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COURT OF APPEALS  
DIVISION II

NO. 39096-5-II

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COURT OF APPEALS, DIVISION II BY Ca STATE OF WASHINGTON  
DEPUTY

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STATE OF WASHINGTON,

Respondent,

vs.

KEVIN R. BOWEN,

Appellant,

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APPEAL FROM THE SUPERIOR COURT  
FOR MASON COUNTY  
The Honorable James B. Sawyer II, Judge  
Cause No. 08-1-00262-4

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BRIEF OF APPELLANT

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A. ASSIGNMENTS OF ERROR

01. The trial court erred by denying Bowen his constitutional right to an open public trial by conducting portions of voir dire in chambers without engaging in a Bone-Club analysis on the record.
02. The trial court erred in permitting Bowen to be represented by counsel who provided ineffective assistance by failing to object to the court conducting portions of voir dire in chambers without engaging in a Bone-Club analysis on the record.
03. The trial court erred in not taking count I from the jury for lack of sufficiency of the evidence that Bowen possessed the methamphetamine found in the pickup truck.
04. The trial court erred in not taking count II from the jury for lack of sufficiency of the evidence that Bowen possessed the firearm found in the pickup truck.

B. ISSUES PERTAINING TO ASSIGNMENTS OF ERROR

01. Whether the trial court erred by denying Bowen his constitutional right to an open public trial by conducting portions of voir dire in chambers without engaging in a Bone-Club analysis on the record? [Assignment of Error No. 1].
02. Whether Bowen's counsel's failure to object to the court conducting portions of voir dire in chambers without engaging in a Bone-Club analysis on the record constituted ineffective assistance? [Assignment of Error No. 2].

03. Whether there was sufficient evidence to support Bowen's criminal conviction for unlawful possession of methamphetamine? [Assignment of Error No. 3].
04. Whether there was sufficient evidence to support Bowen's criminal conviction for unlawful possession of a firearm? [Assignment of Error No. 4].

C. STATEMENT OF THE CASE

01. Procedural Facts

Kevin R. Bowen (Bowen) was charged by information filed in Mason County Superior Court on June 16, 2008, with unlawful possession of methamphetamine, count I, and unlawful possession of a firearm in the first degree, count II, contrary to RCWs 69.50.4013(1) and 9.41.040(1)(a). [CP 46-47].

No pre-trial motions were filed nor heard regarding either a CrR 3.5 or CrR 3.6 hearing. Bowen stipulated that he had previously been convicted of a serious offense. [RP 14, 93].

Trial to a jury commenced on September 17, the Honorable James B. Sawyer II presiding. Neither exceptions nor objections were taken to the jury instructions. [RP 139-40]. The jury returned verdicts of guilty as charged, Bowen was sentenced within his standard range and timely notice of this appeal followed. [CP 3-19, 22-23].

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01. Substantive Facts

On June 12, 2008, at approximately 10:30 in the morning, the police detained Bowen for trespassing, where he was driving a black pickup truck on private property in the woods. [RP 35-39, 61-63]. A search of the truck, which was registered to Bowen, produced from behind the driver's seat a plastic spoon and digital scale with a white powdery substance on it that later tested positive for methamphetamine. [RP 29, 41, 61, 64, 85-87]. An operable .38 caliber handgun was found between the bucket seats inside a nylon bag. [RP 68, 71-72].

Kathy Fultz went grocery shopping with a friend, Laverne, near the same time. "I'm pretty sure it was the 11<sup>th</sup> (of June), but I don't know. It could have been the 10<sup>th</sup>. I don't know." [RP 103]. Laverne was driving Bowen's black pickup truck, which she had borrowed from him. [RP 96]. When Fultz came out of the grocery store, "there was a guy with Laverne at the truck." [RP 97]. After the three returned to Fultz's house, Fultz got out of the truck to take the groceries she had purchased into the house. [RP 97].

I was about half way up my steps and turned around and he – the guy that was at the grocery store with Laverne was taking off in the truck.

[RP 97].

Four days after Bowen was arrested, Fultz realized that she had left her handgun in his truck. [RP 104-05]. “It fell out of my purse and I did not realize it.” [RP 97]. She had purchased the gun, which she kept in black nylon holster, from Brian Downs a day or two before Bowen was arrested. [RP 105, 108]. It had the same serial number as the gun found in Bowen’s truck. [RP 111-12].

