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COA NO. 41505-4-II

**IN THE COURT OF APPEALS FOR THE STATE OF
WASHINGTON**

STATE OF WASHINGTON,

RESPONDENT,

v.

DANIEL RAYMOND LONGAN,

PETITIONER,

12 JAN 23 AM 10:09
STATE OF WASHINGTON
BY [Signature]
DEPUTY
COURT OF APPEALS,
DIVISION II

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

REPLY BRIEF

DANIEL LONGAN

PETITIONER,

[Signature]

COYOTE RIDGE CORRECTIONS CENTER

G-A-13-1-L

1301 N. EPHRATA AVE.

CONNELL WA, 99326-0769

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I. ISSUES

A. OPEN COURT ISSUES

1. THIS ISSUE IS PROPERLY RAISED AS A PERSONAL RESTRAINT PETITION.
2. THERE WAS A COURT ROOM CLOSURE WHEN THE TRIAL COURT HELD PARTIAL VOIR DIRE IN A NON-PUBLIC HALLWAY

B. ASSISTANCE OF COUNSEL WAS INEFFECTIVE FOR THE FOLLOWING REASONS.

1. TRIAL COUNSEL WAS INEFFECTIVE FOR FAILING TO INVESTIGATE PHOTOGRAPHIC EVIDENCE THE POLICE PROVIDED BUT WAS NOT USED AT TRIAL.
2. TRIAL COUNSEL WAS INEFFECTIVE FOR FAILING TO RETAIN MEDICAL RECORDS WHICH WOULD HAVE HELPED PROVIDE LONGAN WITH A DEFENSE.
3. TRIAL COUNSEL WAS INEFFECTIVE FOR VIOLATING LONGAN'S CONSTITUTIONAL RIGHT TO TESTIFY ON HIS OWN BEHALF.

C. UNANIMITY IN FIREARM ENHANCEMENTS.

1. THE TRIAL COURT ERRONEOUSLY INSTRUCTED THE JURY IN UNANIMITY.
2. LONGAN CAN RAISE THE ISSUE FOR THE FIRST TIME ON APPEAL.

3. THE ERROR IS NOT SUBJECT TO THE
HARMLESS ERROR ANALYSIS.

D. CUMULATIVE ERROR.

II. UNLAWFUL RESTRAINT

Restrain on Longan is unlawful because it is a result of a violation of his right to a speedy and public trial, as well as ineffective representation of his trial counsel.

III. MATERIAL CASE FACTS

Direct appeal was filed on August 25th 2009. Motion to reconsider was filed pro se and by appeal counsel , then denied October 20th 2009. Petition for discretionary review was filed on November 30th 2009. This was denied March 30th 2010.

LIBERAL CONSTRUCTION REQUEST

The petitioner is filing pro se and thus respectfully requests that this court afford liberal construction to this petition in keeping in accordance with *Hanies V. Kerner*, 404 U.S. 579, 520 (1972).

IV. ARGUMENTS

A. OPEN COURT ISSUE

THE COURT VIOLATED LONGAN'S RIGHT TO A PUBLIC TRIAL BY HOLDING A PARTIAL JURY VOIR DIRE IN A NON-PUBLIC HALLWAY OUTSIDE THE PUBLIC FORUM OF THE COURTROOM UNDER UN EXCEPTIONAL CIRCUMSTANCES WITHOUT FIRST WEIGHING THE *BONE-CLUB* FACTORS.

1.) Though this issue was raised previously on direct review it should be heard now as a Personal Restrain Petition as there is new evidence to consider.

This court should allow review of this issue due to the new evidence Longan couldn't previously present; Affidavit and photographic which when considered by this court will prove that the voir dire did in fact happen in a non-public hallway. Not a public hallway as this court previously believed. (See Appendix B-6-7 States Response Brief.)

In which this court stated "*But the trial court did not close the court room as the trial judge did in Orange. He conducted the questioning of the potential juror in the hallway, which was just as open to the public as was the courtroom.*" Which is an error and doesn't hold with this courts recent decisions in *State v. Leyerle*, 158Wn. App. 474; 242 P.3d 921;(2010) or *Presley V. Georgia*, 130 S.Ct. 721; 175L.Ed.2d 675;(2010) Which is binding on the states. This court also stated in its order denying motion for reconsideration "*Upon review, we deny the motion for reconsideration as the only potential issue raised is more appropriately brought as a personal restraint petition.*" This order was signed by *Houghton J., Van Dern, C.J., Bridgewater J.* the same judges who decided *Leyerle*.(See Appendix C-1 of the states reply brief).

It would be in the interest of justice to revisit this issue now to keep with recent decisions made by this court and the U.S. Supreme court. This error is also an error of constitutional magnitude and scope. Longan's constitutional public trial rights were violated; *Article I, Sec 10 of the Washington Constitution, Article I section 22 of the Washington constitution, and The Sixth Amendment to The United States Constitution.*

This collateral attack by Personal Restraint Petition on this criminal conviction and sentence does not simply reiterate a issue resolved at trial and on direct appeal, but rather raises new points of fact with the affiants account of the proceedings on the day in question and the non-public voir dire, as well as the pictures provided of the entry way bulletin board at the Cowlitz county court house which shows the area in question as a restricted area not open to the public.(see Appendix 1) These items were previously unavailable and unpreventable as they are not part of the record. The lack of these items in support of Longan's claim was prejudicial to the decisions previously reached in direct appeal made by the reviewing courts. It is clear by the recent decisions in Leyerle, and State V. Abbey (see appendix 2) that if these items were available for this court to review previously. The decision it would have reached would have been drastically different and reversal would have been granted.

2. THERE WAS A COURTROOM CLOSURE.

During Voir Dire, The court called a prospective juror into a non-public hallway immediately outside the courtroom and asked the juror questions. (See app. ³) Only the prosecutor and defense counsel attended this private discussion with the trial judge and the potential juror. Before taking the juror and the voir dire out of the courtroom, the court didn't weigh the Bone-Club factors, seek permission from the public or discuss a waiver of the public trial right with Longan. Even though this interview is recorded and available to the public at a great expenditure of effort, the record is silent regarding whether or to what extent the proceeding in the non-public hallway was accessible to the public and in any event, the trial court should view the presumptively appropriate public forum for proceedings in this case was the public court room. The record reveals that the primary purpose of the closure was to avoid embarrassing the potential juror, and While Longan may have agreed to not be present (at the advice of counsel) he in no way waived his right to a public trial.

As a criminal defendant, Longan is guaranteed as open, public trial under The United States Constitution s Sixth Amendment, and Article I, Sec.10 of the Washington Constitution, article I, Sec. 22 Washington Constitution. While trial courts are given some discretion to close all or a

portion of a trial, the court cannot do so without first weighing certain factors often referred to as the *Bone-Club* factors. Without first weighing the *Bone-Club* factors the trial court closed Longan's trial by interviewing a prospective juror in a non-public hallway with only counsel present and without a waiver of any right from Longan. The closure of Longan's trial during voir dire denied Longan his constitutional right to an open trial.

Here what began as a private interview of one potential juror's medical condition soon evolved into a discussion of another juror's potential ability to serve and the seating, and selection of other jurors. What transpired was an investigation into the juror's ability to serve, a matter neither ministerial nor trivial, certainly these types of information, which directly relate to the voir dire process, absent a *Bone-Club* analysis, needed to be publicly explored.

The *Waller* standards require:

The party seeking to close the hearing must advance an overriding interest that is likely to be prejudiced, the closure must be no broader than necessary to protect what interest, the trial court ***MUST CONSIDER REASONABLE*** alternatives to closing the proceedings and must make findings on the record.

The trial judge spoke privately with the prospective juror. Thus the State bears the burden on Appeal to Show that despite the court's ruling a closure did not occur. *State V. Duckett* 141 Wn.App. at 807. Here the state

has not convincingly shown that proceedings removed from the public forum of the courtroom did not amount to a closure. Nor does the recording of the hallway interview excuse the trial courts failure to follow required procedures before removing trial proceedings from the public forum of the courtroom. Separate questioning of potential jurors is routinely recorded. (See E.G. *Strode* 167Wn.2d at 224n.1) And the mere existence of such recordings and thus the public's potential ability to access those recordings through a determined effort, plays no role in deciding whether a trial court has observed proper courtroom closure procedures. A interview of potential jurors "in unexceptional circumstances" requires reversal. Conducting Voir Dire in an area closed to the public is closure of the trial. *Erickson* 146 Wn.App. at 209. Although trial closure could be appropriate in some circumstances, protection of the right to a public trial requires a trial court to resist a closure except under th "most unusual circumstances" *Bone-Club*, 128Wn.2d at 259. A trial court may close a courtroom after considering the five requirements enumerated in *Bone-Club* and entering specific findings on the record to justify the closure. A trial court's failure to undertake the *Bone-Club* analysis, which directs the trial court to allow any one present the opportunity to object to the closure, undercuts the guarantees enshrined in both the United States Constitution and The Washington Constitution.

Article I, Section 10 as well as Article I, Section 22. *Bone-Club*, 128Wn.2d at 258-59. Where, as here a defendant claims a violation of the right to public trial the courts review de novo. *Brightman*, 155Wn.2d at 514. “one of the limited classes of fundamental rights not subject to harmless error analysis.” *State V. Easterling* 157Wn.2d 167, 181 137P.3d 825(2006).

This court found a Voir Dire in a non-public hallway was a violation of *Leyerle*'s public trial right. See *State V. Leyerle*. It also found a non-public hallway a violation of *Shannon Lee Abbey*'s public trial right in *State V. Abby* 2011 Wash.App. Lexis 1865 No. 37551-6-II (see appendix 2). Both of which happened in the same county in the same courthouse and the same hallway. Thus the state is estopped from challenging this claim pursuant to the collateral estoppel doctrine. The issue is the same; the state of Washington was party to *State V. Leyerle*, and *State V. Abby*. Rulings were entered by this court, and injustice will not result from a application of this doctrine.

A similar analysis applies to the County's argument on collateral estoppel, which may bar litigation of an issue in a subsequent proceeding involving the same parties. *Yakima County v. Yakima County Law*

Enforcement Officers Guild, 157 Wn. App. 304, 331, 237 P.3d 316 (2010).

