 2013); 4RP (April 2, 2013); 5RP (April 3, 2013); 6RP (April 12, 2013).

no contact order with the victims. CP 47-52; 6RP 5. On May 10, 2013, Navarro filed a notice of appeal. CP 60-66.

2. SUBSTANTIVE FACTS.

a. Facts Of The Case.

On September 9, 2012, Frederick and Sue Ayres awoke to their son Colin banging on their bedroom door and yelling they had been robbed. 4RP 9, 37. The Ayres discovered many items missing from their ransacked Bellevue home, including numerous types of electronics,² a handmade leather bag,³ and a purse containing credit cards and a Bluetooth headset device. 4RP 8, 10-14, 38-40. Bellevue Police took a report of the missing items. 3RP 148, 155-56.

During the burglary investigation, Bellevue Police Detective Derek Carter and Officer Gregory Oliden were led to Navarro's home in SeaTac, Washington.⁴ 3RP 83, 85, 160-62. On

² These electronics included two Olympus digital cameras, a desktop computer, three laptops, four iPads, three cell phones, and an iPod. 4RP 12-13.

³ The prosecutor indicated the custom leather bag from France or Italy was valued at \$3400. 3RP 69.

⁴ Navarro's co-defendant Brian Rangle, who was arrested for the burglary of the Ayres' home, told police Navarro purchased some of the stolen property. CP 1-3; 1RP 108. This information was elicited at the CrR 3.5 hearing, but not in front of the jury.

September 28, 2012, police conducted surveillance of Navarro's home and saw Navarro leave it. 3RP 48, 85-86, 162. Navarro was arrested at a local convenience store and transported back to a location close to his home. 3RP 50, 86-87.

Navarro was read his Miranda rights and agreed to speak with Officer Oliden. 3RP 88, 163. Oliden told Navarro that the police were there to recover some stolen property at his house and asked him where the property was. 3RP 89. Navarro asked Oliden what property specifically he was looking for. Id. When Oliden then listed property, Navarro would tell Oliden exactly where it was inside his home. Id. Navarro said that a friend named "Luis" and another person had brought him electronics and the items were inside a little room that was attached to his house. 3RP 89-90, 167.

Navarro provided a description of "Luis" and indicated he brought Navarro items on occasion. 3RP 91. Based on the physical description provided, police believed "Luis" to be Brandon Rangle, the person arrested for the burglary of the Ayres' home. 3RP 91, 177. Navarro said that he paid "Luis" \$200 for two cameras, a laptop, and an iPod. 3RP 92, 93, 168. Navarro said he pawned the iPod, sold the laptop to another friend, and had the two

cameras up on a shelf inside of the little room that he described.
3RP 93-94, 169.

Police asked Navarro where they had gotten the property that they brought him. 3RP 92. Navarro responded that he did not know where the property came from, but said “everyone knows it was stolen.” 3RP 93, 166. When asked how, Navarro said they didn’t tell him exactly where it came from, but repeated multiple times that everyone knew it was stolen. 3RP 93.

Officer Olliden and Detective Carter then executed the search warrant and went into the small room Navarro had described. 3RP 85, 94, 170. They found numerous pieces of the Ayres’ property. 3RP 96-97. Among the items recovered were the Ayres’ expensive leather bag, the Bluetooth headset, the two cameras which still contained a memory card with their pictures, and prescription pill bottles of Attention Deficit Disorder medication made out to their youngest son.⁵ 3RP 96-97, 113, 171; 4RP 15-23, 40-41. The property was in the location where Navarro said it would be. 3RP 103. Officer Olliden and Detective Carter also

⁵ At trial, the Ayres identified these items found in Navarro’s home as belonging to them. 4RP 15-23, 40-41.

found a social security card belonging to a person by the name of "Betty Gordon." 3RP 97-98, 172.

After searching the room, Navarro was transported back to Bellevue City Hall and again agreed to speak with Officer Olliden, this time during a recorded interview. 3RP 118, 175. During this interview, Navarro indicated that "maybe" he knew the property was stolen and said that he paid \$180 and marijuana for the items. 3RP 128-29.

Law enforcement subsequently contacted Betty Gordon to inform her that they found her social security card in Navarro's house. 4RP 30. At trial, Gordon identified one of the items that was taken from Navarro's home as her social security card. 3RP 106; 4RP 32. Gordon testified that her purse containing her social security card had been taken from her car in September, 2012. 4RP 31. She had not reported the incident to police at the time because she did not believe it contained anything of value. 4RP 32.

The Ayres and Gordon each testified Navarro was not permitted to sell or be in possession of their belongings. 4RP 25, 34, 43-44.