Then 12-year-old Patience Kroop, Bowen’s niece, was with her uncle in a blue truck on the day of the incident looking for his black pickup truck in the woods, which they found. [RP 115-16, 122]. As they were leaving the area, with Kroop driving the blue truck and Bowen his black pickup, “(a)ll these cops came.” [RP 118].

In the State’s rebuttal case, Brian Downs denied that he had ever sold a firearm to Fultz, asserting that he had never owned nor sold the firearm found Bowen’s truck. [RP 132]. In the defense’s surrebuttal case, Fultz again maintained that Downs had sold her the gun, though he would not write her a receipt. [RP 136].

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D. ARGUMENT

01. THE TRIAL COURT DENIED BOWEN HIS CONSTITUTIONAL RIGHT TO AN OPEN PUBLIC TRIAL WHEN IT CONDUCTED PORTIONS OF VOIR DIRE IN CHAMBERS WITHOUT ENGAGING IN A BONE-CLUB ANALYSIS ON THE RECORD.

Before jury selection, the court, *sua sponte*, asked the parties the following question:

THE COURT: Does either party have an objection to allowing jurors to take up sensitive issues, sensitive questions, in chambers if they feel that that would be beneficial to them?

(PROSECUTOR): The State doesn't object.

(DEFENSE): Defense has no objection....

[RP 13-14].

Following a recess, the court reconvened in the presence of the parties and in absence of the jury venire.

THE COURT: - - are there any members of the public that would object to our taking up questions in the privacy of chambers? The record should reflect that there is nobody present in the courtroom to object and there are no objections being noted.

[RP 16].

After swearing in the jury venire, the court addressed the procedure for in-chambers voir dire [RP 18], declaring that if there was a

reason that any person felt he or she couldn't serve as a fair and impartial juror then that person would be permitted to explain the reason in the privacy of chambers. [SUPPLEMENTAL RP 09/17/08 2-8]. Thereafter, in the presence of the parties, the court conducted portions of voir dire of nine prospective jurors outside the courtroom in chambers. [SUPPLEMENTAL RP 09/17/08 8-20].

Both the Sixth Amendment to the United States Constitution and article I, section 22 of the Washington Constitution guarantee criminal defendants the right to a public trial. State v. Russell, 141 Wn. App. 733, 737-38, 172 P.3d 361 (2007), reviewed denied, 164 Wn.2d 1020 (2008). As well, article I, section 10 of the Washington Constitution states, "Justice in all cases shall be administered openly," thereby giving the public, in addition to the defendant, a right to open proceedings. Seattle Times Co. v. Ishikawa, Wn.2d 30, 36, 640 P.2d 716 (1982).

"(T)he right to a public trial also extends to jury selection." State v. Brightman, 155 Wn.2d 506, 515, 122 P.3d 150 (2005) (citing In re Pers. Restraint of Orange, 152 Wn.2d 795, 804, 100 P.3d 291 (2004)). A defendant's right and the public's right "serve complementary and independent functions in assuring the fairness of our judicial system. In particular, the public trial right operates as an essential cog in the

constitutional design of fair trial safeguards.” State v. Bone-Club, 128 Wn.2d 254, 259, 906 P.2d 325 (1995). And a defendant has standing to voice the public’s interest in public trials. State v. Erickson, 146 Wn. App. 146 Wn. App. 200, 205 n.2, 189 P.3d 245 (2008); State v. Duckett, 141 Wn. App. 797, 804-05, 173 P.3d 948 (2007).

To protect these rights, a trial court may properly close a portion of a trial only after (1) considering the following five requirements enumerated in Bone-Club and (2) entering specific findings on the record to justify so ruling. State v. Bone-Club, 128 Wn.2d at 258-59.

1. The proponent of closure or sealing must make some showing [of a compelling 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.
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.

id.

A trial court's failure to conduct the required Bone-Club inquiry "results in a violation of the defendant's public trial rights." State v. Brightman, 155 Wn.2d at 515-16. In such a case, the defendant need show no prejudice; it is presumed. Bone-Club, 128 Wn.2d at 261-62. Additionally, a defendant's failure to "lodge a contemporaneous objection" at the time of the exclusion does not amount to a waiver of his or her right to a public trial. Brightman, 155 Wn.2d at 514-15, 517. The remedy for such a violation is to reverse and remand for a new trial. In re Pers. Restraint of Orange, 152 Wn.2d at 814. This court reviews de novo the question of law of whether a defendant's right to a public trial has been violated. Brightman, 155 Wn.2d at 514.