The party seeking to avoid litigation of an issue must show ``that (1) the issue decided in the earlier proceeding was identical to the issue presented in the later proceeding; (2) the earlier proceeding ended in a judgment on the merits; (3) the party against whom collateral estoppel is asserted was a party to, or in privity with a party to, the earlier proceeding; and (4) application of collateral estoppel does not work an injustice on the party against whom it is applied." Id. at 331-32 (quoting *Christensen v. Grant County Hosp. Dist. No. 1*, 152 Wn.2d 299, 307, 96 P.3d 957 (2004)).

Which Longan has showed here.

Longan respectfully requests this court to review this case again do to the erroneous decision made by this court in its prior ruling do to its lack of clarity on the hallway issue, and the newly presented evidence for this court to review. In which several members of the public confirm that they would have exerted their right to a public trial and objected to the closure if given the chance. (See Appendix B, C ,D, E, of Personal Restraint Petition). Thus the trial court violated the rights of not only Longan, but the public's also. Reversal and remand are required.

B. INEFFECTIVE ASSISTANCE OF COUNSEL

1: Longan's trial counsel failed to offer as exhibits Photos of unexplained bullet holes in the vehicle that Longan drove which couldn't have been fired by Longan's co-defendant.

The evidence of this failure to examine these photos is in counsel's lack of a defense which they could have offered the defendant. If these photos had been offered to the jury the jury would have developed very different opinions of Longan's conduct when he did not stop the vehicle. A reasonable person would not expect Longan to stop the vehicle if there was a gun battle going on between his co-defendant and the police. His life would have been in more danger than it already was. The evidence of this failure to offer these photos as exhibits thus putting the officers statements to a true adversarial testing shows that Longan's counsel was truly ineffective. These Photos were taken by the police thus there authenticity wasn't a question. They were readily available for counsel to investigate and present to the court. Yet counsel didn't present them because they were less than favorable to the states case and the officer's statements. The fact that they were taken by competent, police should make them admissible evidence to support this argument. *Sate V. Brennen*, 117Wn.App 797,802, 72P.3d 182(2003). "counsel has a duty to make a reasonable investigation, or make a reasonable decision that makes a particular investigation unnecessary" *Strickland* U.S. at 691.

State v. McFarland, 127Wn.2d 322,335 899P.2d 1251(1995).

“In any ineffective case a particular decision not to investigate must be directly assessed for reasonableness in all circumstances.” *Wiggins v. Smith*, 539 U.S. 510 521 (2003).

There was no reason not to further investigate this legitimate evidence or to not present it to the jury for consideration. (see appendix 4) This was clearly deficient and prejudicial to Longan’s defense, because the officer’s statements were never put to a true adversarial testing.

Counsel’s performance before trial was deficient for lack of preparation of a defense which the photos could have helped develop. “pretrial investigation and preparation are keys to effective representation of counsel; courts have repeatedly stressed the importance of adequate investigation of potential defenses.” See *Goodwin v. Balkom*, 684 F.2d 794, 804-05(11th Cir 1982); *United States v. Porterfield*, 624 F.2d 122 124(10th Cir. 1980); *United States v. Turner*, 716F.2d 576 Versus Law¶ 36(9th Cir. 1983).

Counsel’s decision not to investigate this evidence or present it to the jury constitutes prejudice to Longan getting a fair trial. if presented to the jury this evidence would have called into questions the unexplained

bullet holes in the vehicle Longan was driving which could have only gotten there from shots fire by the officers in pursuit. Thus showing a reason for Longan's continued eluding behavior. Longan couldn't reasonable be expected to stop the car if there was a gun battle going on between his co-defendant and the pursuing police officers. Stopping the vehicle at that time would have endangered Longan's Life as well as the pursuing police officers. These pictures would have called in to question the lack of explanation for the officers firing shots while in pursuit. Why there was no record, why there was no mention of these events no video evidence presented from the dash cams of the police cars. This defense could have had a tremendous effect on the outcome of the trial. The state based its whole case on the fact that Longan was an accomplice because he did not stop the vehicle. This evidence would have showed that the case was weak and unfounded.

2. LONGAN'S TRIAL COUNSEL FAILED TO INVESTIGATE AND PRESENT RELEVANT MEDICAL AND POLICE RECORDS THUS PROVIDING INEFFECTIVE ASSISTANCE OF COUNSEL.

The failure to investigate readily available medical and police records which would have provided proof that Longan was only wearing

the ballistic vest as protection shows a complete lack of a willingness to perform his official duties as defense counsel. these records were easily obtainable at the time from the Clark County Police and the Emergency room at the hospital in Salmon Creek. Longan would request a investigator to provide these records as proof if he had the financial means available to pay for them. "pretrial investigation and preparation are keys to effective representation of counsel; courts have repeatedly stressed the importance of adequate investigation of potential defenses." See *Goodwin v. Balkom*, 684 F.2d 794, 804-05(11th Cir 1982); *United States v. Porterfield*, 624 F.2d 122 124(10th Cir. 1980); *United States v. Turner*, 716F.2d 576 Versus Law¶ 36(9th Cir. 1983).

This evidence could have clearly presented Longan with the proof that he needed to show that at the time the protective vest was purchased and worn only as a means of protection as it was meant to be. Not in preparation of a gun battle with police officers as the state made it seem at trial. The lack of investigation into this defense is clearly ineffective and prejudicial representation of counsel.

Longan respectfully requests a remand for a new trial.

3. LONGAN'S TRIAL COUNSEL DID NOT ALLOW LONGAN TO TESTIFY ON HIS OWN BEHALF.

Longan's trial counsel was not prepared for Longan to testify, and when at trial Longan finally decided that he was sure that he wanted to testify in his own defense, his counsel placated him by telling him he could only rest his case before Longan was able to take the stand in his own defense. Longan said nothing at the time out of ignorance of the law and fear of speaking out in court against his attorney's wishes.

This waiver of Longan's right to testify was clearly an involuntary waiver because the right cannot be waived by trial counsel. When Longan asked to testify his counsel said the risk outweighed the good it would do and wouldn't call him to the stand. When he again said he was sure that he wanted to speak out in his defense counsel said he would call him but never did. "A waiver must be made knowingly, voluntarily, and intelligently. Only the defendant has the right to decide whether or not to testify." *U.S. v. Teague* 953 F.2d 1525, 1532-35(11th Cir) cert denied, 113 S.Ct.127 (1992)(en banc).

Whether Longan was present when counsel prepared the jury for the possibility that Longan might not testify has no bearing on whether or not counsel refused to let Longan testify when he finally decided to defend

himself on the stand. A criminal defendant has a constitutional right to testify in his own behalf. *Rock v. Arkansas*, 583 U.S. 44 49 107 S.Ct. 2704 97L.Ed.2d 37 (9187). The court held that the right to testify is absolute, and may not be waived by defense counsel. *State v. King*, 24 Wash.App. 495,499,601 P.2d 982(1979).

“It may be difficult to determine whether the defendant willingly accepted the attorney’s advice or whether the attorney merely ignored the petitioner’s wishes. However, courts are reluctant to hold that in the absence of coercion, silent defendants may not have the opportunity to prove that their attorneys prevented them from exercising this constitutionally protected right to testify. Such a holding could have the unfortunate result of placing the burden upon the defendant to speak up in court to make their desire to testify known. It is unreasonable to impose upon the defendants the burden of personally informing the court that their attorney is not acceding to their wishes to testify.... defendants might feel intimidated to speak out of turn. Requiring a defendant to object at trial against the wishes of counsel assumes a sophisticated defendant who is knowledgeable in both constitutional rights and criminal trial proceedings.” *State v. Robinson*, 138Wn.2d 752,764 982P.2d 590(1990).

Longan's attorney was clearly deficient in his representation of Longan's interests at trial and before in his pretrial investigation. He was in violation of his professional standards which he fell well below at several times in his representation. Whether this ineffectual and unethical representation was due to inattentiveness or to an overloaded caseload is irrelevant. What is important is that he failed to do his duty as an advocate of Longan's interests. Under *Strickland v. Washington*, 466 U.S. and *State v. McFarland*, 127 Wn.2d 322, 335 897 P.2d 125 (1990). It is clear that denying Longan his right to testify, his trial counsel fell well below objectionable standards because he in essence denied Longan his constitutional right to testify in his own defense. This could not be considered a tactical or strategic decision. Longan's testimony would have had a tremendous outcome on the trial's outcome, explaining several events of the night in question and the days leading up to it.

Remedy is reversal and remand for a new trial.

4. LONGAN'S TRIAL COUNSEL FAILED TO CONTACT OR INVESTIGATE DEFENSE WITNESSES.

Longan asked his trial counsel to contact several witnesses on his behalf and several of these people called him to show their availability to

testify if asked to do so. Even if Longan's counsel would have found nothing to present at trial it was his duty to contact them to determine what if any information they could offer him to use in the defense of Longan at trial. No aspect of an attorney's advocacy "could be more important than the opportunity to finally marshal evidence for each side before submission of the case to judgment". *Hearing v. New York*, 422 U.S. 853 862, 95 S. Ct. 2550(1975). " In any ineffective case, a particular decision not to investigate must be directly assed for a reasonableness in all circumstances." *Wiggins v. Smith*, 539 U.S. 510 521 (2003). Quoting *Strickland* 466U.S. at 690-91. Counsel's unconsidered decision to fail to discharge this duty to investigate cannot be strategic. "Counsel cannot be said to have made a tactical decision without first procuring the information necessary to make such a decision." *Reynoso v. Giurbino*, 462 F.3d 1090 versus law ¶ 69 (9th Cir2006).

Counsel failed to even talk with these witnesses so he could not be said to have made a tactical decision not to use what they could offer as a defense. He contacted no one on Longan's behalf; no witnesses, no Vancouver police to investigate the stabbing, no hospital staff to retain the medical records, no experts to determine if the holes in the car were indeed bullet holes or not to determine if the pictures would be of value to Longan's defense. Counsel was clearly ineffective. Any one of these

uninvestigated items could have lead to a possible defense and all of them combined would have had a dramatic effect on the outcome of the trial. See *Goodwin v. Balkom*, 684 F.2d 794, 804-05(11th Cir 1982). All of these things show a prejudicial lack of preparation by trial counsel. Longan was clearly prejudiced and reversal is required.