C. ARGUMENT

**1. SUFFICIENT INDEPENDENT EVIDENCE
CORROBORATES THE CRIME CHARGED.**

Navarro asserts that, independent of his statements, there was insufficient evidence to establish the *corpus delicti* of trafficking stolen property. Navarro's claim should be rejected. The victim's loss, the physical evidence found at Navarro's home, and the circumstances around how the property was found help to establish the *corpus delicti* of the crime. The evidentiary record, independent of Navarro's statements, supports the reasonable inference that trafficking in stolen property occurred.

a. Additional Facts Relevant To Motion.

After the State rested its case, Navarro moved to dismiss the first-degree trafficking stolen property charge "on sort of a corpus theory." 4RP 59. Navarro contended that the State had not established the *corpus delicti* because the State presented only Navarro's own admissions made during the investigation to prove that he intended to sell the stolen property. 4RP 59-60.

The trial court denied Navarro's motion. 4RP 63. In so doing, it noted that "the corpus delecti rule doesn't indicate that the

State has to have sufficient evidence for conviction absent the confession or the statement itself," and that the whole point of the *corpus delicti* rule was to avoid the prospect of false confessions. 4RP 62. Because the State had sufficient corroboration of the commission of the crime, the trial court ruled the *corpus delicti* rule was not violated and the defendant's own statements could be used. 4RP 62-63.

- b. The State Presented Sufficient Evidence, Independent Of Navarro's Admissions, To Prove The *Corpus Delicti* Of Trafficking Stolen Property.

Before a defendant's remarks can be considered by the finder of fact, the State must first establish the *corpus delicti*⁶ of the crime. State v. Hummel, 165 Wn. App. 749, 758, 266 P.3d 269 (2012). To establish *corpus delicti*, the State must present independent evidence that corroborates the defendant's confession to having committed the crime charged. State v. Brockob, 159 Wn.2d 311, 328, 150 P.3d 59 (2006). The purpose of the *corpus delicti* rule is to prevent a defendant from being unjustly convicted

⁶ *Corpus delicti* literally means "body of the crime" and prevents convictions for crimes that never occurred. State v. Aten, 130 Wn.2d 640, 655, 927 P.2d 210 (1996).

based on a confession alone. State v. Dow, 168 Wn.2d 243, 249, 227 P.3d 1278 (2010). The doctrine stems from judicial concerns that a defendant's confession might be misconstrued, coerced, or false, and that the jury might accept it uncritically. State v. Aten, 130 Wn.2d 640, 656-57, 927 P.2d 210 (1996).

The State must produce *prima facie* evidence that the crime described by the defendant actually occurred. Id. at 656. The independent evidence may be either direct or circumstantial and need not establish *corpus delicti* beyond a reasonable doubt, or even by a preponderance of the evidence. Id. Rather, the evidence is sufficient if it supports a "logical and reasonable inference" of the facts sought to be proved, and is inconsistent with a hypothesis of both guilt and innocence.⁷ Aten, 130 Wn.2d at 656; Brockob, 159 Wn.2d at 328-29. In analyzing whether there is sufficient evidence to support the *corpus delicti* of the crime, a reviewing court assumes the truth of the State's evidence and all reasonable inferences from it in a light most favorable to the State. Aten, 130 Wn.2d at 658; Brockob, 159 Wn.2d at 328.

⁷ Washington courts have declined to adopt the more relaxed federal standard, which requires only that the independent corroborating evidence "tend to establish the trustworthiness of the confession." State v. Aten, 130 Wn.2d 640, 662-63, 927 P.2d 210 (1996); Opper v. United States, 348 U.S. 84, 92, 75 S. Ct. 158, 99 L. Ed. 101 (1954).

To establish *corpus delicti* in this case, the State had to produce *prima facie* evidence that Navarro knowingly trafficked in stolen property. RCW 9A.82.050(1); CP 32. "Traffic" means to sell, transfer, distribute, dispense, or otherwise dispose of stolen property to another person, or to buy, receive, possess, or obtain control of stolen property with intent to sell, transfer, distribute, dispense, or otherwise dispose of the property to another person. RCW 9A.82.010(19); CP 28.

Here, the trial court properly found that the State satisfied its burden under *corpus delicti*. The court applied the correct standard and indicated that the use of the defendant's own statements is permitted "so long as you have sufficient corroboration of the crime." 4RP 62. Viewing the evidence in the light most favorable to the State and drawing all reasonable inferences therefrom, the State produced sufficient evidence to establish a *prima facie* case of trafficking stolen property.