Recently, in State v. Erickson, 146 Wn. App. at 211, this court held that conducting portions of voir dire in chambers amounts to a "closure" requiring Bone-Club analysis even where the court did not explicitly close the proceedings. See also this court's similar decision in State v. Heath, 150 Wn. App. 121, 127-28, 206 P.3d 712 (2009); State v. Frawley, 140 Wn. App. 73, 720, 167 P.3d 593 (2007) (Division III holding the same); but see State v. Momah, 141 Wn. App. 705, 714, 171 P.3d 1064 (2007) (Division I holding that questioning prospective jurors in chambers and jury room does not amount to "closure"), review granted, 163 Wn.2d 1012, 180 P.3d 1291 (2008).

Erickson controls in this case, as it did in this court's recent opinion in State v. Heath, 150 Wn. App. at 127-28. In Erickson, as here, without explicitly closing the courtroom, the court interviewed jurors outside the courtroom with only counsel present. And while the court here did ask an empty courtroom if any member of the public would object "to our taking up questions of privacy in chambers [RP 16]," at no time did the court engage in a meaningful and required five-part Bone-Club analysis or set forth on the record specific findings to justify so ruling. [SUPPLEMENTAL RP 09/17/08 2-20]. And since Bowen's failure to object to the process does not constitute a waiver and because prejudice is presumed, this court must reverse Bowen's convictions and remand for a new trial. State v. Brightman, 155 Wn.2d 514-15.

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02. BOWEN'S COUNSEL'S FAILURE TO OBJECT TO THE TRIAL COURT CONDUCTING PORTIONS OF VOIR DIRE IN CHAMBERS WITHOUT ENGAGING IN A BONE-CLUB ANALYSIS ON THE RECORD CONSTITUTED INEFFECTIVE ASSISTANCE.<sup>1</sup>

A criminal defendant claiming ineffective assistance must prove (1) that the attorney's performance was deficient, i.e., that the representation fell below an objective standard of reasonableness under the prevailing professional norms, and (2) that prejudice resulted from the deficient performance, i.e., that there is a reasonable probability that, but for the attorney's unprofessional errors, the results of the proceedings would have been different. State v. Early, 70 Wn. App. 452, 460, 853 P.2d 964 (1993), review denied, 123 Wn.2d 1004 (1994); State v. Graham, 78 Wn. App. 44, 56, 896 P.2d 704 (1995). Competency of counsel is determined based on the entire record below. State v. White, 81 Wn.2d 223, 225, 500 P.2d 1242 (1972) (citing State v. Gilmore, 76 Wn.2d 293, 456 P.2d 344 (1969)). A reviewing court is not required to address both prongs of the test if the defendant makes an

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<sup>1</sup> While it has been argued in the preceding section of this brief that this issue constitutes constitutional error that may be raised for the first time on appeal, this portion of the brief is presented only out of an abundance of caution should this court disagree with this assessment.

insufficient showing on one prong. State v. Tarica, 59 Wn. App. 368, 374, 798 P.2d 296 (1990).

Additionally, while the invited error doctrine precludes review of any instructional error where the instruction is proposed by the defendant, State v. Henderson, 114 Wn.2d 867, 870, 792 P.2d 514 (1990), the same doctrine does not act as a bar to review a claim of ineffective assistance of counsel. State v. Doogan, 82 Wn. App. 185, 188, 917 P.2d 155 (1996) (citing State v. Gentry, 125 Wn.2d 570, 646, 888 P.2d 1105, cert. denied, 116 S. Ct. 131 (1995)).

Should this court determine that counsel's failure to object to the trial court conducting portions of voir dire in chambers without engaging in a Bone-Club analysis on the record does not constitute constitutional error or that counsel waived the issue or invited the error by failing to object, then both elements of ineffective assistance of counsel have been established.

First, the record does not reveal any tactical or strategic reason why trial counsel would have failed to object, and had counsel done so, the trial court would have granted the objection under the law set forth in the preceding section of this brief. Second, prejudice is presumed where the violation of the public trial right occurs. State v. Bone-Club, 128 Wn.2d at 261-62.

Counsel's performance was deficient, with the result that Bowen was deprived of his constitutional right to effective assistance of counsel, and is entitled to reversal of his conviction.