Longan respectfully requests a remand for new trial and a evidentiary hearing.

C. UNANIMITY IN FIREARM ENHANCEMENTS

1. LONGAN ARGUES THAT THE TRIAL COURT ERRORED WHEN IT PRESENTED THE TRIAL JURY WITH UNCLEAR UNANIMITY INSTRUCTIONS.

The trial court presented the jury with a unanimity instruction which contained portions of concluding instructions.(See appendix 5 WPIC 151.00) Which contains the questionable instruction included in the unanimity instructions to the jury.

“ *when you have all so agreed*, fill in the (SPECIAL) verdict forms to express your decisions. The presiding juror will sign them and notify the bailiff, who will conduct you into court to declare your verdicts.”

The “when all of you have so agreed” portion of the unanimity instruction implies the jury needs to be unanimous as to the special verdict. This instruction comes from a altered **BASIC CONCLUDING INSTRUCTION WPIC 151.00** (see app. 5) and was erroneously placed on the special verdict forms and altered to imply that it was in fact a special verdict instruction. Not an altered **BASIC CONCLUDING INSTRUCTION WPIC 151.00** (see app. 5). In its altered form this instruction strongly implies to a average person who is not proficient in the language of the law that to answer no they had to be unanimous and must continue to deliberate until a unanimous verdict is reached. Which is in violation of *State v. Bashaw*, 169 Wn.2d 133, 254 P.3d 195 (2010). In *Bashaw* our Supreme court held that requiring unanimity for a “NO” answer to a special verdict regarding a sentence enhancement violated a common law right recognized in *State v. Goldberg*, 149 Wn.2d 888 72 P.2d 1083(2003). *Bashaw*, 169 Wn.2d at 147, 234 P.3d 195.

In Longan’s case the jury was given erroneous and unnecessary added closing instruction which confused them as to the unanimity necessity required in the special verdict. “When you all so agree” implies full agreement by all jurors and should not have been included. That one sentence makes Longan’s enhancements invalid and in error.

This was a prejudicial error of constitutional magnitude, which can be brought for the first time on appeal. *State v. Ryan*, 160 Wn.App. 944, 948-49, 252 P.3d 895 (2011) (division I holding the instructional error is constitutional). If the members of the jury were divided as to a, “yes” or “no” answer on the special verdict, With this erroneous instruction they would feel compelled to be unanimous in their answer before they could present their answers to the presiding juror and thus to the bailiff.

A question sent out to the judge implies that there was some doubt as to the ability to convict of the special verdict. (See PRP app. P) The state argues that there was simply no way that the instruction used could have confused the jury. Yet the state added **Basic concluding instruction** to the end of the special verdict form, with only slight alterations. They removed the first part of the last paragraph and added the last paragraph to the special verdict form.

“Because this is a criminal case, each of you must agree to reach a verdict.” “When you have all so agreed”, fill in the special verdict forms to express your decision. The presiding juror must sign the verdict forms and notify the bailiff. The bailiff will bring you into court to declare your verdict.

Thus the last instruction the jurors receive is that the all need to agree before they turn in the special verdicts.

In *Goldberg*, the jury may have been manifestly clear as to “No” being an acceptable answer but *Goldberg’s* instruction did not contain the last added erroneous Paragraph of closing instruction to confuse the jury, as Longan’s instruction did.

For the reasons stated above Longan’s respectfully requests this court to vacate Longan’s enhancements on all 5 counts, and remand for resentencing.

2. LONGAN IS ABLE TO BRING THE ISSUE FOR THE FIRST TIME ON APPEAL.

The constitutional error in instruction may be brought forth to be decided before this court for the first time on appeal. *State v. Ryan*, 160 Wn.App. 944, 948-49, 252 P.3d 895 (2011) (division I holding the instructional error is constitutional). It is Longan’s position that the Ryan court is correct, and Longan has not waived the issue by not objecting as the trial level as his ineffective counsel should have done.

3. THE ERROR IN THE INSTRUCTION WAS NOT HARMLESS ERROR.

When this court finds at this stage in the process, the error was of constitutional magnitude and not subject to the harmless error analysis It should remand for resentencing. The state cannot prove even in a light most favorable to the trial court that the instruction has not affected the outcome of the special verdict. The special verdict would have been different absent the error.

The jury found Longan guilty because of the “accomplice liability”. They would not have found Longan guilty of the “firearm” special verdict absent the errored instruction. Some members of the jury were confused and asked for clarification on, whether or not Longan could be found guilty as he had no gun. Thus Longan had no nexus of control. So reasonable doubt exists and was established at the trial level.(see appendix 6).

The reason that the jury polling showed a unanimous “yes” is because the instruction implies that it was needed. So the jury continued to deliberate until a unanimous verdict was reached before the jury was polled. The jury was swayed towards “yes” instead of “no” because of the last paragraph of instruction. Reversal and remand are required.

D. CUMULATIVE ERROR

The cumulative effect doctrine applies here because, there were several errors made in not only the trial but the pretrial investigative stage. This court will find that several of these errors are of a constitutional nature and scope. These errors all add up to Longan receiving a unfair and prejudicial trial. Longan was substantially prejudiced by the lack of investigation and representation by his trial counsel. Counsel's performance and errors made by the trial court cumulatively and by themselves deprived Longan of a fair trial. State v. Grief, 141 Wn.2d 910, 929, 10 P.3d, State v. Alexander, 64 Wn.App. 147, 158, 822 P.2d 1250 (1992).

V. CONCLUSION

Longan respectfully requests that this court grant the relief sought in the above arguments.

Respectfully submitted this __ th day of November, 2011.



DANIEL RAYMOND LONGAN 827885 G-A-13-1-L

COYOTE RIDGE CORRECTIONS CENTER

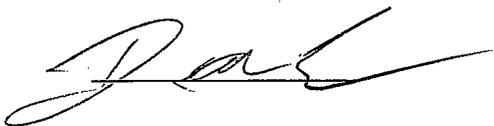
1301 N. EPHRATA AVE.

CONNELL WA, 99326

DECLARATION

I Daniel Longan, State under oath pursuant to RCW 9A.72.085, that the fore-going facts are true to the best of my knowledge, based on personal observations, facts, evidence, experience, and conclusions, and that the appendix's 1 through 5 so attached here to are true and, correct and are what they say they are represented to be. *Dickerson v. Wainwright*, 626 F.2d 1184 (1980). Affidavit sworn as true and correct under penalty of perjury has full force of law and doesn't have to be verified by notary republic.

Under penalty of perjury I do swear the above is true.



_____ (order Signing)

Daniel Longan

Judge

Appendix 1

AFFIDAVIT

Pursuant to 28 U.S.C. § 1746 no Notary Required

I, Patricia A. Bird-Hoffman, am over the age of majority and also a United States citizen competent to testify and herein attest under penalty of perjury that all statements contained herein are the absolute truth.

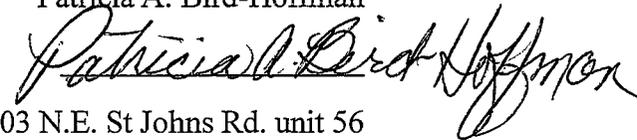
I, Patricia A. Bird-Hoffman, went to the Cowlitz County Courthouse and took photographs of the non-public hallway outside of the courtroom that Daniel R. Longan's trial was held. The photographs were taken as the entrance to the hallway, and outside the actual doorway that the judge and juror stepped to conduct the private interview of the juror. While taking these photos I was discovered by a court clerk. I was told that the hallway was a restricted area and no public was aloud in the hallway. She also stated that I could not take the photographs in question. I left the hallway and proceeded to the main hallway. I entered the elevator and descended to the first floor. I then noticed, a large plaque on the wall at the entrance to the Cowlitz County Courthouse, that showed the hallway in question was, in fact, a restricted hallway. I then took photographs of the plaque and left the building. I went home and printed out the photos and forwarded them to Daniel R. Longan, as they pertained to his case. I am familiar with the court house and know that the hallway in question is now

and was at the time of Longan's trial a restricted area not open to the public.

Affiant pursuant to 28 U.S.C. § 1746 and United States v. Carr 928 F.2d 1138 (9th Cir 1991), sworn as true and correct under penalty of perjury has full force of and is not required to be verified by Notary Public.

Respectfully submitted on this 27th day of November, 2011.