The Ayres' valuables were stolen from their home. 4RP 8, 10-14, 38-40. They each testified that they did not know Navarro and did not give him permission to obtain or possess their valuables. 4RP 25, 43-44. Navarro's co-defendant told police Navarro purchased some of the property stolen from the Ayres'

home. 1RP 108. Much of their stolen property was later discovered at Navarro's home. 3RP 85, 94, 96-97, 170. The items belonging to the Ayres that Navarro had obtained, such as the Bluetooth headset, digital cameras, expensive leather bag, and prescription medication, were all valuable items. These items were found in a room containing other stolen property; a room connected to Navarro's house, under Navarro's control, and to which Navarro led the officers after they asked about stolen property. 3RP 89-90, 97-98, 169-70, 172-73. That room was small, messy, chaotic, and disconnected from the house so that one could not enter the room from the house. 3RP 94-96, 170-71.

On appeal, this Court must consider the evidence in the light most favorable to the State and draw all reasonable inferences therefrom. Brockob, 159 Wn.2d at 328. Viewing the evidence in the light most favorable to the State, a reasonable inference that could be drawn from Navarro having a messy assortment of stolen property co-located together in a small room detached from the main part of the house is that this is where he stashed his loot out of the sight of those in the house until those goods could be sold or otherwise dispensed or disposed of. Indeed, Navarro did dispose of the stolen prescription pill bottles in that room. 3RP 106-07.

A Bluetooth headset, prescription pills, an expensive leather bag, and digital cameras are exactly the type of valuable, marketable items that one who resold stolen property would want to obtain. The fact that these items were obtained for resale can reasonably be inferred, not only from the types, value, and location of the items, but also from the fact that the two Olympus cameras Navarro obtained were nearly identical. 4RP 13. It is not reasonable to infer that Navarro was simply a collector of fine cameras, expensive leather bags, or somebody else's medications.

When drawing all reasonable inferences from the State's evidence in a light most favorable to the State, the above evidence supports a logical and reasonable deduction of the facts to be proved, even without Navarro's confession. RCW 9A.82.050(1). This logical and reasonable deduction was all that the State was required to prove in order to allow Navarro's admissions to be considered. Given that only *prima facie* evidence is needed, there was enough independent evidence of Navarro's confession to establish the *corpus delicti* of trafficking stolen property.

Nevertheless, Navarro argues that the State failed to establish the *corpus delicti* of trafficking stolen property claiming insufficient evidence to prove intent to traffic the stolen property.

Navarro claims “[w]ithout [his] statements, the State cannot prove the charge.” App. Br. at 7. However, as noted by the trial court when denying Navarro’s *corpus delicti* motion, the State doesn’t need to establish every element of the offense in order to utilize the confession so long as there is sufficient corroboration that the crime occurred. 4RP 62-63; State v. Smith, 115 Wn.2d 775, 783, 801 P.2d 975 (1990) (In an attempted first degree murder case, *corpus delicti* rule did not require that the State prove, absent defendant’s confession, that murder had been attempted); State v. Burnette, 78 Wn. App. 952, 957, 904 P.2d 776 (1995) (*Corpus delicti* rule did not require State to establish underlying robbery in order to establish the *corpus delicti* of a felony murder charge).

For example, in State v. Angulo, 148 Wn. App. 642, 653, 200 P.3d 752 (2009), Division III of this Court underscored that corroboration of a defendant’s incriminating statement does not require proof of all elements of the charged offense, for purposes of establishing the *prima facie* case required by the *corpus delicti* rule. Angulo was convicted of two counts of first-degree rape of a child after his confession to the offenses was related to a jury. Id. at 645-46. At trial, the child victim’s testimony had described behavior that would constitute molestation or attempted rape. Id. On

appeal, Angulo claimed that his confession was wrongly admitted into evidence due to his counsel's error because there was no independent proof of penetration, the element distinguishing rape from molestation, so the charged offense was never established. Id. at 647.

However, the Angulo court found that the child's testimony was sufficient corroboration to permit the admission of Angulo's statement that he had succeeded in achieving penetration, where both statements referred to the same charged incidents, which incidents formed the bases for the charges. Id. at 656. In determining that not all of the elements had to be proved to satisfy the *corpus delicti* rule, the Court underscored that the purpose of the rule is to safeguard against jury consideration of incriminating statements that are false. Id. at 654. The Court also noted:

The evidentiary *corpus delicti* rule involves not a question of *which* crime was committed, but *whether* one was committed. The rule was not designed as a method of distinguishing one crime from another. Rather it is a safeguard to ensure that an incriminating statement relates to an actual offense.⁸

Id. at 656-57 (emphasis in the original).

⁸ Brockob confirms that the crime involved must be the one charged. The corroboration and a defendant's incriminating statement must relate to the same charged incident. Brockob, 159 Wn.2d at 328; Angulo, 148 Wn. App. at 657.

In arguing that the State has not established *corpus delicti*, Navarro quotes State v. Dow for the proposition that the purpose of the rule is “to ensure that other evidence supports the defendant’s statement and satisfies the elements of the crime.” Dow, 168 Wn.2d at 249. However, his reliance on that case is misplaced. See Hummel, 165 Wn. App. at 763-66. As noted above, independent evidence need not prove each element of the crime beyond a reasonable doubt.