03. THERE IS INSUFFICIENT EVIDENCE TO UPHOLD BOWEN'S CRIMINAL CONVICTIONS FOR UNLAWFUL POSSESSION OF METHAMPHETAMINE AND UNLAWFUL POSSESSION OF A FIREARM.

03.1 Legal Overview

03.1.1 Sufficiency Of The Evidence

The test for determining the sufficiency of the evidence is whether, after viewing the evidence in light most favorable to the State, any rational trier of fact could have found guilt beyond a reasonable doubt. State v. Salinas, 119 Wn.2d 192, 201, 829 P.2d 1068 (1992). All reasonable inferences from the evidence must be drawn in favor of the State and interpreted most strongly against the defendant. Salinas, at 201; State v. Craven, 67 Wn. App. 921, 928, 841 P.2d 774 (1992). Circumstantial evidence is no less reliable than direct evidence, and criminal intent may be inferred from conduct where "plainly indicated as a matter of logical probability." State v. Delmarter, 94 Wn.2d 634, 638, 618 P.2d 99 (1980). A claim of insufficiency admits the truth of the State's evidence and all inferences that reasonably can be drawn therefrom. Salinas, at 201; Craven, at 928.

### 03.1.2 Actual Or Constructive Possession

Possession may be actual or constructive. State v. Escheverria, 85 Wn. App. 777, 783, 934 P.2d 1214 (1997). “Actual possession occurs when the goods are in the personal custody of the person charged with possession; whereas, constructive possession means that the goods are not in actual, physical possession, but that the person charged with possession has dominion and control over the goods.” State v. Callahan, 77 Wn.2d 27, 29, 459 P.2d 400 (1969).

Mere proximity is not enough to establish possession. State v. Potts, 93 Wn. App. 82, 88, 969 P.2d 494 (1998) (citing State v. Robinson, 79 Wn. App. 386, 391, 902 P.2d 652 (1995)). For example, in State v. Spruell, 57 Wn. App. 383, 388-89, 788 P.2d 21 (1990), the court found that the defendant’s presence in a room where drugs were found plus his fingerprint on a plate that appeared to contain a controlled substance plus his rising from a chair when the police broke through the front door was insufficient to establish actual possession. Spruell, 57 Wn. App. at 388-89.

### 03.2 Unlawful Possession Of Methamphetamine

RCW 69.50.4013(1) requires the State to prove that the defendant was in possession of a controlled substance. The

charge was based on the methamphetamine residue found on the digital scale seized from behind the driver's seat. And given that there is nothing in the record from which to argue that Bowen was in physical custody of this methamphetamine, the issue is whether the evidence supports a finding of constructive possession. It does not.

To prove that Bowen constructively possessed the methamphetamine, the State was required to prove that he had dominion and control over the drug, for it is not a crime to have dominion and control over a car, and mere proximity, arm length or otherwise, is not enough to establish dominion and control over a controlled substance. State v. Potts, 93 Wn. App. at 88.

Bowen did not have dominion and control over the methamphetamine found on the digital scale seized from a location behind the driver's seat. No furtive movements were observed on his part while in the pickup and there was no evidence that a search of his person produced anything. And no fingerprints connected him to the methamphetamine.

The totality of this evidence, or lack thereof, would not permit a reasonable jury to infer that Bowen had dominion and control over the methamphetamine, with the result that this conviction must be reversed and dismissed.

03.3 Unlawful Possession of a Firearm

The nature and circumstances in this case do not support a finding that there was sufficient evidence that Bowen had dominion and control over the firearm seized in the vehicle. In this regard, the State failed to carry its burden to prove, as instructed, that any alleged dominion and control could be “immediately exercised.” [Court’s Instruction 15; CP 24-44; RP 149].

The gun was found in a nylon bag between the bucket seats. It wasn’t visible, let alone found in a place where Bowen had the ability to immediately take possession of it. There was insufficient evidence that it was even within his reach. There was no evidence that Bowen ever made any movement toward where the gun was found. And there were no fingerprints nor other evidence connecting him to the gun, with the result that his conviction on this charge must be reversed.

E. CONCLUSION

Based on the above, Bowen respectfully requests this court to reverse his convictions and remand for a new trial consistent with the arguments presented herein.

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DATED this 21<sup>st</sup> day of September 2009.

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CERTIFICATE

I certify that I mailed a copy of the above brief by depositing it in the United States Mail, first class postage pre-paid, to the following people at the addresses indicated:

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