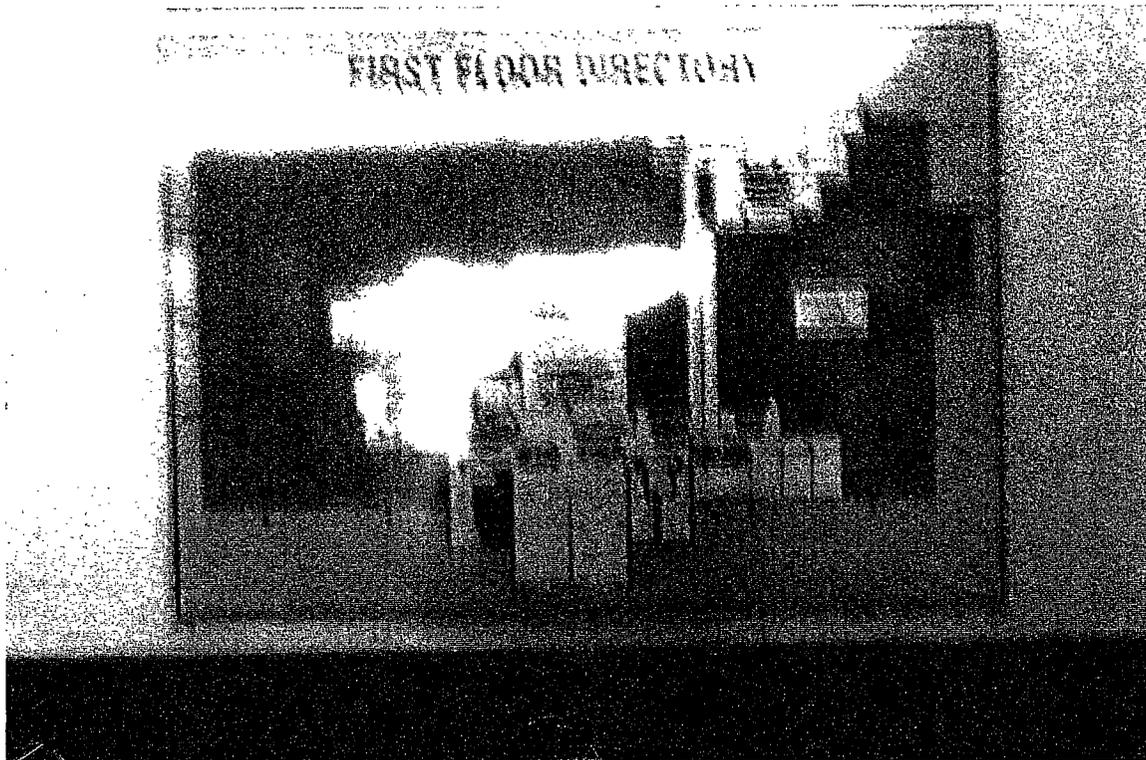
Patricia A. Bird-Hoffman



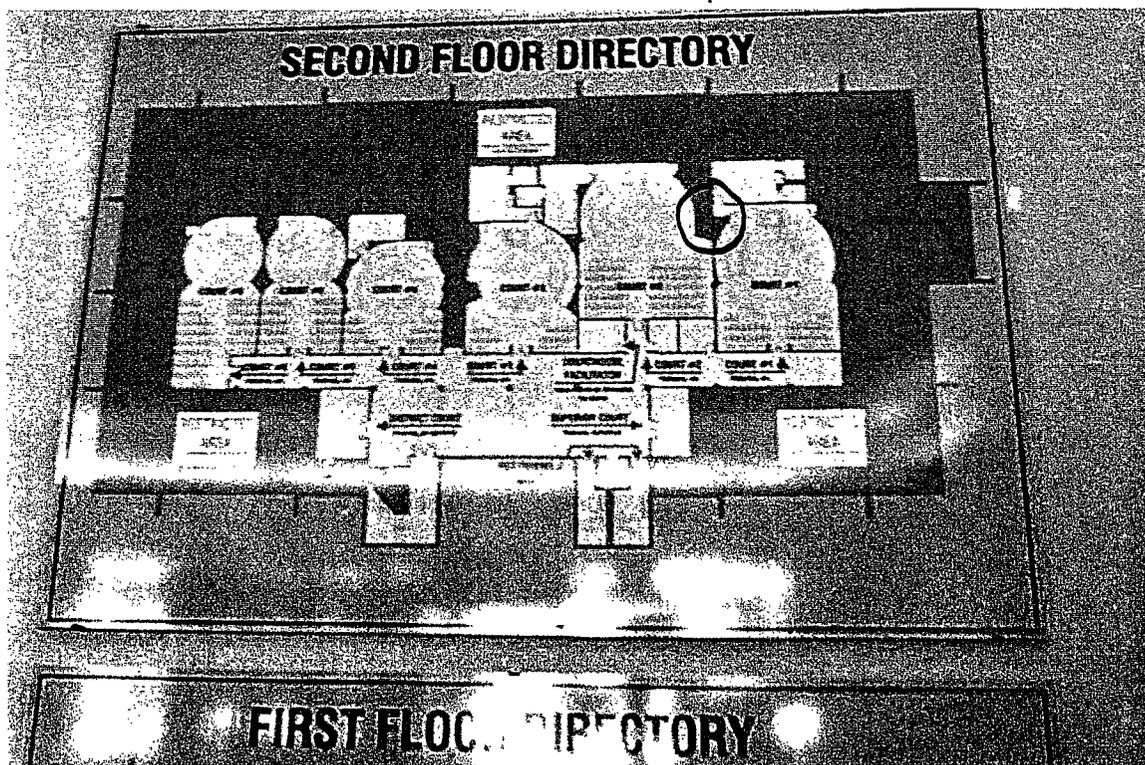
8403 N.E. St Johns Rd. unit 56

Vancouver, Wa 98665

Phone: (360) 281-5337



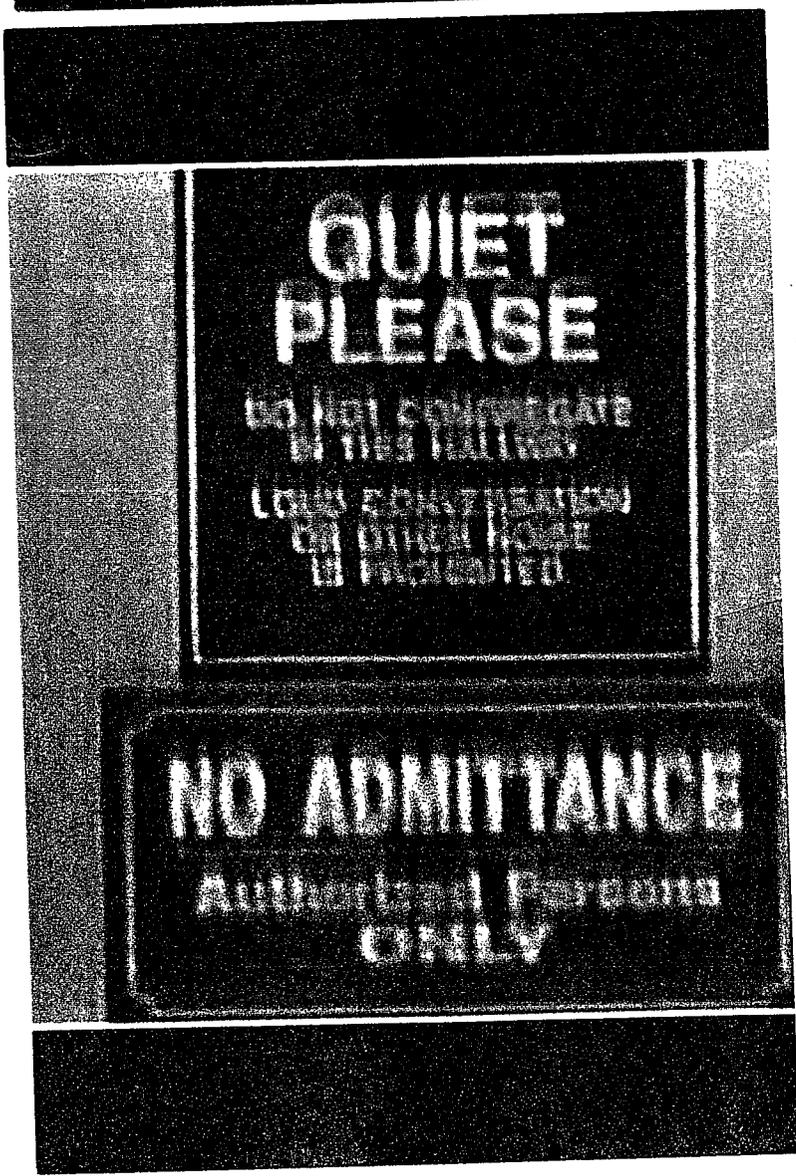
First and Second Floor Directory



Shows the areas where the Juror was taken to question which is clearly in the blue restricted area behind Court room 2



← Show's
the area
where
the
Jury
was
taken.



sign
outside
Courtroom
2

Appendix 2

The State of Washington, *Respondent*, v. Shannon Lee Abbey, Appellant.

COURT OF APPEALS OF WASHINGTON, DIVISION TWO

2011 Wash. App. LEXIS 1865

No. 37551-6-II

January 4, 2011, Oral Argument

August 5, 2011, Filed

Notice:

RULES OF THE WASHINGTON COURT OF APPEALS MAY LIMIT CITATION TO UNPUBLISHED OPINIONS. PLEASE REFER TO THE WASHINGTON RULES OF COURT.

Editorial Information: Prior History

Appeal from Cowlitz Superior Court. Docket No: 07-1-00941-5. Judgment or order under review. Date filed: 03/13/2008. Judge signing: Honorable James J Stonier.

Counsel *Lisa Elizabeth Tabbut*, Attorney at Law, Longview, WA, for Appellant(s).
Michelle L Shaffer, Cowlitz Co Pros Attorney Office, Kelso, WA, for Respondent(s).

Judges: AUTHOR: Joel Penoyar, C.J. I concur: Lisa Worswick, J., Christine Quinn-Brintnall, J. (concurring in the result).

Opinion

Opinion by: Joel Penoyar

Opinion

1 Penoyar, C.J. Shannon Lee Abbey appeals his voyeurism conviction and exceptional sentence, claiming the trial court violated his right to a public trial when it questioned a juror in the hallway outside the courtroom about the juror's failure to take his oath. Because the trial court failed to weigh the necessary factors before privately questioning the juror on a matter that involved the juror's ability to fulfill his duties as a juror, we reverse and remand for a new trial.