In Dow, the Washington Supreme Court discussed the judicially-created *corpus delicti* rule, but the case actually turned on the applicability of RCW 10.58.035. Dow was charged with first degree child molestation. Id. at 247. The victim was a three-year-old child, and the State acknowledged she was too young to testify. Id. Dow and the child were the only people present at the time of the alleged offense, and the State conceded there was no evidence independent of Dow’s statements to the police that the crime occurred. Id. The State nevertheless argued that Dow’s statements were trustworthy and should be admitted under RCW 10.58.035. Id. at 254. That statute allowed a defendant’s statements into evidence even where independent evidence of the

crime was absent, so long as certain statutory indications of trustworthiness of the statements were present. RCW 10.58.035.

Dow's trial court declined to admit the statements and dismissed the case. The Supreme Court affirmed dismissal, holding that even if Dow's statements were trustworthy and should have been admitted, RCW 10.58.035 pertained "only to admissibility" and did not relieve the State of the burden of presenting sufficient evidence independent of a defendant's confession to support a conviction. *Id.* at 253-54. Given the State conceded there was no corroborating evidence independent of Dow's statements, the Court held the *corpus delicti* was not satisfied.

In reaching this conclusion, the Supreme Court also stated: "[T]he State must still prove every element of the crime charged by evidence independent of the defendant's statement."⁹ *Id.* at 254. Navarro relies on this premise to suggest that, instead of needing to have independent evidence to support a logical and reasonable deduction of the facts to be proved, the State must now prove every

⁹ This statement has the same premise as the one cited by Navarro, specifically that *corpus delicti* requires proof of the elements without the defendant's admissions. See also supra; *Dow*, 168 Wn.2d at 249.

element of the charged crime. However, Navarro takes this statement out of context.

First, the sentence was entirely unnecessary to resolve Dow. It was undisputed in Dow that there was no evidence other than the defendant's statements to establish that the charged crime had been committed. Thus, the Court had no reason to analyze or elaborate on the quantum of proof necessary to establish the *corpus delicti* because there was none, and the Court's statement on this issue was "wholly incidental" to the decision. Statements made in the course of the Supreme Court's reasoning that are "wholly incidental" to the basic decision constitute dictum and do not bind the appellate court. See Burress v. Richens, 3 Wn. App. 63, 66, 472 P.2d 396 (1970).

Second, if the cited statement is to be taken at face value, it directly contradicts, without explicitly overruling or distinguishing, decades of supreme court and court of appeals decisions holding that proof of identity, while a necessary element to be proved at trial, need not be proved to establish the *corpus delicti* of the

charged crime.¹⁰ Neither Navarro nor the Dow court cite to any case holding that every element of the charged crime need to be proved to establish the *corpus delicti*. Moreover, in Brockob, the Washington Supreme Court explicitly stated: “The independent evidence need not be sufficient to support a conviction, but it must provide *prima facie* corroboration of the crime described in a defendant’s incriminating statement.” Brockob, 159 Wn.2d at 328. Nowhere in Brockob did the Court indicate that the State was required to prove every element of the charged crime to establish the *corpus delicti*.

¹⁰ See, e.g., State v. Gates, 28 Wash. 689, 695, 69 P. 385 (1902) (in manslaughter case, *corpus delicti* requires only “the existence of a certain act or result forming the basis of the criminal charge; and... the existence of criminal agency as the cause of this act or result”); State v. Richardson, 197 Wash. 157, 163, 84 P. 699 (1938) (in first degree murder case, *corpus delicti* requires only existence of act forming basis of criminal charge and criminal agency); State v. Lung, 70 Wn.2d 365, 371, 423 P.2d 72 (1967) (in second degree homicide case, *corpus delicti* requires only “fact of death and... a causal connection between the death and a criminal agency, but the *corpus delicti* does not require proof of a causal relation between the death and the accused”); State v. Mason, 31 Wn. App. 41, 47-48, 639 P.2d 800 (1982) (in first degree assault case, this Court specifically rejected the idea that *corpus delicti* requires all independent proof of all elements such as mens rea: “defendant’s argument is that all the material elements of the statutory offense are necessary to establish the *corpus delicti*. We disagree and decline to impose such a rule”); State v. Rooks, 130 Wn. App. 787, 802, 125 P.3d 192 (2005) (in second degree murder case, *corpus delicti* required only “the fact of death and... a causal connection between the death and a criminal act”).

Given the record and the case law, the trial court properly denied Navarro's motion to dismiss based on *corpus delicti*.

