

NO. 43737-6-II

**COURT OF APPEALS, DIVISION II
STATE OF WASHINGTON**

STATE OF WASHINGTON, RESPONDENT

v.

THOMAS ESPEY, APPELLANT

Appeal from the Superior Court of Pierce County
The Honorable Judge Linda Lee (trials 1-3)
The Honorable Judge Stephanie Arend (suppression motion)

No. 11-1-01881-6

BRIEF OF RESPONDENT

MARK LINDQUIST
Prosecuting Attorney

By
STEPHEN TRINEN
Deputy Prosecuting Attorney
WSB # 30925

930 Tacoma Avenue South
Room 946
Tacoma, WA 98402
PH: (253) 798-7400

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A. ISSUES PERTAINING TO APPELLANT'S ASSIGNMENTS OF ERROR.

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3. Whether the State properly admitted, and argued the defendant's statements in the interview with the Detective, and in doing so did not violate the defendant's exercise of his rights even though he explained why he didn't contact police voluntarily, and that he spoke to counsel where the defendant was not in custody when he did those things, and the evidence was relevant to the defendant's motive and credibility?

B. STATEMENT OF THE CASE.

1. Procedure

On May 4, 2011, the State filed an information based on an incident that occurred on April 8, 2011 charging the defendant with Count I, robbery in the first degree; count ii, burglary in the first degree. CP 1-2. A bench warrant was issued for the defendant's arrest. CP 265. The defendant was arraigned on May 26, 2011. See CP 266; CP 267-68.

On September 16, 2011, the State filed an amended information based upon an additional incident that occurred on May 25, 2011 that added count III, unlawful possession of a firearm in the first degree; count iv, possession of a stolen firearm; and count v, unlawful possession of a controlled substance, methamphetamine. CP 5-7.

On September 22, 2011 the case was assigned to the Honorable Judge Stephanie Arend, for trial. RP 09-22-2011, p. 2, ln. 12-20; CP 269. However, for purposes of trial the defense sought in a motion *in limine* to sever counts I and II from counts III, IV and V because they arose from separate incidents. RP 09-22-2011, p. 2, ln. 24 to p. 3, ln. 16; CP 32-36. The State did not oppose the motion and agreed that the two incidents that led to the charges were not connected in a manner relevant for trial. RP 09-22-2011, p. 3, ln. 17 to p. 4, ln. 7. The parties also wanted to proceed to trial on counts III, IV, and V first, with the hope that depending upon the outcome, an agreed resolution of counts I and II might be likely as a result. RP 09-22-2011, p. 4, ln. 14 to p. 5, ln. 2.

The court then considered a defense motion under CrR 3.6 to suppress evidence obtained from a green Cadillac the defendant was driving when arrested. RP 09-22-2011, p. 19, ln. 16; CP 8-12. The defense motion and declaration in support thereof were filed that same day, and the State did not prepare a responsive pleading. CP 8-12, 18-29.

The defense motion was a challenge to sufficiency of probable cause to support the issuance of the warrant on two bases, staleness, and a nexus to the place searched, so factually it was limited to the facts contained within the four corners of the probable cause declaration, and neither party put on additional evidence. RP 09-22-2011, p. 19, ln. 20-25.

As to the staleness claim, the defense claimed that the information in the probable cause declaration was stale where the robbery and burglary that occurred on April 8, 2011, and the warrant to search the defendant's vehicle was not obtained until May 26, 2011. RP 09-22-2011, p. 21, ln. 14 to p. 22, ln. 25; CP 28. As to nexus to the place to be searched, the defense argued that although the defendant was arrested on a warrant for the underlying robbery and burglary when he had been driving a green Cadillac, there was no nexus to support a search of that vehicle where he had not used it to commit the robbery and burglary. RP 09-22-2011, p. 23, ln. 17 to p. 24, ln. 5.

The court denied the motion to suppress the evidence obtained from the green Cadillac. RP 09-22-2011, p. 34, ln. 19 to p. 37, ln. 24; CP 30.

The case was expected to proceed to trial the following Monday, September 26. However, that day defense counsel requested a short recess regarding additional discovery and information regarding witness

tampering, and the defendant expressed dissatisfaction with his attorney's representation and asked that a new attorney be appointed. CP 270-72. As a result, the case was returned to the presiding judge to be set for a new trial date. CP 270-72. Defense counsel was later disqualified that same day due to a conflict. CP 31.

A new attorney was assigned the following day. CP 273.

On December 5, 2011, the case was assigned to the Honorable Judge Linda Lee for trial. CP 274.

A motion to sever counts was filed on February 21, 2012. CP 32-36. At this time the prosecutor filed a motion opposing severance of trial, in part because in the interim the defendant had expressed his desire not to have the counts severed. CP 275-82. The court entered an order severing or bifurcating trial on the counts. CP 37. The court severed the counts and directed that trial on counts III, IV and V would commence first, and trial on counts I and II would follow. CP 37; CP 283-84.

A jury was empaneled for trial on counts III, IV, and V on March 8, 2013. RP 03-08-12, p. 119, ln. 3 to p. 120, ln. 9. At the conclusion of the State's case, the court dismissed Count IV, possession of a stolen firearm, holding that the State had failed to produce sufficient evidence that the defendant knew the gun was stolen. RP 03-13-12, p. 158, ln. 28 to p. 161, ln. 20.

The jury concluded its deliberations as to the remaining two counts, III and V, on March 15, 2012. The Jury was unable to reach a verdict as to Count III (unlawful possession of a firearm in the first degree). RP 03-15-12, p. 268, ln. 10-13; CP 136. The jury found the defendant guilty as to counts V (unlawful possession of a controlled substance). RP 03-15-12, p. 268, ln. 7-9; CP 137.

On March 14, 2012, while the jury in the first trial was still deliberating as to counts III and V, the court began jury selection for the second trial with regard to counts I and II. RP 04-14-12 (trial 2), p. 2ff. A jury was empaneled for the second trial on March 15, 2012. RP 03-15-2012 (trial 2), p. 95, ln. 20 to p. 96, ln. 25.

On March 21, 2012, the jury returned verdicts of not-guilty as to Count I, robbery in the first degree, and guilty as to Count II, burglary in the first degree. RP 03-21-12, p. 6, ln. 12 to p. 10, ln. 10; CP 175-77 (Verdict Forms, filed 03-21-12); CP 300-07.

On June 11, 2012 the parties commenced a third trial as to Count III, the count upon which the jury in the first trial was unable to reach a verdict. RP 06-11-12, p. 2, ln. 11 to p. 4, ln. 7.¹ A jury was empaneled that same day. RP 06-11-12, p. 11, ln. 3. CP 308; CP 309-11; CP 312.

¹ The verbatim Report of Proceedings from June 11, 2012 does not have any page numbers. However, the transcript is only 11 pages long. The State will therefore refer to the pages by their number in order, inclusive of the title page as page 1.

On June 20, 2012 the jury returned a verdict of guilty as to Count III, unlawful possession of a firearm in the first degree. CP 227; CP 318-32.

On July 20, 2012, based on an offender score of 19, the court sentenced the defendant on counts II (burglary in the first degree), III (unlawful possession of a firearm in the first degree), and V (unlawful possession of a controlled substance) to a total sentence of 232 months in custody. CP 234-47. In doing so, the court imposed counts 3 and 5 concurrent to each other and count 2 consecutive to counts 3 and 5. CP 242; CP 252-55; CP 333-35.

A notice of appeal was timely filed on July 20, 2012. CP 228.