FACTS

2 On July 17, 2007, the State charged Abbey with one count of voyeurism. 1 Following a CrR 3.5 hearing, jury voir dire began on January 28, 2008. During jury voir dire, the following discussion took place:

[JUDGE]: Alright. Okay. An important part of the jury trial is the selection of a jury and the law requires that you would be sworn. So if you would all please rise at this time. (Potential jurors stand.) Would you please rise? Raise your right hands and repeat after the clerk, please. CLERK: Do each of you solemnly swear to truthfully answer all questions asked of you by the Court or Counsel relating to your qualifications and acting as jurors in this trial? If you agree, please answer I do. POTENTIAL JURORS: (In unison.) I do. [JUDGE]: Please be seated. Mr. Munn, Counsel, will you step out in the hallway with me? (Hallway conference.) [JUDGE]: Mr. Munn, I noticed that you didn't raise your hand or you didn't promise to tell the truth? [MUNN]: I know this is a jury but I just honestly with my beliefs it is in violation of my rights because I filled out a paper saying that it is against my religion to judge people and I will not judge another fellow human. [JUDGE]: Well, we haven't decided if you are going to be on this jury yet. We only asked you if you would tell the truth. That's all we asked. [MUNN]: Then why am I sent here if I fill out the paper saying not to be here. To be excused. [JUDGE]: Because we asked you to come in and we wanted to talk to you and ask you some questions about that. Alright. Because from time to time some people respond the same way and they are able to serve as a juror. So that's why we asked you to come in. [MUNN]: Alright. Because I feel it is a waste of my gas and a waste of my time. [JUDGE]: Well, I understand that but it is part of your civic duty and we ask you to come in and serve on this jury. And you came in and I asked everybody to rise and tell me if they would tell the truth and you didn't first you didn't rise and then you didn't say you would tell the truth. [MUNN]: Well, it's because that's not what I want to do. It's against my beliefs and I don't feel that it is right that you are forcing me to do something against my beliefs. [JUDGE]: Is it against your belief to tell the truth? [MUNN]: No. [JUDGE]: Well, that's all I asked from the jury. Will you tell the truth? [MUNN]: Well, you know, I can do that. [JUDGE]: Well, why didn't you do that? [MUNN]: I was just really upset that you guys are forcing me. Otherwise, the other option and this is not supposed to be in my beliefs and the amendment that says you have the freedom to choose without having to be arrested if I don't show up. [JUDGE]: What amendment is that? [MUNN]: I don't remember which one it is but I know that it is in the amendment of the freedom of speech and the freedom to choose. [JUDGE]: Freedom of speech is the first amendment. [MUNN]: Alright. The freedom of right and the freedom to choose and I chose to fill out the papers like the Court (inaudible) that you guys asked me to fill out to be excused and you guys still did not excuse me. [JUDGE]: "You guys?" [MUNN]: Who ever [sic] is in charge of all that that still sent me down here. I'm not sure who is in charge of all that. But I filled it out to be excused and I don't appreciate having to come down here. [JUDGE]: Oh. Well, I understand a lot of jurors in there probably made a special effort this morning so you somehow think that somehow you are different? [MUNN]: No. It is just that I filled out the paper accordingly like you asked me to do and be excused and like I have done in the past and filled it out the same exact way and get excused because of my beliefs not to judge others because that's what Jesus died for, you know, for our sins and so it is up to Jesus and God to judge use [sic] after this life, on this life. That's the reason why I wish to be excused in the first place and that's why I didn't believe that I needed to come down her[e]. Because I filled it out like you guys asked me to be excused. [JUDGE]: Alright. If we ask you questions, will you promise to tell the truth? [MUNN]: Uh-huh. [JUDGE]: Raise your right hand. Do you

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ANALYSIS

3 Abbey makes a single challenge on appeal, claiming that the trial court violated his right to a public trial when it questioned juror Munn in the hallway rather than in open court. 3

4 The Sixth Amendment to the United States Constitution provides, "In all criminal prosecutions, the accused shall enjoy the right to a . . . public trial." Similarly, article I, section 22 of the Washington Constitution guarantees, "In criminal prosecutions the accused shall have the right . . . to have a . . . public trial." The Washington Constitution also provides in article I, section 10 that "[j]ustice in all cases shall be administered openly." The public trial right is not absolute; it is strictly guarded to ensure proceedings occur outside the public courtroom in only the most unusual circumstances. *State v. Strode*, 167 Wn.2d 222, 226, 217 P.3d 310 (2009) (C. Johnson, J. dissenting) (citing *State v. Easterling*, 157 Wn.2d 167, 174-75, 137 P.3d 825 (2006) (Chambers, J. concurring).

"Whether a defendant's constitutional right to a public trial has been violated is a question of law, subject to a de novo review on direct appeal." *Strode*, 167 Wn.2d at 225.

5 Our Supreme Court has articulated guidelines every trial court must follow before closing a courtroom to the public. *State v. Bone-Club*, 128 Wn.2d 254, 258-59, 906 P.2d 325 (1995). Those criteria are:

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. *Bone-Club*, 128 Wn.2d at 258-59 (quoting *Allied Daily Newspapers of Wash. v. Eikenberry*, 121 Wn.2d 205, 210-11, 848 P.2d 1258 (1993)). See also *Presley v. Georgia*, ___ U.S. ___, 130 S. Ct. 721, 724, 175 L. Ed. 2d 675 (2010); *State v. Brightman*, 155 Wn.2d 506, 514, 122 P.3d 150 (2005); *State v. Bowen*, 157 Wn. App. 821, 239 P.3d 1114 (2010). If the proceeding is subject to the right to a public trial, the trial court's failure to conduct a *Bone-Club* inquiry before excluding the public violates the defendant's public trial rights. *Brightman*, 155 Wn.2d at 515-16.

6 The public trial right applies to jury voir dire. *Presley v. Georgia*, 130 S. Ct. at 724-25; *In re Pers. Restraint of Orange*, 152 Wn.2d 795, 806, 100 P.3d 291 (2004); *State v. Erickson*, 146 Wn. App. 200, 206, 189 P.3d 245 (2008) (Quinn-Brintnall, J. dissenting); *State v. Duckett*, 141 Wn. App. 797, 803, 173 P.3d 948 (2007) (Brown, J. dissenting); *State v. Frawley*, 140 Wn. App. 713, 719-20, 167 P.3d 593 (2007) (Brown, J. dissenting). A defendant does not, however, have a right to a public hearing on purely ministerial or legal issues when it does not involve consideration of evidence or any issue related to trial. *State v. Rivera*, 108 Wn. App. 645, 653, 32 P.3d 292 (2001) (neither public nor defendant had a right to be present when trial court addressed juror's complaint about another juror's hygiene). *But see State v. Wise*, 148 Wn. App. 425, 433-35, 200 P.3d 266 (2009) (Van Deren, J. dissenting), *review granted*, 170 Wn.2d 1009, 236 P.3d 207 (2010) (*Bone-Club* analysis unnecessary for temporary relocation of voir dire to chambers, defendant waived public trial right, and defendant lacked standing to assert public's right).

7 We resolve this case on the issue of Abbey's right to a public trial, not the public's right to the same. We analyze Abbey's public trial rights under *Momah* 4 and *Strode*, 5 two decisions the Washington State Supreme Court issued the same day. 6

8 In *Momah*, the defendant:

affirmatively assented to the closure, argued for its expansion, had the opportunity to object but did not, actively participated in it, and benefited from it. Moreover, the trial judge in this case not only sought input from the defendant, but he closed the courtroom after consultation with the defense and the prosecution. Finally, and perhaps most importantly, the trial judge closed the courtroom to safeguard *Momah's* constitutional right to a fair trial by an impartial jury, not to protect any other interests. 167 Wn.2d 140, 151-52, 217 P.3d 321 (2009) (Alexander, J. dissenting). The court affirmed *Momah's* convictions. 167 Wn.2d at 156.

9 In *Strode*, the defendant merely stated that he did not object to chambers interviews of jurors. 167 Wn.2d at 229. Our Supreme Court overturned Strode's conviction and remanded to the trial court for a new trial. *Strode*, 167 Wn.2d at 231. Abbey, like Strode, merely acquiesced in the private interviews. In *Strode*, six justices agreed that this mere acquiescence did not waive Strode's public trial right. 167 Wn.2d at 229, 235. The result here is the same. We reverse Abbey's conviction and remand for further proceedings. See *Bowen*, 157 Wn. App. at 821 (found violation of defendant's public trial right under *Momah* and *Strode*).

10 Here, what began as a ministerial matter, i.e., finding out why the juror refused to stand and take the oath, soon evolved into a discussion highly relevant to whether the State or defendant felt that the juror should serve, such that the State even suggested removing the juror for cause. What transpired was an investigation into the juror's ability to serve, a matter neither ministerial nor trivial, and how his religious beliefs interfered with his ability to pass judgment or render a verdict. Certainly, this type of information, which directly relates to the integrity of the process, absent a *Bone-Club* analysis, needed to be publicly explored. 7

11 We reverse and remand for a new trial.

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

Worswick, J., concurs.

Concur

Concur by: QUINN-BRINTNALL

13 Quinn-Brintnall, J. (concurring in the result) Because Shannon Lee Abbey did not object to the trial court's decision to question the prospective juror in the hallway outside the courtroom and his counsel participated in the investigation into why the prospective juror had refused to take an oath to tell the truth, 8 I would hold that he has not preserved this error for our review. See, e.g., *Presley v. Georgia*, ___ U.S. ___, 130 S. Ct 721, 722, 175 L. Ed. 2d 675 (2010) (defendant objected to trial court's decision to exclude the public, including Presley's uncle, during voir dire); *State v. Wise*, 148 Wn. App. 425, 200 P. 3d 266 (2009), review granted, 170 Wn.2d 1009 (1020) (*Bone-Club* 9 analysis unnecessary for temporary relocation of voir dire to chambers, defendant waived public trial right, and defendant lacked standing to assert public's right). But because the record clearly establishes that, unlike *Wise*, Abbey was excluded from being present in the hallway during the judge's questioning of the recalcitrant juror, I concur with the result of the majority opinion that Abbey is entitled to a new trial.

Footnotes

1

A violation of RCW 9A.44.115(2)(a).

2

Abbey has three misdemeanor convictions of attempted voyeurism.

3

We asked the parties twice to provide supplemental briefing. First, we asked for briefing on how article I, section 11 of the Washington Constitution and RCW 2.36.080(3) pertain to this case. Second, we asked for briefing on whether the trial court's failure to include Abbey in the in-hall questioning of Juror Munn violated Abbey's due process rights under the Sixth and Fourteenth Amendments and, if so, was it harmless error. Upon further consideration, we confine our discussion to that raised in the original briefs.

4

State v. Momah, 167 Wn.2d 140, 217 P.3d 321 (2009) (Alexander, J. dissenting).

5

Strode, 167 Wn.2d 222, 217 P.3d 310.

6

Two recent decisions from this court have concluded that *Momah* and *Strode* have been eclipsed by a more recent United Supreme Court case, *Presley*, 130 S. Ct. 721, 175 L. Ed. 2d 675. See *State v. Leyerle*, 158 Wn. App. 474, 242 P.3d 921 (2010) (Hunt, J. dissenting) and *State v. Paumier*, 155 Wn. App. 673, 230 P.3d 212 (Quinn-Brintnall, J. dissenting), review granted, 169 Wn.2d 1017, 236 P.3d 206 (2010). Because our result here is the same under *Momah* and *Strode* as under these more recent cases and because here, unlike in *Presley*, the defendant did not object to the closure, we analyze this case under *Momah* and *Strode*.