2. THE TRIAL COURT'S PEREMPTORY CHALLENGE PROCESS PRESERVED THE FOUNDATIONAL PRINCIPLE OF AN OPEN JUSTICE SYSTEM.

Navarro contends that the trial court violated his constitutional right to a public trial by not considering or articulating a Bone-Club¹¹ analysis before selecting peremptory challenges through a "secret ballot method" and that, because of the manner in which peremptory challenges were made, it was not readily apparent to the jurors or the public which party made which peremptory strike. App. Br. at 15. This argument should be rejected. The public trial right did not attach to the identity of the lawyer exercising any given peremptory challenge, because the identity of the challenging lawyer does not implicate the core values of the public trial right. Therefore, Navarro has not established that a closure or public trial right violation occurred.

¹¹ State v. Bone-Club, 128 Wn.2d 254, 256, 906 P.2d 325 (1995).

a. Additional Relevant Facts.

On the first day of trial, the trial court explained the way in which the parties would select peremptory challenges. 1RP 188.

[T]he way I do peremptories is... I'll fill out a notepad and the first page will say first peremptory and there will be a plaintiff sign for the prosecution and a delta for defense. The State will write down the juror number in the box that they wish to excuse as the first peremptory, hand it over to you, counsel, and you'll write down your first peremptory challenge. And then [the bailiff] will give the pad to me, I'll excuse those two people in numerical order so nobody knows which side didn't want them on the jury. I'll kick them both out, replace them with the next two folks from the benches. And we'll do that until we've exhausted the peremptory challenges or until both of you write pass, which indicates you're happy with who's in the box.... And the benefit to doing it that way is it allows me to do them in numerical order so that it doesn't taint any of the jurors, they don't know who bumped them. It allows us to do it in open court without having each one of you say I'd like to bump number five...and it just works smoother, I think.

1RP 188-89.

After the court's explanation, the prosecutor asked whether the note on which the peremptories would be written was going to be filed. 1RP 190. The judge responded that a record would be kept of the peremptories because the clerk would write them down for the clerk's records. 1RP 190-91. The judge also indicated that he would keep the note on which the challenges were written and

then throw it out at the end of trial. Id. Which alternates were excused and by whom was not reflected in the clerk's minutes or elsewhere in the record.¹² CP 68-78. Navarro was present for the exercise of peremptory challenges, during which time the courtroom was open to the public.

When instructing the parties on how to exercise "for cause" challenges, the judge indicated that those would be discussed outside the presence of the jury on the record. 1RP 187. The trial court added:

I don't do sidebars anymore. The latest court opinions make me nervous about saying anything without everybody in the world being present. So, we'll do it that way so that we don't taint the jury by having the discussion, but it's openly vetted.

Id.

- b. Experience And Logic Show That Navarro's Public Trial Rights Were Not Implicated By The Peremptory Challenge Process Used.

Whether the constitutional right to a public trial has been violated is a question of law, subject to de novo review on direct appeal. Bone-Club, 128 Wn.2d at 256. A criminal defendant's right

¹² Voir dire questioning and the rest of the jury selection process was not transcribed in this case. 2RP 7.

to a public trial is found in article I, section 22 of the Washington State Constitution and the Sixth Amendment to the United States Constitution, both of which provide a criminal defendant with a “public trial by an impartial jury.” Additionally, article I, section 10 of Washington’s Constitution provides that “[j]ustice in all cases shall be administered openly,” granting both the defendant and the public an interest in open, accessible proceedings. Seattle Times Co. v. Ishikawa, 97 Wn.2d 30, 36, 640 P.2d 716 (1982). There is a strong presumption that courts are to be open at all stages of trial. State v. Sublett, 176 Wn.2d 58, 70, 292 P.3d 715 (2012). The right to a public trial ensures a fair trial, reminds the prosecutor and judge of their responsibilities to the accused and the importance of their functions, encourages witnesses to come forward, and discourages perjury. State v. Brightman, 155 Wn.2d 506, 514, 122 P.3d 150 (2005).

However, the public trial right is not absolute; a trial court may close the courtroom under certain circumstances. State v. Momah, 167 Wn.2d 140, 148, 217 P.3d 321 (2009); State v. Strode, 167 Wn.2d 222, 226, 217 P.3d 310 (2009). The public trial right may be overcome to serve an overriding interest based on findings that closure is essential and narrowly tailored to preserve

higher values. Press-Enterprise Co. v. Superior Court of California, 464 U.S. 501, 510, 104 S. Ct. 819, 78 L. Ed. 2d 629 (1984) (Press I). Additionally, trial courts have wide discretion to manage the voir dire processes, and relief will be granted on appeal only if the defendant can show error and prejudice. State v. Davis, 141 Wn.2d 798, 825, 10 P.3d 977 (2000).