2. Facts

a. Facts at First Trial

In May of 2011, Pierce County Sheriff's Deputy Laliberte was investigating a crime relating to the defendant in this case, Thomas Espey. RP (03-12-2012) p. 24, ln. 14-21. Deputy Laliberte referred the completed investigation to the prosecutor's office, which obtained a warrant for the defendant's arrest. RP (03-12-2012) p. 24, ln. 24 to p. 25, ln. 8. Deputy Laliberte attempted to locate the defendant and serve the warrant, which he was able to do a month and a half later. RP (03-12-2012) p. 25, ln. 8-25.

On May 24, 2011, the deputies were looking for the defendant to be associated with a green Cadillac, which they located at a residence at 104th Street and Canyon Road. RP (03-12-2012) p. 26, ln. 8-15; p. 28, ln. 8-10. Officers surveilled the residence where the Cadillac was located, waiting for someone to get in the vehicle and drive off in it so that they could attempt to identify the occupants of the vehicle. RP (03-12-2012) p. 26, ln. 18-25. Officers did observed the defendant driving the vehicle. RP (03-12-2012) p. 29, ln. 7-11. They followed the defendant to the Muckleshoot Casino in Auburn. RP (03-12-2012) p. 30, ln. 4-10.

Officer Darby observed the defendant in the casino parking lot get out of the car, go to the trunk and open, rummage around in the trunk for several seconds, and then pull out and put on a black t-shirt. RP (03-12-2012) p. 115, ln. 2-7. After the defendant left the casino, officers followed him to a Shell gas station near the Tacoma Mall. RP (03-12-2012) p. 33, ln. 2-5.

The defendant went into the convenience store at the station and used the bathroom, so officers set up outside the bathroom and were able to make a peaceful arrest of the defendant when he came out. RP (03-12-2012) p. 33, ln. 9-17. Officers also secured and impounded the car. RP (03-12-2012) p. 34, ln. 5-7. Officer Laliberte then obtained and applied for a search warrant to search the vehicle for evidence of the same crime

for which the original arrest warrant was issued. RP (03-12-2012) p. 34, ln. 22 to p. 35, ln. 9.

Officers searched the vehicle and found a Glock .40 caliber handgun in the trunk. RP (03-12-2012) p. 36, ln. 6 to p. 38, ln. 17; p. 40, ln. 20 to p. 42, ln. 11. The trunk contained miscellaneous clothes and a laundry basket, and the handgun was found stuffed inside some balled-up socks that were inside the laundry. RP (03-12-2012) p. 38, ln. 18-21; p. 43, ln. 20 to p. 44, ln. 1. The clothes in the trunk were men's clothes of a large size. RP (03-12-2012) p. 44, ln. 2-11.

The parties entered several stipulations, including to the officers' finding of the gun, as well as other items of evidence in the search of the vehicle and to the chain of custody of those items, and a second stipulation as to the chain of custody of the Cadillac. RP (03-12-2012) p. 40, ln. 20 to p. 42, ln. 11; CP 63-64; 67-68. Other items found in the vehicle included the gun clip [magazine] and bullets, documents in the name of the defendant, Thomas Espey, methamphetamine, electronic scales, and a glass pipe. RP (03-12-2012) p. 40, ln. 20 to p. 42 to ln. 11; CP 290-93. Officers also found a prescription bottle with Espey's name on it in the trunk, as well as the documents with the defendant's name. RP (03-12-2012) p. 44, ln. 18 to p. 45, ln. 13; p. 54, ln. 23 to p. 55, ln. 5; Ex. 4-L. *See also* Exs. 4-A to 4-M.

The methamphetamine and glass pipe were found in the center console of the car. RP (03-12-2012) p. 53, ln. 14-19; p. 57, ln. 23 to p. 59, ln. 25; Ex. 8-K. The parties entered a stipulation that the methamphetamine in exhibit 5 was forensically tested and contained .7 grams of methamphetamine. RP (03-12-2012) p. 56, ln. 21 to p. 57, ln. 15; CP 65-66.

The parties also entered a stipulation that the defendant had a previous conviction for a serious felony offense. RP (03-12-2012) p. 77, ln. 22 to p. 78, ln. 12; CP 69-70.

Stephen Kuykendall testified that the Glock handgun found in the vehicle the defendant was driving had been stolen from his vehicle on May 14, 2011. RP (03-12-2012) p. 99, ln. 23 to p. 101, ln. 16. The theft of the gun occurred 11 days before the defendant was arrested and it was found in the trunk of the Cadillac was driving. RP (03-12-2012) p. 101, ln. 16.

At trial, Amy Dolsky testified that the defendant had made an arrangement with her in which the defendant would pay for the renewal of her the license tabs on her vehicle, which she could not afford to pay, in exchange for registering the green Cadillac in her name. RP (03-12-2012) p. 121, ln. 15 to p. 123, ln. 2. The defendant went with her to the DMV [Department of Licensing] office when she transferred the title into her

name. RP (03-12-2012) p. 123, ln. 2-3. She also never drove the car. RP (03-12-2012) p. 123, ln. 8.

b. Facts at Second Trial

On April 8, 2011 Sonny Campbell lived at 9613 Sales Road with Kimberly Bischof, and a guest Donny Resnick had been staying with them for about a week and a half. RP 03-19-2012 p. 20, ln. 10-13. Sonny Campbell had met the defendant, Thomas Espey a few years earlier through friends, and then met him again later through a mutual friend or acquaintance, Katie Bass. RP 03-19-2012 p. 21, ln. 18-23. Sonny Campbell helped Katie Bass get into a place for Christmas because she had kids and they needed a place. RP 03-19-2012 p. 22, ln. 1-2. He had not known Katie Bass prior to that. RP 03-19-2012 p. 22, ln. 1-3.

On April 8, 2011 at about 2:00 in the afternoon, Sonny Campbell came home from work for a brief moment and was in the back room with Kimberly, when he looked down the hall and saw Tom Espey coming down the hallway. RP 03-19-2012 p. 22, ln. 18-20. Two other people were with the defendant, two of whom Sonny Campbell did not know their names, and a third who had the last name of Falsetta. RP 03-19-2012 p. 22, ln. 22-24.

Sonny Campbell asked them what they were doing there. RP 03-19-2012 p. 23, ln. 17. Espey responded, "You know why I am here. You know what time it is." RP 03-19-2012 p. 23, ln. 17-19. Espey was putting on some fingerless gloves as he said this. RP 03-19-2012 p. 23, ln. 19, 25.

Sonny Campbell didn't know why Espey was in his house as Espey had never been in there before, or why Espey was putting on gloves, or what this was about. RP 03-19-2012 p. 23, ln. 19-22. Sonny Campbell was in shock and drawing a blank because of all of that. RP 03-19-2012 p. 23, ln. 22-23. Based on all these circumstances, Sonny Campbell had the sense that Espey was there to create some kind of confrontation and was likely about to harm him. RP 03-19-2012 p. 23, ln. 2-7. And, indeed, a confrontation occurred from there. RP 03-19-2012 p. 24, ln. 22.

Three of the assailants assaulted Campbell, with two hitting him and one kicking him. RP 03-19-2012 p. 25, ln. 17-21. Espey was throwing a punch hear and there, but it was limited because there was only so much room in that spot [of the house]. RP 03-19-2012 p. 25, ln. 24-25.

From the hallway, Campbell fell back through the bathroom door and fell into the tub. RP 03-19-2012 p. 24, ln. 24-25. He was being hit by all the people at once. RP 03-19-2012 p. 25, ln. 1-2.

Sonny Campbell had some head trauma and some blood coming from his ear and soreness. RP 03-19-2012 p. 28, ln. 4-7.

When the assailants left, Sonny Campbell found that they had taken a computer, a money bag with methamphetamine and money, a paint ball gun, and other jewelry. RP 03-19-2012 p. 266, ln. 18-20; p. 27, ln. 2-3.