7

The trial court abandoned this method of questioning after this point in the trial following the State's objection to using it for private questions. Instead, the trial court had the venire leave the courtroom while the attorneys questioned individual jurors publicly. The trial court could easily have employed this same method with juror Munn.

8

Although the record suggests that the trial court believed John Munn was asserting a First Amendment free exercise of religion right, in my opinion his statements made in the hallway suggest that he was referring to constitutional and statutory prohibitions on questioning prospective jurors and witnesses regarding religious belief. See Wash. Const. art. I, 11; RCW 2.36.080(3).

9

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

The State of Washington, Respondent, v. Shannon Lee Abbey, Appellant.

COURT OF APPEALS OF WASHINGTON, DIVISION TWO

2011 Wash. App. LEXIS 1865

No. 37551-6-II

January 4, 2011, Oral Argument

August 5, 2011, Filed

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ANALYSIS

3 Abbey makes a single challenge on appeal, claiming that the trial court violated his right to a public trial when it questioned juror Munn in the hallway rather than in open court. 3

4 The Sixth Amendment to the United States Constitution provides, "In all criminal prosecutions, the accused shall enjoy the right to a . . . public trial." Similarly, article I, section 22 of the Washington Constitution guarantees, "In criminal prosecutions the accused shall have the right . . . to have a . . . public trial." The Washington Constitution also provides in article I, section 10 that "[j]ustice in all cases shall be administered openly." The public trial right is not absolute; it is strictly guarded to ensure proceedings occur outside the public courtroom in only the most unusual circumstances. *State v. Strode*, 167 Wn.2d 222, 226, 217 P.3d 310 (2009) (C. Johnson, J. dissenting) (citing *State v. Easterling*, 157 Wn.2d 167, 174-75, 137 P.3d 825 (2006) (Chambers, J. concurring)). "Whether a defendant's constitutional right to a public trial has been violated is a question of law, subject to a de novo review on direct appeal." *Strode*, 167 Wn.2d at 225.

5 Our Supreme Court has articulated guidelines every trial court must follow before closing a courtroom to the public. *State v. Bone-Club*, 128 Wn.2d 254, 258-59, 906 P.2d 325 (1995). Those criteria are:

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. *Bone-Club*, 128 Wn.2d at 258-59 (quoting *Allied Daily Newspapers of Wash. v. Eikenberry*, 121 Wn.2d 205, 210-11, 848 P.2d 1258 (1993)). See also *Presley v. Georgia*, ___ U.S. ___, 130 S. Ct. 721, 724, 175 L. Ed. 2d 675 (2010); *State v. Brightman*, 155 Wn.2d 506, 514, 122 P.3d 150 (2005); *State v. Bowen*, 157 Wn. App. 821, 239 P.3d 1114 (2010). If the proceeding is subject to the right to a public trial, the trial court's failure to conduct a *Bone-Club* inquiry before excluding the public violates the defendant's public trial rights. *Brightman*, 155 Wn.2d at 515-16.

6 The public trial right applies to jury voir dire. *Presley v. Georgia*, 130 S. Ct. at 724-25; *In re Pers. Restraint of Orange*, 152 Wn.2d 795, 806, 100 P.3d 291 (2004); *State v. Erickson*, 146 Wn. App. 200, 206, 189 P.3d 245 (2008) (Quinn-Brintnall, J. dissenting); *State v. Duckett*, 141 Wn. App. 797, 803, 173 P.3d 948 (2007) (Brown, J. dissenting); *State v. Frawley*, 140 Wn. App. 713, 719-20, 167 P.3d 593 (2007) (Brown, J. dissenting). A defendant does not, however, have a right to a public hearing on purely ministerial or legal issues when it does not involve consideration of evidence or any issue related to trial. *State v. Rivera*, 108 Wn. App. 645, 653, 32 P.3d 292 (2001) (neither public nor defendant had a right to be present when trial court addressed juror's complaint about another juror's hygiene). *But see State v. Wise*, 148 Wn. App. 425, 433-35, 200 P.3d 266 (2009) (Van Deren, J. dissenting), *review granted*, 170 Wn.2d 1009, 236 P.3d 207 (2010) (*Bone-Club* analysis unnecessary for temporary relocation of voir dire to chambers, defendant waived public trial right, and defendant lacked standing to assert public's right).

7 We resolve this case on the issue of Abbey's right to a public trial, not the public's right to the same. We analyze Abbey's public trial rights under *Momah* 4 and *Strode*, 5 two decisions the Washington State Supreme Court issued the same day. 6

8 In *Momah*, the defendant:

affirmatively assented to the closure, argued for its expansion, had the opportunity to object but did not, actively participated in it, and benefited from it. Moreover, the trial judge in this case not only sought input from the defendant, but he closed the courtroom after consultation with the defense and the prosecution. Finally, and perhaps most importantly, the trial judge closed the courtroom to safeguard *Momah's* constitutional right to a fair trial by an impartial jury, not to protect any other interests. 167 Wn.2d 140, 151-52, 217 P.3d 321 (2009) (Alexander, J. dissenting). The court affirmed *Momah's* convictions. 167 Wn.2d at 156.

9 In *Strode*, the defendant merely stated that he did not object to chambers interviews of jurors. 167 Wn.2d at 229. Our Supreme Court overturned Strode's conviction and remanded to the trial court for a new trial. *Strode*, 167 Wn.2d at 231. Abbey, like Strode, merely acquiesced in the private interviews. In *Strode*, six justices agreed that this mere acquiescence did not waive Strode's public trial right. 167 Wn.2d at 229, 235. The result here is the same. We reverse Abbey's conviction and remand for further proceedings. See *Bowen*, 157 Wn. App. at 821 (found violation of defendant's public trial right under *Momah and Strode*).

10 Here, what began as a ministerial matter, i.e., finding out why the juror refused to stand and take the oath, soon evolved into a discussion highly relevant to whether the State or defendant felt that the juror should serve, such that the State even suggested removing the juror for cause. What transpired was an investigation into the juror's ability to serve, a matter neither ministerial nor trivial, and how his religious beliefs interfered with his ability to pass judgment or render a verdict. Certainly, this type of information, which directly relates to the integrity of the process, absent a *Bone-Club* analysis, needed to be publicly explored. 7

11 We reverse and remand for a new trial.

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

Worswick, J., concurs.

Concur

Concur by: QUINN-BRINTNALL

13 Quinn-Brintnall, J. (concurring in the result) Because Shannon Lee Abbey did not object to the trial court's decision to question the prospective juror in the hallway outside the courtroom and his counsel participated in the investigation into why the prospective juror had refused to take an oath to tell the truth, 8 I would hold that he has not preserved this error for our review. See, e.g., *Presley v. Georgia*, ___ U.S. ___, 130 S. Ct 721, 722, 175 L. Ed. 2d 675 (2010) (defendant objected to trial court's decision to exclude the public, including Presley's uncle, during voir dire); *State v. Wise*, 148 Wn. App. 425, 200 P. 3d 266 (2009), review granted, 170 Wn.2d 1009 (1020) (*Bone-Club* 9 analysis unnecessary for temporary relocation of voir dire to chambers, defendant waived public trial right, and defendant lacked standing to assert public's right). But because the record clearly establishes that, unlike Wise, Abbey was excluded from being present in the hallway during the judge's questioning of the recalcitrant juror, I concur with the result of the majority opinion that Abbey is entitled to a new trial.

Footnotes

1

A violation of RCW 9A.44.115(2)(a).

2

Abbey has three misdemeanor convictions of attempted voyeurism.

3

We asked the parties twice to provide supplemental briefing. First, we asked for briefing on how article I, section 11 of the Washington Constitution and RCW 2.36.080(3) pertain to this case. Second, we asked for briefing on whether the trial court's failure to include Abbey in the in-hall questioning of Juror Munn violated Abbey's due process rights under the Sixth and Fourteenth Amendments and, if so, was it harmless error. Upon further consideration, we confine our discussion to that raised in the original briefs.

4

State v. Momah, 167 Wn.2d 140, 217 P.3d 321 (2009) (Alexander, J. dissenting).

5

Strode, 167 Wn.2d 222, 217 P.3d 310.

6

Two recent decisions from this court have concluded that *Momah* and *Strode* have been eclipsed by a more recent United Supreme Court case, *Presley*, 130 S. Ct. 721, 175 L. Ed. 2d 675. See *State v. Leyerle*, 158 Wn. App. 474, 242 P.3d 921 (2010) (Hunt, J. dissenting) and *State v. Paumier*, 155 Wn. App. 673, 230 P.3d 212 (Quinn-Brintnall, J. dissenting), review granted, 169 Wn.2d 1017, 236 P.3d 206 (2010). Because our result here is the same under *Momah* and *Strode* as under these more recent cases and because here, unlike in *Presley*, the defendant did not object to the closure, we analyze this case under *Momah* and *Strode*.

7

The trial court abandoned this method of questioning after this point in the trial following the State's objection to using it for private questions. Instead, the trial court had the venire leave the courtroom while the attorneys questioned individual jurors publicly. The trial court could easily have employed this same method with juror Munn.

8

Although the record suggests that the trial court believed John Munn was asserting a First Amendment free exercise of religion right, in my opinion his statements made in the hallway suggest that he was referring to constitutional and statutory prohibitions on questioning prospective jurors and witnesses regarding religious belief. See Wash. Const. art. I, 11; RCW 2.36.080(3).

9

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

Appendix 3

1 that causes anybody to start off with any problems, or
2 strong feelings, one way or the other?

3 Okay. We anticipate that this case will
4 finish up sometime tomorrow, the presentation of the
5 case. I can't tell you how long your deliberations will
6 take, that's strictly up to you. We aren't going to
7 keep you sequestered, or locked together, during the
8 case. You'll be free to leave at the noon hour. Today,
9 we're going to break at approximately a quarter after
10 4:00. And if you are on the jury, the first thing we do
11 is make sure that you get access to a phone.

12 Is there anybody here who knows of any reason
13 whatsoever why you might not be able to sit on this
14 case? We usually get one or two hands.