The first step in determining whether a defendant's constitutional right to a public trial was violated is to determine whether a closure occurred. Sublett, 176 Wn.2d at 71. A closure of a trial "occurs when the courtroom is completely and purposefully closed to spectators so that no one may enter and no one may leave"; however, not every interaction between the court, counsel, and defendants will implicate the right to a public trial, or constitute a closure if the courtroom is closed to the public during the interaction. Id. (citing State v. Lormor, 172 Wn.2d 85, 93, 257 P.3d 624 (2011)).

If, in experience and logic, the core values of the public trial right are implicated by a particular proceeding, then the public trial right attaches to that proceeding. Press-Enterprise Co. v. Superior Court of California, 478 U.S. 1, 8-10, 106 S. Ct. 2735, 92 L. Ed. 2d 1 (1986) (Press II). The first part of the test, the experience prong,

asks “whether the place and process have historically been open to the press and general public.” Id. at 8. The second part of the test, the logic prong, asks “whether public access plays a significant positive role in the functioning of the particular process in question.” Id. If the answer to both is yes, the public trial right attaches. Id. at 7-8.

If the public trial right attaches, the trial court, before closing the proceeding to the public, is required to weigh the five Bone-Club criteria and enter specific findings on the record.¹³ Bone-Club, 128 Wn.2d at 258-59. If it is determined upon appeal that a closure that triggered the public trial right occurred at trial, the court then looks to whether the trial court properly conducted a Bone-Club analysis before closing the courtroom. If the trial court failed to do so, then a per se prejudicial public trial violation has occurred, even where the defendant failed to object at trial. State v. Easterling, 157 Wn.2d 167, 181, 137 P.3d 825 (2006); In re Pers. Restraint of Orange, 152 Wn.2d 795, 814, 100 P.3d 291 (2004).

¹³ Those five criteria are: (1) the proponent of closure must show a compelling interest, and if based on anything other than defendant's right to a fair trial, must show serious and imminent threat to that right; (2) anyone present when the closure motion is made must be given opportunity to object; (3) the least restrictive means available for protecting the threatened interests must be used; (4) the court must weigh the competing interests of the proponent of the closure and the public; and (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.

The jury selection process is presumptively open to the public because, “[T]he process of juror selection...is itself a matter of importance, not simply to the adversaries, but to the criminal justice system.” In re Orange, 152 Wn.2d at 804 (quoting Press-Enterprise Co., 464 U.S. at 505). The Washington Supreme Court has stressed the necessity of public voir dire. Indeed, in State v. Momah, the court noted that voir dire is a significant aspect of trial because it allows parties to secure their article I, section 22 right to a fair and impartial jury through juror *questioning*. 167 Wn.2d at 152 (emphasis added).

The purpose and general process of jury selection in criminal trials, including voir dire examination as well as for cause and peremptory challenges, is governed by superior court criminal rule 6.4. With respect to how peremptory challenges are taken, this rule provides:

After prospective jurors have been passed for cause, peremptory challenges shall be exercised alternately first by the prosecution then by each defendant until the peremptory challenges are exhausted or the jury accepted. Acceptance of the jury as presently constituted shall not waive any remaining peremptory challenges to jurors subsequently called.

CrR 6.4(e)(2). The rule does not require that the jury and public must be informed as to which party struck which prospective juror.

There is nothing in experience which would require public awareness as to the identity of the lawyer challenging any given juror. Navarro has cited no case, rule, or practice aid that requires the exercise of peremptory challenges in open court, nor that they be exercised verbally. Division III of this Court recently found that, in over 140 years of cause and peremptory challenges in Washington, “there is little evidence of the public exercise of such challenges, and some evidence that they are conducted privately.” State v. Love, 176 Wn. App. 911, 919, 309 P.3d 1209 (2013). Thus, history does not compel the process Navarro argues for.

Under the logic prong, a trial or reviewing court must consider whether openness will “enhance both the basic fairness of the criminal trial and the appearance of fairness so essential to public confidence in the system.” Id. at 508. Relevant to the logic inquiry are the overarching policy objectives of having an open trial such as fairness to the accused ensured by permitting public scrutiny of proceedings. Richmond Newspapers, Inc. v. Virginia, 448 U.S. 555, 572, 100 S. Ct. 2814, 65 L. Ed. 2d 973 (1980).

As it pertains to this case, the logic prong of the test is whether disclosing to jurors and any spectators which lawyer excused which prospective juror increases the fairness of the jury

selection process. The fairness of this process would not be enhanced by telling the jury and any spectators which lawyer struck which jurors.¹⁴ There is no logical purpose of telling jurors and any spectators which party excused which jurors, nor any perceivable benefit related to the public trial right that would flow from it. There is no reason whatsoever to believe that the process used in selecting peremptory challenges diminished the prosecutor's or judge's understanding of their responsibility to the accused and the importance of their functions.