Pierce County Sheriff's Deputies Clark and Reigle responded to a report of a home invasion robbery at 9613 Sales Road South in the Parkland area. RP 03-19-2012, p. 8, ln. 10-15. The location was a residential structure between several apartment complex areas. RP 03-19-2012, p. 8, ln. 15-23. When the deputies arrived at the scene they contacted two individuals, Sonny Campbell and Kimberly Bischof. RP 03-19-2012, p. 8, ln. 16-19. Sonny Campbell had injuries to his ears and neck. RP 03-19-2012, p. 9, ln. 11-12.

c. Facts at Third Trial

Pierce County Sheriff's Deputies obtained an arrest warrant for the defendant based upon an incident that occurred on April 8, 2011. RP 06-18-12, p. 36, ln. 10-14. The Deputies had a very difficult time trying to locate the defendant and ultimately had to make use of a confidential informant to locate him. RP 06-18-12, p. 37, ln. 8-13. The deputies were eventually able to locate a car associated with Espey, a green Cadillac, and performed surveillance on it. RP 06-18-12, p. 39, ln. 7-25.

Eventually, the defendant got in the car and drove it away. RP 06-18-12, p. 41, ln. 22 to p. 42, ln. 12. The deputies followed the car to the Muckleshoot Casino in Auburn. RP 06-18-12, p. 43, ln. 1-2. Detective Darby observed the green Cadillac park and after a few minutes the defendant got out of the driver's side, walked to the trunk, opened it, rummaged around in it, pulled out a black T-shirt, put it on and walked into the Casino. RP 06-18-12, p. 118, ln. 11 top. 120, ln. 1. Detective Darby entered the casino and observed the defendant playing slots for about 45 minutes while he was in there. RP 06-18-12, p. 43, ln. 13-18; p. 120, ln. 4-5. The defendant left the Casino with a woman, Kalyn Smith and they drove off. RP 06-18-12, p. 42, ln. 13-22; p. 89, ln. 12 to p. 91, ln. 18; p. 8-9. The defendant returned to the vehicle and drove to Tacoma, where he stopped at a gas station at 56th and Tacoma Mall Boulevard. RP 06-18-12, p. 43, ln. 24 to p. 44, ln. 5.

The defendant went into bathroom in the convenience store at the station, so officers waited for him outside with guns drawn because they had known him to be armed in the past. RP 06-18-12, p. 44, ln. 14-25. When he came out, the officers arrested him. RP 06-18-12, p. 44, ln. 11-12, ln. 19-20; p. 50, ln. 12-17.

Deputy Darby contact Kalyn smith at the gas station, identified and questioned her, but she did not appear to have any useful information and

as far as officers could she did not appear to have ever been associated with the defendant before the night he was arrested, nor has her name ever come up since then. RP 06-18-12, p. 120, ln. 10-20; p. 121, ln. 9-11. Ms. Smith had a misdemeanor warrant for her arrest and was transported to jail. RP 06-18-12, p. 121, ln. 11-13.

The deputies transported the defendant to their headquarters building, where the defendant was advised of his *Miranda* rights and interviewed. RP 06-18-12, p. 50, ln 18 to p. 51, ln. 10. The interview was recorded, and a redacted copy of the interview limited to the portions relevant to the issues in this trial was played for the jury and admitted into evidence as Exhibit 10. RP 06-18-12, p. 51, ln. 21 to p. 53, ln. 6; p. 53, ln. 21. A transcript of the interview was also provided to the jury for illustrative purposes only. RP 06-18-12, p. 52, ln. 21 to p. 53, ln. 6.

The car was impounded from the scene and secured. RP 06-18-12, p. 53, ln. 24 to p. 54, ln. 14. Detective Laliberte obtained a warrant for the car, which he served on May 31. RP 06-18-2012, p. 54, ln. 15-20. Inside the dashboard center console, officers found a digital scale and a black pipe. RP 06-18-2012, p. 60, ln. 22 to p. 61, ln. 20; Ex. 8-I; CP 313-17. In a baggie sticking out of the end of the pipe in the center console, officers also found a baggie of suspected methamphetamine. RP 06-18-12, p. 62, ln. 2 to p. 63, ln. 8; Ex. 8-J, 8-K.

In the trunk the officers found an overnight or shaving kit bag that contained a men's razor and a prescription bottle. RP 06-18-12, p. 64, ln. 3-24. The prescription bottle was in the name of the defendant. RP 06-18-12, p. 69, ln. 23 to p. 70, ln. 3; Ex. 8-V.

Also in the trunk was a laundry basket that contained laundry. RP 06-18-12, p. 65, ln. 2-4; Ex. 8-Q; 8-Y. One of the items of laundry in the basket was a sock that had a black Glock .40 cal semi-automatic handgun stuffed inside it. RP 06-18-12, p. 65, ln. 5-11; p. 68, ln. 2-4 Ex. 8-R. The serial number on the handgun was LTV754. RP 06-18-12, p. 66, ln. 11. The gun was loaded, with four bullets in the magazine. RP 06-18-12, p. 66, ln. 18 to p. 67, ln. 7.

Inside a black gym bag in the trunk the deputies found a legal size envelope with the defendant's name on it. RP 06-18-12, p. 69, ln. 8-12; Ex. 8-T, 8-U; 8-V. Inside the envelope were documents in the defendant's name. RP 06-18-12, p. 69, ln. 12-15.

Detective Laliberte conducted a follow-up search of the vehicle on September 21, specifically to look at the items of clothing in the trunk that could be specific to the defendant. RP 06-18-12, p. 72, Ln. 13-21; Ex. 8-Y. A number of items of clothing were identified, all of rather large size. RP 06-18-12, p. 73, ln. 13 to p. 74, ln. 9; Ex. 8-Z to 8-KK.

After the deputies seized the gun, they ran a background check on it and determined that it had been reported stolen. RP 06-18-12, p. 76, ln. 14-21.

Stephen Kuykendall testified that the gun at issue was his. RP 06-18-12, p. 123, ln. 10 to p. 124, ln. 9. He bought it at the end of November 2008. RP 06-18-12, p. 124, ln. 6-12. It was stolen out of his car while he was at work at the end of April in 2011. RP 06-18-12, p. 124, ln. 16-24.

Amy Dolsky testified that the defendant didn't have a driver's license and wanted to register the green Cadillac in the name of a licensed driver, so he arranged with her to register the green Cadillac in her name and in exchange he would pay for the tabs for her Mustang. RP 06-18-12, p. 164, ln. 4-19. They submitted a bill of sale and he paid for the cost of having the vehicle transferred to her name. RP 06-18-12, p. 164, ln. 22 to p. 165, ln. 11. Ms. Dolsky never drove the green Cadillac. RP 06-18-12, p. 165, ln. 12-13.

The defendant's girlfriend also contacted Ms. Dolsky prior to trial and attempted to have her testify at trial and direct her what to say. RP 06-18-12, p. 166, ln. 7 to p. 167, ln. 15. As a result, she initially gave a false statement to the trial prosecutor in a witness interview, however, when he re-contacted her and showed her that he knew she had not told

the truth, she changed her story and decided to tell the truth. RP 06-18-12, p. 167, ln. 16 to p. 168, ln. 14.

She was later contacted by the defendant's friend and landlord, a man named Jimmy, who asked her to try to get the car out of impound. RP 06-18-12, p. 170, ln. 1 to p. 171, ln. 9. The defendant's girlfriend called to find out where the car was located and how much it would cost to get it out of impound. RP 06-18-12, p. 171, ln. 12. Amy Dolsky couldn't pay the whole impound bill, so Jimmy offered to pay the balance she could not. They paid the bill, however, because the Sheriff's department had a hold on the vehicle, they could not get it out of impound. RP 06-18-12, p. 171, ln. 13 to p. 172, ln. 6. The impound bill was paid, but Amy Dolsky never did get ahold of the car, and as far as she could tell, neither did Jimmy. RP 06-18-12, p. 172, ln. 11.