15 Okay, yes, ma'am?

16 JUROR: I do have a health problem that could cause
17 me to be late, or not be very efficient.

18 THE COURT: Okay.

19 If -- if you know what our schedule is, can
20 you make that work?

21 JUROR: I -- there's -- it's doubtful -- I mean,
22 there's a doubt that I can.

23 THE COURT: Okay.

24 JUROR: If you'd like, I could talk to you
25 privately, if you'd like to know more about that.

1 THE COURT: All right, we'll come back to it.

2 What is your name?

3 JUROR: Janice Wood.

4 THE COURT: Okay, we will come back to it, if need
5 be.

6 All right, anyone else?

7 Okay, before I turn this over to the lawyers
8 for their questions, let me tell you a little bit about
9 this process.

10 In the State of Washington, we use what's
11 called the struck jury method for selecting jurors.
12 Basically, what that means is the lawyers are going to
13 be talking to you, generally, as a group. When I first
14 started doing this as a lawyer, we would start with
15 Juror No. 1, and each side would ask Juror No. 1 all
16 their questions; then we'd go to Juror No. 2 and ask all
17 the question; and so on. And by the time we'd get down
18 to about Juror No. 14, you've heard it a few times;
19 okay? The lawyers may, from time to time, ask questions
20 of individual jurors, but generally, they're talking to
21 everybody at once.

22 This is also sometimes called the "Donahue
23 Method." It got that name, probably, because of Judge
24 Donahue, who was, at that time, a Judge over in Spokane
25 County, was the first to use it. I'm pretty sure the

1 Do you think they all lie?

2 JUROR: No, but anybody can lie. Just because they
3 have a badge on doesn't mean they don't.

4 MR. LADOUCEUR: All right.

5 Well, thank you for that; and, once again,
6 thank you very much.

7 THE COURT: All right, Counsel, want to approach?

8 Ladies and gentlemen, I told you a little
9 while ago that each side can strike some jurors, if they
10 wish, without giving a reason. That's the process we're
11 going to be going through. It will take us about five
12 minutes, that's why nobody is asking you questions.

13 MR. LADOUCEUR: Can I just have a minute?

14 THE COURT: Sure.

15 Counsel, approach, please.

16 (Bench conference begins at 11:23 a.m.)

17 THE COURT: Ladies and gentlemen, if you'd give us
18 just a moment.

19 Ms. Wood, if you would step out here with us.

20 (Hall conference begins at 11:25 a.m.)

21 (The following proceedings occurred
22 outside the presence of the jurors.)

23 THE COURT: I was looking at that again, and I -- I
24 don't think this is a problem; all right?

25 Hang on just a moment, until Mr. Ladouceur

1 comes out.

2 Okay, I just wanted to ask you about the
3 medical situation, preferably without a whole lot of
4 people hearing.

5 JUROR: Yes, I appreciate that.

6 It's kind of complicated. First, I have
7 [inaudible] and I just -- and that's a blood disease, by
8 the way, okay? So -- which causes me to have -- to need
9 phlebotomies, that type of things.

10 But now I have a secondary condition, and for
11 some reason, I'm having to go to the bathroom. Like
12 this morning, I thought I would be late because I was in
13 the bathroom a lot. And, so, that's -- that was my
14 concern, that I wouldn't even be here on times.

15 So, that -- if I were on the [inaudible] the
16 jury --

17 THE COURT: We take a break about every hour and a
18 half, or so, and if -- I always tell the jury if anybody
19 wants a break raise your hand and we'll take one, I'm
20 not gonna ask you why.

21 JUROR: Oh.

22 THE COURT: Would that be sufficient for you, do
23 you think?

24 JUROR: If I could do that -- I can -- that ad they
25 have on tv for a while, that's kind of me, you know,

1 right now.

2 THE COURT: Yeah, so, you think that'll be
3 sufficient for you?

4 JUROR: Yes, but then like -- what happens if I'm
5 late, like this morning? See, I just -- I could've been
6 late.

7 THE COURT: Yeah, okay.

8 JUROR: Now, I'm fine now, it just seems like I
9 just have that -- that one time in the morning, and, so
10 that was -- but I'm just fine to be [inaudible] here if
11 you don't want me having to do that.

12 THE COURT: Okay.

13 All right. Thank you, ma'am.

14 JUROR: Sure. Thank you.

15 MS. SHAFFER: I think we're going to need
16 [inaudible] the record.

17 THE COURT: Mr. Ladouceur, for the record, at this
18 point, your client was comfortable with not coming out
19 here to participate in this?

20 MR. LADOUCEUR: I specifically advised him of his
21 right to do so, and he indicated that he had no problem
22 with my advice; that he would decline the invitation;
23 and would be happy to put that on the record --

24 THE COURT: Okay, yeah, we'll do that outside the
25 presence of the jury.

1 Just to confirm, I was going to strike Mr.
2 Tipton.

3 MR. LADOUCEUR: Yeah.

4 THE COURT: I -- unfortunately, I don't think he's
5 hearing much.

6 MS. SHAFFER: The State has no objection.

7 THE COURT: Any objection?

8 MR. LADOUCEUR: No objection.

9 THE COURT: All right.

10 Any other issues we need to take up?

11 MR. LADOUCEUR: Well, just again, and pardon me for
12 not being familiar with your ways, but 16, 17, those are
13 the folks that are moving up, and they're not -- okay,
14 all right.

15 THE COURT: Yeah, we're just working our way down,
16 regardless of how they're sitting out there.

17 MR. LADOUCEUR: Yeah, okay.

18 THE COURT: All right?

19 MR. LADOUCEUR: Sure.

20 (Hall conference concludes at 11:27 a.m.)

21 (The following proceedings occurred
22 in the presence of the jurors.)

23 (Peremptory challenges not
24 made audibly on record.)

25 /////

Appendix 4

LPD:

607-7192

DATE:

3/20/07

TIME:

085

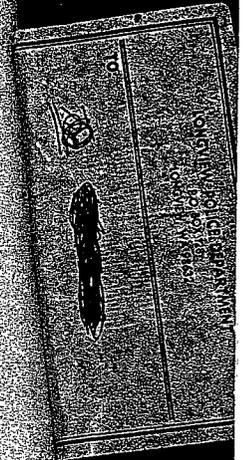
DET:

LAZENSKY

LANGLOIS

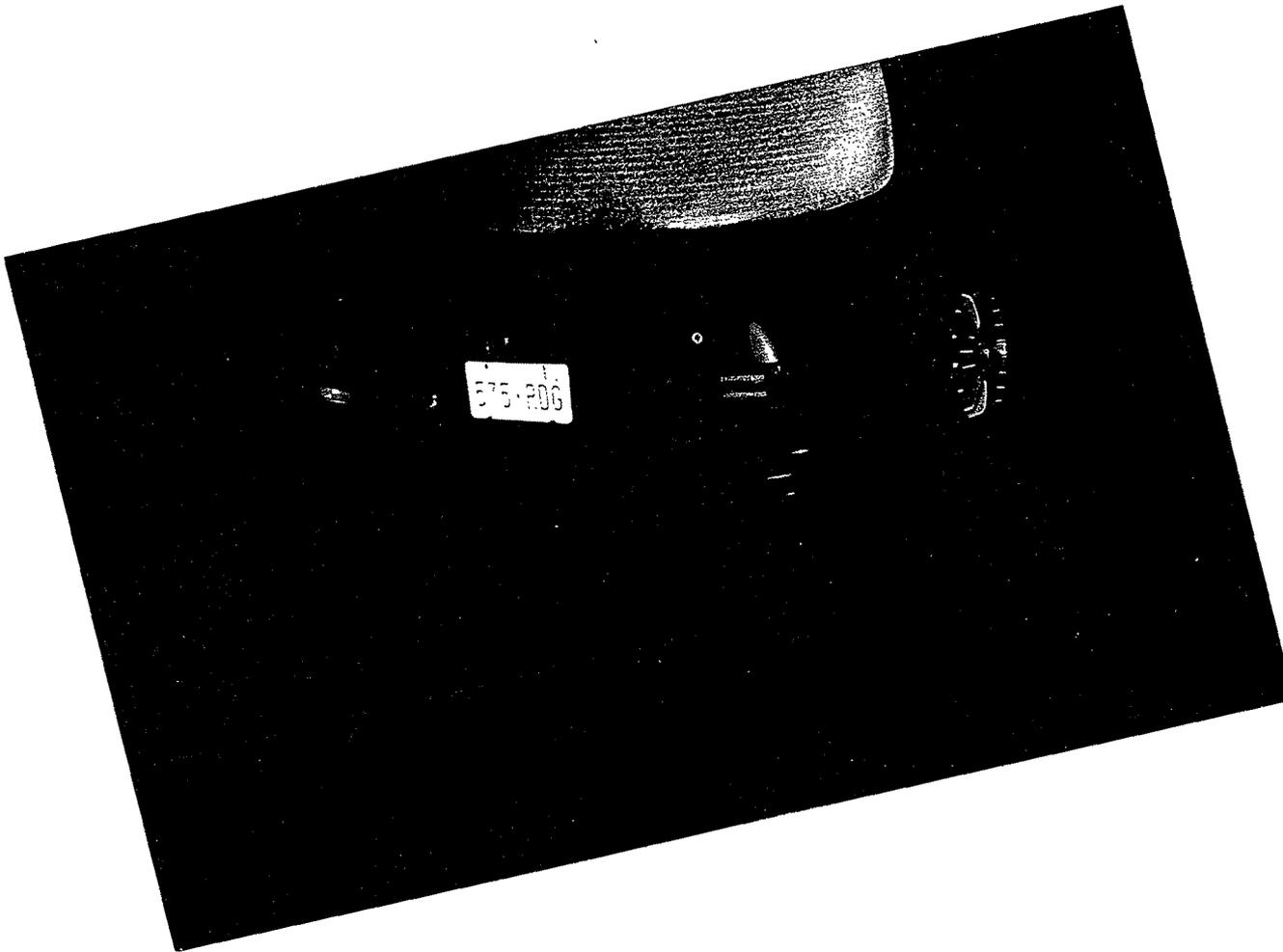
ROLL:

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Appendix 5

WPIC 151.00

BASIC CONCLUDING INSTRUCTION

When you begin deliberating, you should first select a presiding juror. The presiding juror's duty is to see that you discuss the issues in this case in an orderly and reasonable manner, that you discuss each issue submitted for your decision fully and fairly, and that each one of you has a chance to be heard on every question before you.