Furthermore, there are numerous considerations that make the peremptory challenge process used in this trial just as fair as in a case where the prosecutor and defense counsel state their challenges aloud on the record. As the trial court explained on the record, the process the court employed for peremptory challenge selection allows it to be done in open court, but avoided tainting the jurors since they did not know who challenged them. 1RP 188-89. Any members of the jury, the press, or the public who may have been present when the court explained its procedures with respect

¹⁴ However, it is possible that fairness may be enhanced by *not* sharing this information with the jurors. A party's decision about how to exercise their peremptory challenges is a subjective determination made at the party's discretion without on-the-record discussion about the excused jurors' qualifications to serve impartially. Some judges feel this process protects lawyers from ill-will that may be engendered by their challenges.

to this portion of the jury selection process could see that Navarro was being treated in an open and fair manner.

Additionally, since the parties were both aware of which jurors were being stricken by the other party, each still had the opportunity to object to any perceived discriminatory motive behind exercised peremptory challenges. RCW 2.36.080; Batson v. Kentucky, 476 U.S. 79, 96-98, 106 S. Ct. 1712, 90 L. Ed. 2d 69 (1986); State v. Burch, 65 Wn. App. 828, 834, 830 P.2d 357 (1992). Not having jurors or spectators know which party challenged which jurors did not compromise either party's ability to make a Batson challenge, another factor protecting the fairness of the proceedings.

Because Navarro has not shown that which party challenged which prospective juror is information that has historically been open to the press and general public, nor any showing that the peremptory challenge selections of the lawyers would play any "significant positive role" in the jury selection process, this court should find that there was no courtroom closure that implicated Navarro's public trial rights. Since a closure that triggered the public trial right did not occur, the public trial right does not attach to the particular procedure used for exercising peremptory challenges

and the Bone-Club factors did not have to be considered by the court.

While Navarro analogizes this case to State v. Jones, 175 Wn. App. 87, 303 P.3d 1084 (2013), he provides no governing authority for his assumption that a closure occurred. Moreover, Jones is easily distinguished. In Jones, a court recess off the record during which the trial court clerk randomly selected four alternate jurors constituted a “closure” that implicated Jones’ constitutional right to a public trial on charges for attempted murder and a related firearms offense. Id. at 95, 101-03. The clerk conducted the drawing during an afternoon court recess, which was announced to Jones, counsel, and the jurors after it had occurred. Id. at 102. Thus, the alternate juror drawing occurred off the record and outside of the trial proceedings, thus constituting a closure. Id.

Navarro is distinguishable from Jones. As an initial matter, while Jones deals with the selection of alternate jurors, Navarro deals with the selection of peremptory jurors and, specifically, whether not disclosing the identity of the challenging attorney can constitute a closure. While the Jones court found that the procedure for selecting alternate jurors historically occurs as part of voir dire in open court, Id. at 101, the same can not be said for

disclosing which attorney challenged which prospective juror. Furthermore, here, unlike in Jones, the selection of peremptory challenges occurred in open court and was part of the trial proceedings. Navarro, counsel, and the jurors were present, as well as any spectators who wanted to observe. Anyone who wanted to hear which jurors were being excused could do so. Moreover, in Jones, there was no way to tell how the drawing was performed. Id. at 102. However, in Navarro's case, the judge gave explicit instructions both as to how and why the peremptory challenge process would occur as it did.

Navarro also cites State v. Slerf, 169 Wn. App. 766, 774 n.11, 282 P.3d 101 (2012), review granted in part, 176 Wn.2d 1031 (2013), for the legal concept that, "a closure occurs even when the courtroom is not physically closed if the proceeding at issue takes place in a manner that renders it inaccessible to public scrutiny." App. Br. at 15. However, Slerf is easily distinguished.

In Slerf, the Court of Appeals (Division II) reversed Slerf's conviction, holding that an in-chambers conference during which the court and counsel discussed jury questionnaires specific to the case and the court dismissed four jurors off the record violated Slerf's right to a public trial. 169 Wn. App. at 778-79. The court

found that, as in State v. Irby,¹⁵ the questionnaires were part of jury selection because they dealt with publicity from Slert's earlier trials and thus were "designed to elicit information with respect to [the jurors'] qualifications to sit" as jurors in Slert's particular case, as opposed to inquiring about the jurors' general qualifications.

170 Wn.2d at 882 (quoting Irby Clerk's Papers at 1234). Because the record indicated that the in-chambers conference involved the dismissal of four jurors for case-specific reasons based at least in part on the jury questionnaires, the court held that the conference and dismissals were part of the jury selection process to which the public trial right applied. Id. at 774.