The parties also entered stipulations that were read to the jury. RP 06-18-12, p. 126, ln. 3 to p. 128, ln. 19; p. 178, ln. 24 to p. 179, ln. 16. CP 203-04; CP 205-06; CP 207-08; CP 225-26.

C. ARGUMENT.

1. THE TRIAL COURT PROPERLY DENIED THE MOTION TO SUPPRESS EVIDENCE WHERE THE SEARCH WARRANT WAS VALID.

The defense claims that the trial court improperly denied the defense motion to suppress evidence. Br. App. 10. The motion to suppress evidence, as raised to the trial court, argued that the warrant was stale, and that there was an insufficient nexus to the vehicle the defendant was driving to support a search of that vehicle. CP 8-12.

The claim is without merit where officers were looking for evidence of a home invasion robbery and burglary, to include stolen property, and where the defendant knew he was being sought, took extreme measures to elude capture, and after being arrested claimed that he did not steal any property from the victim.

a. Standard of Review

When a search warrant has been properly issued by a judge, the party attacking it has the burden of proving its invalidity. *State v. Fisher*, 96 Wn.2d 962, 639 P.2d 743 (1982). A judge's determination that a warrant should issue is an exercise of discretion that is reviewed for abuse of discretion and should be given great deference by the reviewing court. *State v. Cole*, 128 Wn.2d 262, 286, 906 P.2d 925 (1995). *See also State v.*

Young, 123 Wn.2d 173, 195, 867 P.2d 593 (1994) (“Generally, the probable cause determination of the issuing judge is given great deference.”); *State v. J-R Distribs., Inc.*, 111 Wn.2d 764, 774, 765 P.2d 281 (1988) (“[D]oubts as to the existence of probable cause [will be] resolved in favor of the warrant.”). Hypertechnical interpretations should be avoided when reviewing search warrant affidavits. *State v. Feeman*, 47 Wn. App. 870, 737 P.2d 704 (1987). The magistrate is entitled to draw commonsense and reasonable inferences from the facts and circumstances set forth. *State v. Yokley*, 139 Wn.2d 581, 596, 989 P.2d 512 (1999); *State v. Helmka*, 86 Wn.2d 91, 93, 542 P.2d 115 (1975). Doubts are to be resolved in favor of the warrant. *State v. Casto*, 39 Wn. App. 229, 232, 692 P.2d 890 (1984) (citing *State v. Partin*, 88 Wn.2d 899, 904, 567 P.2d 1136 (1977)).

[W]hen a magistrate has found probable cause, the courts should not invalidate the warrant by interpreting the affidavit in a hypertechnical, rather than a commonsense, manner. Although in a particular case it may not be easy to determine when an affidavit demonstrates the existence of probable cause, the resolution of doubtful or marginal cases in this area should be largely determined by the preference to be accorded to warrants. *State v. Walcott*, 72 Wn.2d 959, 962, 435 P.2d 994 (1967) (quoting, with

approval from *United States v. Ventresca*, 380 U.S. 102, 85 S. Ct. 741, 13 L. Ed. 2d 684 (1965).

In reviewing probable cause the court looks to the four corners of the search warrant itself. Probable cause to search is established if the affidavit in support sets forth facts sufficient facts for a reasonable person to conclude that the defendant is probably involved in criminal activity, and that evidence of a crime can be found at the place to be searched. *State v. Maxwell*, 114 Wn.2d 761, 791 P.2d 223 (1990). Thus, probable cause requires a nexus between the criminal activity and any items sought to be seized, as well as a nexus between the items to be seized and the place to be searched. *State v. Thein*, 138 Wn.2d 133, 140, 977 P.2d 582 (1999).

Facts that, standing alone, would not support probable cause can do so when viewed together with other facts. *State v. Cole*, 128 Wn.2d 262, 286, 906 P.2d 925 (1995).

Here, the State provided to the court the following cases: *State v. Dobyms*, 55 Wn. App. 609, 779 P.2d 746 (1989); *Allen v. Indiana*, 798 N.E.2d 490 (2003); *United States v. Shomo*, 786 F.2d 981 (10th cir. 1986); *State v. Garbaccio*, 151 Wn. App. 716, 214 P.3d 168 (2009); *United States v. Estey*, 595 F.3d 836 (8th Cir. 2010), *cert. denied*, ____

U.S. ___, 130 S. Ct. 3342, 176 L. Ed. 2d 1236.² See RP 09-22-2011, p. 25, ln. 14 to p. 30, ln. 20.

b. Staleness

The court looks to the totality of the circumstances to determine whether the facts supporting a warrant are stale. *State v. Maddox*, 152 Wn.2d 499, 98 P.3d 1199 (2004). Whether probable cause for a warrant is stale depends in part upon the nature of the crime, and the type of evidence sought. See *Maddox*, 152 Wn.2d at 506 (citing *Andresen v. Maryland*, 427 U.S. 463, 478 n. 9, 96 S. Ct. 2737, 49 L. Ed. 2d 627 (1976)). See also *State v. Garbaccio*, 151 Wn. App. 716, 214 P.3d 168 (2009) (noting that the passage of time is not controlling and that other factors include the nature of the crime, the nature of the criminal, the character of the evidence to be seized, and the nature of the place to be searched).

Here, the following facts are derived from the complaint for search warrant. See CP 19-29. It indicates that the officers were investigating the crimes of robbery in the first degree and burglary in the first degree. The evidence the officers sought included not only specific items of stolen property, to include a laptop computer, and jewelry, but also weapons, cell

² The State also provided a copy of an unpublished opinion. That is omitted here.

phones, receipts for purchases, and supporting or related documents. CP
19.

The victim stated that Espey put on gloves before he began assaulting the victim. The victim and his girlfriend also said that Espey took a laptop computer, cell phone, three rings, and a paint ball gun. The victim's girlfriend called the police and reported the assault and said the suspects fled in a blue 80's Chevy truck.

Officers checked several locations in an attempt to locate Espey, but were unsuccessful. Through the investigation, officers received information that Espey was aware he was being sought on the charges and was taking measures to elude capture by distancing himself from his co-participants and avoiding areas he was known to frequent. Officers then received information on Espey's whereabouts from a confidential informant working for an officer at another agency. Through that informant, the officers were able to keep informed of Espey's location, were able to determine patterns in Espey's activity, and were able to establish several locations at which he spent the majority of his sleeping hours. Ultimately the officers were able to arrest Espey based on the informant's information.

Upon being arrested and asked why they were arresting him Espey said it was for robbery. He gave a statement to the officers in which he

admitted going to the victim's house, because he was angry at the victim and wanted to confront him. He claimed others followed him there, and when he arrived, to additional persons were already there. He admitted to entering the house, but claimed it was with permission. He also admitted to lunging toward the victim upon seeing him, and later admitted that he grabbed the victim, but claimed that one of the others, one "Casey" "snuck past him" and started hitting the victim.

Espey then claimed that he walked out of the residence, got into his truck and left the area. Espey acknowledged knowing that items had been taken from the residence, but claimed the other persons present did so, and he only learned about it later from associates. Espey also admitted that he learned that Police were looking for him regarding the incident, and that he didn't want to turn himself in.

As for the stolen property, the issuing magistrate could infer that there was probable cause that Espey had some or all of it based on the victim's statements that Espey was the "ringleader," and the Statement of the victim's girlfriend that they fled in a truck that Espey later admitted was his. The magistrate could infer that Espey personally retained some of the stolen property, or had sold or pawned it. The items stolen were durable goods and unlike controlled substances are not consumables. It was therefore reasonable for the issuing magistrate to infer that there was

probable cause to believe Espey might still have the stolen property, or that he would have documentary records from the sale or pawn of that property, to include items such as pawn receipts.