During your deliberations, you may discuss any notes that you have taken during the trial, if you wish. You have been allowed to take notes to assist you in remembering clearly, not to substitute for your memory or the memories or notes of other jurors. Do not assume, however, that your notes are more or less accurate than your memory.

You will need to rely on your notes and memory as to the testimony presented in this case. Testimony will rarely, if ever, be repeated for you during your deliberations.

If, after carefully reviewing the evidence and instructions, you feel a need to ask the court a legal or procedural question that you have been unable to answer, write the question out simply and clearly. [For this purpose, use the form provided in the jury room.] In your question, do not state how the jury has voted. The presiding juror should sign and date the question and give it to the bailiff. I will confer with the lawyers to determine what response, if any, can be given.

You will be given [the exhibits admitted in evidence,] these instructions [,] and _____ verdict form[s] for recording your verdict. [Some exhibits and visual aids may have been used in court but will not go with you to the jury room. The exhibits that have been admitted into evidence will be available to you in the jury room.]

You must fill in the blank provided in [the] [each] verdict form the words "not guilty" or the word "guilty", according to the decision you reach.

Because this is a criminal case, each of you must

CONCLUDING INSTRUCTIONS

WPIC 151.00

agree for you to return a verdict. When all of you have so agreed, fill in the verdict form(s) to express your decision. The presiding juror must sign the verdict form(s) and notify the bailiff. The bailiff will bring you into court to declare your verdict.

NOTE ON USE

Use bracketed material as applicable. A bracketed sentence may be used by courts that provide jurors with forms for submitting questions during their deliberations. A sample form is set forth in Appendix G.

Use WPIC 180.01, Verdict Form A—General, with this instruction.

COMMENT

Procedures for handling questions from a deliberating jury.

The instruction explains for jurors, before they begin their deliberations, the steps they must take if they need to ask the court a question during their deliberations. When deliberating jurors send out such a question, the judge should number the question and review it with the lawyers outside the presence of the jury. The judge should respond to the question in open court or in writing (if the question relates to a point of law, the answer should be written). If the jury is brought back into open court, the lawyers and the defendant should have the opportunity to be present. The judge should supplement any written response by telling jurors to consider the response together with all the other written instructions in the case. The judge should enter the question, response, and any objections in the record. The judge should carefully refrain from appearing to comment on the evidence, coerce a verdict, or be unfairly prejudicial to one side or the other. For more complete discussions of the issues involved in handling questions from deliberating jurors, see CrR 6.15(f); CrRLJ 6.15(e); see also Recommendations 38-40 of the Report of the Washington State Jury Commission (see Appendix H in Volume 11A of Washington Practice); Ferguson, 13 Washington Practice, Criminal Practice & Procedure, §§ 4413, 4610, and 4611 (3rd ed.) (regarding procedures for communicating with jurors during deliberations); State v. Koontz, 145 Wn.2d 650, 41 P.3d 475 (2002) (regarding repeating testimony for deliberating jurors); and WPIC 4.68 (regarding additional jury instructions), 4.68.01 (regarding changed instructions), 4.70 (regarding inquiring as to the probability of a verdict), and 4.81 (regarding deadlocked juries).

Question from deliberating jury—Presence of counsel and defendant. A defendant has a constitutional right to be present at every stage of a trial. This includes the right to be present for communications between the court and jurors after deliberations have

begun. See *State v. Rice*, 110 Wn.2d 577, 757 P.2d 889 (1988) (constitutional right to be present for return of verdict); *State v. Caliguri*, 99 Wn.2d 501, 664 P.2d 466 (1983) (stating, in a case involving replaying testimony for a deliberating jury, that “[i]t is settled in this state that there should be no communication between the court and jury in the absence of the defendant”); *State v. Shutzler*, 82 Wash. 365, 144 P. 284 (1914); see also *United States v. Treatman*, 524 F.2d 320 (8th Cir. 1975) (stating that “it is settled law that communications between the judge and the jury in the absence of and without notice to defendant and his counsel are improper,” and “[t]he appellant’s right to be present is constitutionally guaranteed by both the Fifth and Sixth Amendments to the federal constitution”); see also CrR 3.4(a) (“defendant shall be present . . . at every stage of the trial . . . except as otherwise provided by these rules, or as excused or excluded by the court for good cause shown”); CrRLJ 3.4(a) (same).

Two Court of Appeals opinions have held that the trial judge may answer a question from deliberating jurors without the presence of the defendant, as long as defense counsel is present. *State v. Jury*, 19 Wn.App. 256, 576 P.2d 1302 (1978), and *State v. Brown*, 29 Wn.App. 11, 627 P.2d 132 (1981). These opinions, however, were based on a prior version of CrR 6.15 (the prior version stated that the judge’s answer “shall be given in the presence of, or after notice to the parties or their counsel”; emphasis added). The rule, as amended in 2002, no longer includes the disjunctive language as to the defendant’s presence, leaving this issue to be governed by CrR 3.4 (quoted above). Additionally, the holdings in *Jury* and *Brown* are difficult to square with the cases described above addressing the constitutional issues in this area of the law.

Accordingly, the committee recommends that the defendant be present for any in-court or substantive communication between the judge and a deliberating jury, unless the defendant has knowingly and voluntarily waived the right to be present.

Bailiff’s communications with deliberating jurors. Bailiffs are prohibited from any communications with deliberating jurors that may affect the case. CrR 6.7; CrRLJ 6.7; see, e.g., *State v. Booth*, 36 Wn.App. 66, 671 P.2d 1218 (1983) (court should have granted a mistrial after the bailiff had an unauthorized conversation with deliberating jurors about why a certain witness had not testified).

The court rule expressly allows the bailiff to ask jurors if they have agreed upon a verdict and to allow communication upon order of the court. CrR 6.7; CrRLJ 6.7. Moreover, the bailiff may communicate with deliberating jurors in order to take care of housekeeping needs, eating, lodging, personal arrangements, and family messages for jurors. See *State v. Smith*, 43 Wn.2d 307, 261 P.2d 109 (1953); *State v. Carroll*, 119 Wash. 623, 206 P. 563 (1922) and 41 A.L.R.2d 227, 257.

ning and/or sophistication of a kind not usually associated with the commission of the offense in question.

◆ **Commentary: Non-pattern instruction.** For future trials, the aggravating circumstance of sophistication or planning is explained in WPIC 300.22, Aggravating Circumstance—Sophistication or Planning.

No. 13

You will now be furnished with Special Verdict Forms 1C, 2C, 3C, and 5B. You will use these special verdict forms and fill in the blanks for each question on each form with the answer “yes” or “no” according to the decision you reach. In order to answer any question on the special verdict forms “yes”, you must unanimously be satisfied beyond a reasonable doubt that “yes” is the correct answer. If you have a reasonable doubt as to any question, you must answer “no” to that question.

◆ **Commentary: WPIC 160.00, Concluding Instruction—Special Verdict—Penalty Enhancements.** For future trials, the substance of this instruction is covered by WPIC 300.51, Concluding Instruction—Aggravated Circumstance—Bifurcated Trial or Stand-Alone Sentencing Proceeding.

No. 14

As jurors, you have a duty to discuss the case with one another and to deliberate in an effort to reach a unanimous verdict. Each of you must decide the case for yourself, but only after you consider the evidence impartially with your fellow jurors. During your deliberations, you should not hesitate to re-examine your own views and to change your opinion based upon further review of the evidence and these instructions. You should not, however, surrender your honest belief about the value or significance of evidence solely because of the opinions of your fellow jurors. Nor should you change your mind just for the purpose of reaching a verdict.

◆ **Commentary: WPIC 1.04, Juror’s Duty to Consult with one Another.** For future trials, this instruction will not be needed in a bifurcated proceeding. If WPIC 300.51 is given, the original instructions on this subject will remain applicable.

No. 15

Upon retiring to the jury room for your deliberation of this matter, your first duty is to select a presiding juror.

It is this person’s duty to see that discussion is carried on in a sensible and orderly fashion, that the issues submitted for your

Appendix 6

FILED
SUPERIOR COURT
DATE: 2008 JUNE 24
COWLITZ COUNTY
RONI A. BOOTH
BY: AB

SUPERIOR COURT OF WASHINGTON FOR COWLITZ COUNTY

St.
Plaintiff(s),
vs.
Daniel Longan
Defendant(s).

No. 07-1-00431-6
QUESTION FROM THE
DELIBERATING JURY AND
COURT'S RESPONSE

Do NOT indicate how the jury has voted.

JURY QUESTION: Form E has typo - one statement says count I it should refer to count II
Form G has a misstatement - it says we found the defendant guilty of ASSAULT as charged in count IV - it should say we found him guilty of taking a motor vehicle.
Presiding Juror / Date Kathleen Bricker 6/24/08

Date and time received by the Bailiff: 5:30 6/24/08 JKC

COURT'S RESPONSE: (After affording all counsel/parties opportunity to be heard.)
Please return the special verdict forms to the Bailiff and use the set provided.

[Signature]
Judge

Date and time returned to the jury: 6/24/08 5:50pm

Scanned

(50)

FILED
SUPERIOR COURT
DATE: 2008 JUNE 24
COWLITZ COUNTY
RONIA. BOOTH
BY: [Signature]

SUPERIOR COURT OF WASHINGTON FOR COWLITZ COUNTY

State
Plaintiff(s),
vs.
Daniel Longan
Defendant(s).

No. 07-1-00431-6
QUESTION FROM THE
DELIBERATING JURY AND
COURT'S RESPONSE

Do NOT indicate how the jury has voted.

JURY QUESTION: The firearm was not found. Is this a problem for answering the special instructions. On instruction 24 it says circumstances under which the firearm was found.
[Signature] June 24, 2008
Presiding Juror / Date

Date and time received by the Bailiff: 5:05 6/24/08 DK

COURT'S RESPONSE: (After affording all counsel/parties opportunity to be heard.)
Please consider all the evidence, or lack thereof, relating to firearms in your deliberations.

[Signature]
Judge

Date and time returned to the jury: 6/24/08 5:15pm