The court added that, "if a side-bar conference was used to dismiss jurors, the *discussion* would have involved dismissal of jurors for case-specific reasons and, thus, was a portion of jury selection held wrongfully outside Slert's and the public's purview." Id. at n.11(emphasis added). Thus, in Slert, as in Irby, the Court

¹⁵ In State v. Irby, the Washington Supreme Court held that an email exchange where trial court and counsel *discussed* jury questionnaire responses and dismissed seven potential jurors for cause implicated the defendant's trial rights because the email exchange "did not simply address the general qualifications of 10 potential jurors, but instead tested their fitness to serve as jurors in [Irby's] particular case." 170 Wn.2d 874, 882, 246 P.3d 796 (2011). The court held that the email exchange was a portion of jury selection and that the email exchange violated Irby's right under the federal and state constitutions to be present at critical stages of his trial. Id. at 882.

held a violation of the public trial right occurred when there was *discussion* regarding the juror's qualifications to sit on the specific case at hand that the defendant and public was not privy to. Id., Irby, 170 Wn.2d at 882.

The present case is entirely distinguishable from both Slerf and Irby. Here, the peremptory challenge procedure used occurred in open court and involved no discussion whatsoever, let alone any discussion designed to determine jurors' individual fitness for serving on Navarro's particular jury. The defendant, jury, and any spectators were present during the process. The challenged jurors were dismissed on the record and anyone who wanted to know which juror was struck could readily observe this information.

Navarro claims "[m]embers of the public are no more able to approach the bench and listen to an intentionally private jury selection process than they are able to enter a locked courtroom, access the judge's chambers, or participate in a private hearing in a hallway." App. Br. at 16. However, those hypothetical scenarios are irrelevant as none of them occurred here. We know that no discussion occurred as the parties made their peremptory challenges in light of the judge making clear on the record that he does not permit sidebar discussions and does not feel comfortable

with anyone making statements “without everyone in the world being present.” 1RP 187.

No closure existed in Navarro’s trial since it was conducted in an open courtroom where public attendance was never prohibited. Therefore, this case should be analyzed as a matter of courtroom operations, where the trial court judge possesses broad discretion. Lormor, 172 Wn.2d at 93. In addition to its inherent authority, the trial court, under RCW 2.28.010, has the power “to provide for the orderly conduct of proceedings before it,” and “[t]o control, in furtherance of justice, the conduct of its ministerial officers, and all other persons in any manner connected with a judicial proceeding before it, in every matter appertaining thereto.” RCW 2.28.020(3), (5); Lormor, 172 Wn.2d at 93-94, n.4. The trial court acted well within its considerable discretion to manage courtroom proceedings in having the attorneys write down their peremptory challenges and then reading them aloud on the record in numerical order, for the reasons articulated by the trial court.

The trial court in Navarro’s case did not violate his public trial rights because, under considerations of experience and logic, those rights were not implicated by the peremptory challenge process used. The court was not required to conduct a Bone-Club analysis

because no closure existed at any point of the jury selection process. Therefore, the trial court protected the foundational principle of an open justice system.

D. CONCLUSION

For the foregoing reasons, the State respectfully asks this Court to affirm Navarro's conviction and sentence.

DATED this 18th day of March, 2014.

Respectfully submitted,

DANIEL T. SATTERBERG
King County Prosecuting Attorney

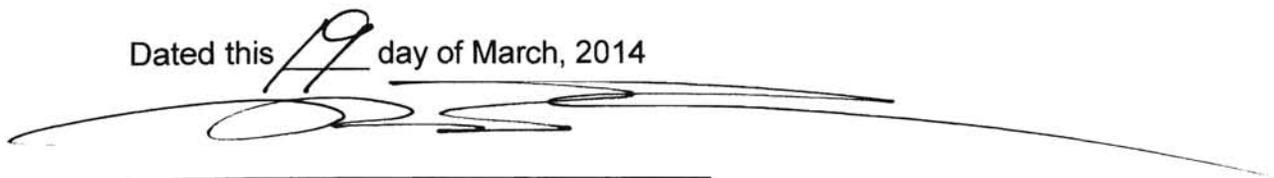
By: Grace Ariel Wiener
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Certificate of Service by Mail

Today I deposited in the mail of the United States of America, postage prepaid, a properly stamped and addressed envelope directed to Andrew Zinner, the attorney for the appellant, at Nielsen, Broman & Koch, PLLC, 1908 East Madison Street, Seattle, WA 98122, containing a copy of the Brief of Respondent, in STATE V. JESUS GASPARD NAVARRO, Cause No. 70359-5-I, in the Court of Appeals, Division I, for the State of Washington.

I certify under penalty of perjury of the laws of the State of Washington that the foregoing is true and correct.

Dated this 19 day of March, 2014

A large, stylized handwritten signature in black ink, appearing to read 'Bora Ly', is written over a horizontal line. The signature is fluid and cursive, with a long horizontal stroke extending to the right.

Bora Ly
Done in Seattle, Washington