Espey used the gloves as a weapon, and the magistrate could reasonably infer that there was probable cause to believe that Espey still had them.

Because the officers were looking for evidence of durable stolen property, it was not unreasonable for the issuing magistrate to infer that where the robbery occurred on April 8, 2011, and Espey was arrested on May 25, 2011, that evidence of the stolen property could still be found. For this reason, the probable cause for the issuance of the warrant was not stale.

c. Nexus to the vehicle

The informant advised the officers that Espey took extreme measures to avoid capture. Officers independently verified this by tracking Espey's activities and ultimately arresting him with the help of the informant. After being arrested, the Magistrate could infer that Espey himself confirmed this when he stated he knew he was being arrested for robbery, and that he didn't want to turn himself in. Through the use of the informant, the officers were able to determine pattern's in Espey's activity,

where he spent the majority of his time, and the several locations where he spent the majority of his "sleeping" hours. The issuing magistrate could reasonably infer that Espey was attempting to avoid law enforcement. The issuing magistrate could also infer that he was avoiding his own vehicle and driving a vehicle registered to someone else in order to do so. Given that Espey was spending his "sleeping" hours at multiple locations, the magistrate could also infer that he was not currently associated with any single fixed address as a residence. The issuing magistrate could infer that Espey was primarily associated with the vehicle in which he was arrested. Given that the magistrate could infer that the evidence of theft and/or assault was not stale, the issuing magistrate could infer that evidence might be located with Espey in the vehicle he was driving when he was arrested.

For this reason, the issuing magistrate could infer that there was probable cause to believe that evidence related to the crimes might be found in the vehicle.

Because of the strong preference in favor of the validity of the warrant, the trial court below properly denied the motion to suppress evidence, and this court should similarly deny the defendant's claim on this issue as without merit.

2. THE COURT DID NOT VIOLATE THE
DEFENDANT'S RIGHT TO A PUBLIC TRIAL
WHEN IT CONSIDERED CHALLENGES AT
SIDE BAR DURING JURY SELECTION AT ALL
THREE TRIALS.

The defendant claims that his right to a public trial was violated when, during jury *voir dire*, the court heard challenges at sidebar. Br. Ap. at 27ff.

The Sixth Amendment to the United States Constitution provides in pertinent part that:

In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial.

Because secret tribunals have been effective instruments of oppression, the Sixth Amendment's requirement of a public trial guarantees that the defendant is dealt with fairly and not unjustly condemned. *Estes v. State of Texas*, 381 U.S. 532, 538-39, 85 S. Ct. 1628, 14 L. Ed. 2d 543 (1965).

The Sixth Amendment's public trial right "...was created for the benefit of defendants in order to discourage perjury and ensure that judges, lawyers and witnesses carry out their respective functions responsibly. *U.S. v. Sherlock*, 962 F.2d 1349, 1356 (9th Cir. 1989), *cert. denied*, 429 U.S. 919, 97 S. Ct. 314, 50 L. Ed. 2d 286 (citing *Waller v. Goergia*, 467

U.S. 39, 46, 104 S. Ct. 2210, 2215, 81 L. Ed. 2d 31 (1984); *Gannett Co. v. DePasquale*, 443 U.S. 368, 380, 99 S. Ct. 2898, 61 L. Ed. 2d 608 (1979)).

On the other hand, the public trial provision of the Sixth Amendment serves "not only to protect the accused but to protect as much the public's right to know what goes on when men's lives and liberty are at stake." *United States v. Cianfrani*, 573 F.2d 835 (3rd Cir. 1978) (quoting *Lewis v. Peyton*, 352 F.2d 791, 792 (4th Cir. 1965)). "[J]ustice cannot survive behind walls of silence," even when those walls are erected at the behest of the defendant.' [Citation omitted.] *Cianfrani*, 573 F.2d at 854 (quoting *Sheppard v. Maxwell*, 384 U.S. 333, 349, 86 S. Ct. 1507, 16 L. Ed. 2d 600 (1966)).

Caselaw under the Sixth Amendment does not appear to significantly distinguish between the defendant's right to a public trial, as opposed to the public's right.

Article I, section 22, of the Washington State Constitution provides in pertinent part that:

In criminal prosecutions the accused shall have the right...to have a speedy public trial...

This provision creates in the defendant the right to a public trial. See *State v. Beskurt*, 176 Wn.2d 441, 446, 293 P.3d 1159 (2013).

On the other hand, Article I, § 10 of the Washington Constitution provides that:

Justice in all cases shall be administered openly and without unnecessary delay.

Although the defendant's and the public's rights under the two separate provisions of the Washington Constitution often overlap, a defendant's public trial rights are separate from those of the general public, so that a defendant is only entitled to relief if the defendant's rights under article I, § 22 were violated. *Beskurt*, 176 Wn.2d at 446. If the defendant's right under article I, § 22 is violated, the defendant may be entitled to a new trial. *Beskurt*, 176 Wn.2d at 446 (citing *State v. Strode*, 167 Wn.2d 222, 217 P.3d 310 (2009)).

While the Washington Supreme Court has held that a defendant's failure to object does not preclude review of a violation of a defendant's right to a public trial, that authority relies upon a common law rule of procedure that has been superseded by RAP 2.5. See *Beskurt*, 176 Wn.2d at 449ff (Madsen J. concurring) (citing *State v. Marsh*, 126 Wash. 142, 146-47, 217 P.2d 705 (1923); RAP 2.5).

It remains unclear if the rights to a public trial under article I, § 10, and § 22 are identical to or different from the rights to a public trial under the Sixth Amendment of the United States Constitution as the question does not appear to have ever been expressly addressed.

In summary, the Sixth Amendment and article I, section 22 both protect a defendant's right to a public trial. *Presley v. Georgia*, 558 U.S. 209, 130 S. Ct. 721, 175 L. Ed. 3d 675 (2010) (Sixth Amendment); *Waller v. Georgia*, 467 U.S. 39, 44-45, 104 S. Ct. 2210, 81 L. Ed. 2d 31 (1984); *State v. Bone-Club*, 128 Wn.2d 254, 257, 906 P.2d 325 (1995). The public in general and the accused each have a right to an open, public trial. Each may assert and enforce these rights. See *Bone-Club*, *supra*, and *Allied Daily Newspapers v. Eikenberry*, 121 Wn.2d 205, 210, 848 P.2d 1258 (1993).

The right to a public trial applies not only to the evidentiary phase of a criminal trial, but also to other proceedings such as jury *voir dire*. *Gannett Co. v. DePasquale*, 443 U.S. 368, 379, 99 S. Ct. 2898, 61 L. Ed. 2d 608 (1999); *Press-Enterprise v. Superior Court of California*, 464 U.S. 501, 509-10, 104 S. Ct. 819, 78 L. Ed. 2d 629 (1984) ("Press-Enterprise I"); *Federated Publications, Inc. v. Kurtz*, 94 Wn.2d 51, 59-60, 615 P.2d 440 (1980); *In re Personal Restraint of Orange*, 152 Wn.2d 795, 100 P.3d 291 (2004).

Closure of a criminal trial courtroom may constitutionally occur under limited circumstances. The strict standards for closure were first enunciated by the Supreme Court, with varying formulations, in cases considering the First Amendment access rights of the press and the public. See *Press-Enterprise I*, 464 U.S. at 510 ("the presumption of openness

may be overcome only by an overriding interest based on findings that closure is essential to preserve higher values and is narrowly tailored to serve that interest”); *Richmond Newspapers Inc. v. Virginia*, 448 U.S. 555, 581, 100 S. Ct. 2814, 65 L. Ed. 2d 973 (1980) (closure was permitted only upon a showing of an “overriding interest articulated in findings”); *Globe Newspaper Co. v. Superior Court*, 457 U.S. 596, 606-07, 102 S. Ct. 2613, 73 L. Ed. 2d 248 (1982) (closure to “inhibit the disclosure of sensitive information” required a showing that denial of public access “is necessitated by a compelling governmental interest, and is narrowly tailored to serve that interest”).

In *Waller v. Georgia*, *supra*, the United States Supreme Court extended the procedures announced in the First Amendment cases to cover an accused’s right to a public trial under the Sixth Amendment as well.

Waller reformulated the standards for courtroom closure into a four-factor test:

- (1) The party seeking to close the hearing must advance an overriding interest that is likely to be prejudiced,
- (2) The closure must be no broader than necessary to protect that interest,
- (3) The trial court must consider reasonable alternatives to closing the proceeding, and
- (4) It must make findings adequate to support the closure.

Waller, 467 U.S. at 48. The Washington Supreme Court, following *Waller*, created standards that a trial court must apply before closing a courtroom to the public. *State v. Bone-Club*, 128 Wn.2d at 257. The Court adopted the same standards originally articulated in cases considering a public's right to access under article I, section 10 of the Washington State Constitution, and extended the standards to cover an accused's right to public trial under article I, section 22. The closure test involves an analysis of five criteria:

- (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.

A violation of a defendant's right to a public trial is structural error. *Waller*, 467 U.S. at 49. Structural error is not subject to harmless error analysis in a direct appeal. *Arizona v. Fulminante*, 499 U.S. 279,

309, 111 S. Ct. 1246, 113 L. Ed. 2d 302 (1991). Therefore, once a defendant demonstrates a violation of his Sixth Amendment right to a public trial in a direct appeal, he need not show that the violation prejudiced him in any way. *Judd v. Haley*, 250 F.3d 1308, 1314-15 (11th Cir. 2001).

However, some closures are too trivial to implicate the Sixth Amendment right to a public trial. *United States v. Ivester*, 316 F.3d 955, 959-60 (9th Cir. 2003); *State v. Brightman*, 155 Wn.2d 506, 517, 122 P.3d 150 (2005). Some courts have concluded that limited seating by itself is not enough to violate a defendant's public trial right, requiring some affirmative act from the trial judge. *See, e.g., United States v. Shryock*, 342 F.3d 948, 974 (9th Cir. 2003); *Morales v. United States*, 294 F. Supp. 2d 174, 177-179 (2003). “Obviously, the public trial guarantee is not violated if an individual member of the public cannot gain admittance to a courtroom because there are no available seats.... A public trial implies only that the court must be open to those who wish to come, sit in the available seats, conduct themselves with decorum, and observe the trial process.” *Estes v. Texas*, 381 U.S. 532, 588–89, 85 S. Ct. 1628, 14 L. Ed. 2d 543 (1965). *See also United States v. Kobl*, 172 F.2d 919, 923 (3d Cir.1949) (constitutional right to a public trial does not require

holding trial in a place large enough to accommodate all those who desire to attend).

In order to determine whether a particular error implicates the Sixth Amendment, a court “must look not only to the right violated, but also at the particular nature, context, and significance of the violation.” *Brown v. Kuhlmann*, 142 F.3d 529, 540 (2nd Cir. 1998) (quoting *Yarborough v. Keane*, 101 F.3d 894, 897 (2nd Cir. 1996)) “The remedy should be appropriate to the violation.” *Waller*, 467 U.S. at 49. By this logic, a court must first determine if a closure occurred -- and, if so, the nature of the closure -- before deciding whether the Sixth Amendment has been violated. See *Shryock*, 342 F.3d at 974 (citing *United States v. Al-Smadi*, 15 F.3d 153, 155 (10th Cir. 1994) (a defendant’s Sixth Amendment right to a public trial “requires some affirmative act by the trial court meant to exclude persons from the courtroom”).

The Washington Supreme Court has held that the reviewing court determines the nature of the closure by the presumptive effect of the plain language of the court’s ruling, not by the ruling’s actual effect. *Orange*, 152 Wn.2d at 807-08. In *Orange*, the parties discussed access for family members during the *voir dire* process. After a short colloquy, the judge stated:

... I am ruling no family members, no spectators will be permitted in this courtroom during the selection of the jury

because of the limitation of space, security, etcetera [sic].
That's my ruling.

Orange, 152 Wn.2d at 801 (emphasis in original). The court made no written findings on the issue of courtroom space. The Supreme Court ultimately decided, based solely on the transcript of the trial court's oral ruling, that the closure in **Orange** was a permanent, full closure. **Orange**, 152 Wn.2d at 808. The trial court therefore should have engaged in the five-step analysis mandated by **Bone-Club**.

Similarly, in **Brightman**, the court found that the following ruling by the trial court constituted a permanent full closure:

In terms of observers and witnesses, we can't have any observers while we are selecting the jury, so if you would tell the friends, relatives, and acquaintances of the victim and defendant that the first two or three days for selecting the jury the courtroom is packed with jurors, they can't observe that. It causes a problem in terms of security.

When we move to the principal trial, anybody can come in here that wants to. It is an open courtroom.

Any other problem?

State v. Brightman, 155 Wn.2d at 511 (2005).

The right to a public trial applies not only to the evidentiary phase of a criminal trial, but also to other proceedings such as jury *voir dire*.

Presley, 558 U.S. 209; **Gannett Co. v. DePasquale**, 443 U.S. 368, 379, 99 S. Ct. 2898, 61 L. Ed. 2d 608 (1999); **Press-Enterprise I**, 464 U.S. at 509-

10; *Federated Publications, Inc. v. Kurtz*, 94 Wn.2d 51, 59-60, 615 P.2d 440 (1980).

While many cases dealt with closures of the courtroom to the general public during trial proceedings, the Washington Supreme Court first applied the *Bone-Club* analysis to jury selection in *In re Orange*, 152 Wn.2d 795. There, the defendant was charged with several violent felonies including murder in the first degree, attempted murder in the first degree, and assault in the first degree. The trial court tried to balance or resolve space limitations for the venire panel with the interests of both the defendant's and victim's families to attend the trial. The court was also faced with trying to keep the families separated to avoid potential conflict. The court ruled that no family members or spectators would be allowed in the courtroom during jury selection. *Orange*, 152 Wn.2d at 802. Using the *Bone-Club* analysis, the Supreme Court reversed, holding that the trial court erred by closing the courtroom during jury selection. *Orange*, 152 Wn.2d at 812.

The following year, the Supreme Court addressed a similar issue in *Brightman*, 155 Wn.2d 506. *Brightman* was charged with murder in the second degree. As in *Orange*, the trial court had to deal with a large venire panel and limited space in the courtroom, as well as accommodating the wishes of family members or interested parties who

wished to attend the proceedings. The court resolved the issue by excluding “the friends, relatives, and acquaintances” during jury selection. *Brightman*, 155 Wn.2d at 511. The Supreme Court reversed the conviction, holding that the trial court was required to do a *Bone-Club* analysis before closing the courtroom during jury selection. *Brightman*, 155 Wn.2d at 509.

The individual questioning of a juror in an open courtroom outside the presence of the rest of the venire panel does not raise a situation where the court must weigh the *Bone-Club* factors. *State v. Vega*, 144 Wn. App. 914, 917, 184 P.3d 677 (2008).

More recently, the Washington Supreme Court issued two decisions addressing situations where jurors had been subject to *voir dire* questioning in a place other than the courtroom. *State v. Momah*, 167 Wn.2d 140, 217 P.3d 321 (2009) (judge’s chambers); *State v. Strode*, 167 Wn.2d 222, 217 P.3d 310 (2009) (judge’s chambers). In *Momah*, the court found that the in-chamber’s questioning of potential jurors did not violate the right to a public trial despite the failure of the trial court to specifically address the *Bone-Club* factors because:

Momah 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. Where, as here, a defendant's other constitutional rights are implicated, the trial court is required to give due consideration to those rights in determining whether closure is appropriate.

Momah, 167 Wn.2d at 151-52.

In contrast, in *Strode*, the court found that the questioning of several potential jurors in chambers violated the right to a public trial because:

[T]here is no indication in the record that the trial judge engaged in the required *Bone-Club* analysis or made the required formal findings of fact and conclusions of law relevant to the *Bone-Club* criteria. Although the trial judge mentioned several times that juror interviews were being conducted in private either for "obvious" reasons, ... to ensure confidentiality, or so that the inquiry would not be "broadcast" in front of the whole jury panel, ... the record is devoid of any showing that the trial court engaged in the detailed review that is required in order to protect the public trial right.

Strode, 167 Wn.2d at 228.

This line of cases that discuss the right of the defendant and the public to open trials of course assumes that the courtroom was closed, or, in the most recent line of cases, including *State v. Frawley*, 140 Wn. App.713, 167 P.3d 593 (2007), that persons were in some way excluded from trial proceedings. The *Bone-Club* factors discuss what a proponent must demonstrate, a proponent's interest, opportunity of those present to

object to closure, and the breadth of the court's order. *Bone-Club*, 128 Wn.2d at 258-259.

To determine if a courtroom is closed, courts look to the plain language of the closure request and order. *In re Orange*, 152 Wn.2d at 808 (“Looking solely at the transcript of the trial court's ruling..., the court ordered a permanent, full closure of voir dire”). There, the court clearly ordered that the families and spectators would be excluded: “That’s my ruling.” *In re Orange*, 152 Wn.2d at 808. In *State v. Brightman*, 155 Wn.2d at 516 (“[O]nce the plain language of the trial court's ruling imposes a closure, the burden is on the State to overcome the strong presumption that the courtroom was closed.”). There, the court brought up the issue of limited space and excluded them, saying “...they can’t observe that.” *Brightman*, 155 Wn.2d at 511. In *State v. Easterling*, 157 Wn.2d 167, 137 P.3d 825 (2006), the closure occurred in a pretrial motion by the co-defendant, rather than in jury selection. There, co-defendant’s counsel requested, and the court ordered, the courtroom cleared for the motion. *Easterling*, 157 Wn.2d at 172. Similarly, in *Bone-Club*, the prosecutor requested the courtroom be cleared for the pretrial hearing, and the court so ordered. 128 Wn.2d at 256. *See also United States v. Shryock*, 342 F.3d 948, 974 (9th Cir. 2003) (“The denial of a defendant’s Sixth Amendment right to a public trial requires some affirmative act by

the trial court meant to exclude persons from the courtroom.’”) (quoting *United States v. Al-Smadi*, 15 F.3d 153, 155 (10th Cir. 1994)).

The Washington Supreme Court's most recent case to address the issue of closure in jury *voir dire* deal with private interviews of potential jurors in the court's chambers, with peremptory challenges having been exercised and without a *Bone-Club* analysis having been conducted. See *State v. Paumier*, 176 Wn.2d 29, 288 P.3d 1126 (2012).

By contrast, the court held that the sealing of juror questionnaires that were answered by jurors prior to coming to court did not violate the right to an open courtroom. *Beskurt*, 176 Wn.2d 441.

Not every interaction between the court, counsel, and defendants will implicate the right to a public trial, or constitute a closure if closed to the public. *State v. Sublett*, 176 Wn.2d 58, 71, 292 P.3d 715 (2012). To decide whether a particular process must be open to the press and the general public, the court in *Sublett* adopted the “experience and logic” test formulated by the United States Supreme Court. *Sublett*, 176 Wn.2d at 73 (citing *Press-Enterprise Co. v. Superior Court*, 478 U.S. 1, 8, 106 S. Ct. 2735, 92 L. Ed. 2d 1 (1986)).

The first part of that test is the experience prong, under which the court asks whether the place and process have historically been open to the press and general public. *Sublett*, 176 Wn.2d at 73 (quoting *Press II*, 478

U.S. at 8). The second part of the test is the logic prong, under which the court considers whether public access plays a significant positive role in the functioning of the particular process in question. *Press Enterprise Co. v. Superior Court of California for Riverside County*, 478 U.S. 1, 8, 106 S. Ct. 2735 (1986) (*Press II*).

If a particular proceeding passes the tests of experience and logic, a qualified First Amendment right of public access attaches. *Press II*, 478 U.S. at 9. However, such a right is qualified when it attaches and is not absolute. *Press II*, 478 U.S. at 9. Under some circumstances, other interests might be undermined, such as defendant's right to a fair trial, *e.g.* by publicity, etc., the protection of victims of sex crimes from trauma and embarrassment, or in which case the other interest would override the qualified right under the First Amendment. *Press II*, 478 U.S. at 9.

"If the answer to both [prongs of the experience and logic test] is "yes," the public trial right attaches, and the *Waller* or *Bone-Club* factors must be considered before the proceeding may be closed to the public."

Sublett, 176 Wn.2d at 73.

Applying the "experience and logic" test, the court in *Sublett* held that no violation of the right to a public trial occurred when the court considered a jury question in chambers. *Sublett*, 176 Wn.2d at 74–77. "None of the values served by the public trial right is violated under the facts of this case." *Sublett*, 176 Wn.2d at 77. "The appearance of fairness

is satisfied by having the question, answer, and any objections placed on the record.” *Sublett*, 176 Wn.2d at 77.

The defendant and members of the public have traditionally not been privy to the substance of discussions of administrative or ministerial matters during a sidebar or in chambers. Cf. *In re Personal Restraint of Pirtle*, 136 Wn.2d 467, 483–84, 965 P.2d 593 (1998) (defendant's presence not required for in-chambers discussion of jury sequestration, wording of jury instructions, and ministerial matters); *In re Personal Restraint of Lord*, 123 Wn.2d 296, 306, 868 P.2d 835 (1994) (defendant's presence not required for in-chambers or bench conferences between court and counsel when preparing a response to a jury question); *Sublett*, 176 Wn.2d at 77-78 (public trial right inapplicable to court's conference with counsel regarding jury's purely legal question submitted during deliberations), *review granted*, 170 Wn.2d 1016 (2010); *State v. Bremer*, 98 Wn. App. 832, 834–35, 991 P.2d 118 (2000) (defendant had no right to be present during in-chambers conference for legal inquiry about jury instruction).

Here, the court's practice of hearing challenges for cause at sidebar in order not to single out or cause undue embarrassment to the challenged jurors by not singling them out in front of the entire venire was not improper. The court's procedure also avoided the risk of introducing bias

into the jury, e.g. if a juror were challenged for cause by one of the parties in front of the venire, but the court were to deny the challenge.

The process did not violate the defendant's right to a public trial.

In the first place, the courtroom was open to the public, and neither the court nor the parties left it.

Under the "experience and logic" test, the court's action did not require a *Bone-Club* analysis because consideration of the challenges at sidebar does not rise to the level of implicating the defendant's right to a public trial. Although jury selection generally has been historically open to the public, sidebars for administrative matters historically have not. Additionally, the claim also fails the logic test where the record clearly demonstrates the reasons why the juror was challenged for cause.

Additional specific arguments relating to the sidebar at each trial are addressed separately.

a. First Trial

During jury selection in the first trial, the parties and the court had a sidebar discussion off the record. RP 03-08-12, p. 118,ln. 12-13. Once the jury was empaneled and the remaining jury *venire* was excused, the court then put on the record a challenge for cause that the court granted,

which was raised by the defendant at sidebar. RP 03-08-12, p. 118, ln. 12-13; p. 120, ln. 10 to p. 121, ln. 8.

The court made a complete record, not only orally, but also in its written documentation. *See* CP 285-87; CP 288; CP 289.

Nothing about this procedure violated the defendant's right to a public trial.

b. Second Trial

During jury selection in the second trial, the parties and the court had a sidebar discussion off the record. RP 03-15-12 (trial 2), p. 94, ln. 20-21. No discussion of the sidebar is included in the transcript. RP 03-15-12 (trial 2), p. 94, ln. 20 to p. 96, ln. 25.

The defendant's claim as to the second trial fails because the defendant has not provided an adequate record to permit review. RAP 9.2(b) provides that:

A party should arrange for the transcription of all those portions of the verbatim report of proceedings necessary to present the issues raised on review. A verbatim report of proceedings provided at public expense will not include the *voir dire* examination or opening statement unless so ordered by the trial court.

The defendant obtained an order from the court that *voir dire* be transcribed. CP 336. The report of proceedings indicates, but does not transcribe that the jury was sworn, the court gave the jury preliminary

instructions, the jury was excused and the court was at recess. RP 03-15-12 (trial 2), p. 96, ln. 22-25. Because that material was not transcribed, it remains unclear whether the court made an oral record regarding sidebar during the course of the matters that were not transcribed. Nor did the defense obtain a statement from the court reporter indicating that the court did not put the sidebar on record.

Moreover, even though the record does not contain an express summary of the contents of the sidebar by the trial court, the record that does exist adequately establishes what happened at the sidebar.

The memorandum of journal entry indicates that the court heard challenges for cause at 1:58 p.m. and that Juror No. 23 was excused for cause, and that one minute later, counsel conducted peremptory challenges. CP 303. CP 294; CP 295-97; CP 298.

On the record, the court noted that juror 23 returned a "green slip" dealing with juror conflicts and indicated "work and single parent, financial hardship." RP 03-15-12 (trial 2), p. 47, ln. 10-15. When the jury returned, the parties explored this issue with the juror. RP 03-15-12 (trial 2), p. 86, ln. 12 to p. 86, ln. 4; p. 89, ln. 13-18.

This record clearly establishes that juror 23 was excused for cause due to the hardship of being a single parent and loss of income.

Because the record adequately establishes that juror 23 was excused for cause at the sidebar, the defendant's claim as to this matter is without merit.

c. Third Trial

At the third trial, after the jury was empaneled, the court made a record that she wanted to make sure that the challenges for cause that were discussed in chambers be placed on the record. RP 06-11-12 (trial 3 *voir dire*), p. 62, ln. 25 to p. 63, ln. 3. No record occurs in the report of proceedings of them going off the record or going in chambers. However, the Memorandum of Journal Entry indicates that the court went on recess at 11:52 a.m. and returned from recess at 11:58 a.m. CP 318-32. This corresponds to a five minute break the court took according to the report of proceedings. *See* RP 06-11-12 (trial 3 *voire dire*), p. 54, ln. 9-10. The Memorandum of Journal Entry also states that during the recess, the court and counsel stipulated to excuse jurors no. 9, 13, 14 and 20 for cause. CP 319. After that, the prosecutor waived further *voir dire*, while defense counsel conducted further *voir dire*. RP 06-11-12, p. 54, ln. 11-13; CP 319.

Again, the court made a record of what happened off the record during the recess. For this reason, the defendant's right to a public trial was not violated.

None of these occurrences rose to the level where a *Bone-Club* or Waller analysis was required in the first place. Sidebars to address administrative matters do not implicate the defendant's right to a public trial. This is particularly so where the record clearly indicates what occurred off the record. For this reason, the defendant's claim on this issue should be denied as without merit.

3. THE PROSECUTOR DID NOT IMPROPERLY COMMENT ON THE DEFENDANT'S EXERCISE OF HIS CONSTITUTIONAL RIGHT IN THE SECOND TRIAL.

The defense claims that the prosecutor improperly admitted the defendant's statements from his recorded interview with Detective Laliberte because in the interview the detective asked the defendant why he didn't contact police, say that he didn't do the stuff, and tell his side of the story. Br. App. 33ff; RP 03-19-12, p. 54, ln. 15 to p. 55, ln. 15; Ex. C (Transcript of Exhibit D admitted for illustrative purposes only); Ex. D; CP 299. The defense argues that this evidence constituted an improper comment on the defendant's exercise of his right to remain silent, and his seeking the advise of counsel. Br. App. 34ff. The defense also argues that

the prosecutor compounded the error when he argued these facts to the jury in closing. Br. App. 34ff.

The instances the defendant cites occurred in the second trial on counts I and II. Br. App. 34.

The United States Constitution provides in pertinent part that "...no person shall be compelled in any criminal case to be a witness against himself..." Fifth Amendment. The Washington Constitution employs substantially similar language that, "No person shall be compelled in any criminal case to give evidence against himself..." Wash. Const. art. I, § 9. The Fifth Amendment to the United States Constitution, and art. I § 9 of the Washington Constitution provide the same protection against compelled self-incrimination. *State v. Hager*, 171 Wn.2d 151, 157 n. 3, 248 P.3d 512 (2011); *State v. Templeton*, 148 Wn.2d 193, 207-08, 59 P.3d 632 (2002).

This protection was designed to bar the use of legal process to compel a defendant to testify against himself. *United States v. White*, 322 U.S. 694, 698, 64 S. Ct. 1248, 88 L. Ed. 1542 (1944). The right against self-incrimination "...is intended to prohibit the inquisitorial method of investigation in which the accused is *forced* to disclose the contents of his mind or speak his guilt." *State v. Easter*, 130 Wn.2d 228, 236, 922 P.2d 1285 (1996). [Emphasis added.].

The right against compelled self-incrimination has also been held to apply to custodial interrogation. *Templeton*, 148 Wn.2d at 207 (citing *Miranda v. Arizona*, 384 U.S. 436, 439, 86 S. Ct. 11602, 16 L. Ed. 2d 694 (1966)).

The Fifth Amendment privilege against self-incrimination attaches when "custodial interrogation" begins. *Templeton*, 148 Wn.2d at 208 (citing *Miranda*, 384 U.S. at 479).

"Courts have generally treated comments on post-arrest silence as a violation of a defendant's right to due process because the warnings under *Miranda* constitute an "implicit assurance" to the defendant that silence in the face of the State's accusations carries no penalty. *Easter*, 130 Wn.2d at 236. Pre-arrest silence, which lacks such "implicit assurance" from the State about its punitive effect in future proceedings, does not implicate due process principles, although the constitutional inquiry does not end at that point. *Easter*, 130 Wn.2d at 236.

The court in *Easter* did state in *orbiter dictum* that, "The Fifth Amendment applies before the defendant is in custody or is the subject of suspicion or investigation." That statement is *orbiter dictum* because that issue was not before the court, where *Easter* was in the custody of a police officer at the time he made his statements and his silence was in response to the questions of the officer. See *Easter*, 130 Wn.2d at 232-33.

That court's statement in *Easter* is not only *orbiter dictum*, it is also unsupported by citation to authority, although in the next sentence the court did go on to note that:

The right can be asserted in any investigatory or adjudicatory proceeding." *Kastigar v. United States*, 406 U.S. 441, 444, 92 S.Ct. 1653, 1656, 32 L.Ed.2d 212 (1972)). Indeed, the *Miranda* warning states the accused is entitled by the Fifth Amendment to remain silent' *Miranda* indicates the right to silence exists prior to the time the government must advise the person of such right when taking the person into custody for interrogation.

While the petitioners in *Kastigar* were not in police custody, they were under "compulsory" process where they were subpoenaed to appear before a United States Grand Jury. *Kastigar*, 406 U.S. at 442. Further, the analysis of the court in *Easter* is fallacious insofar as the *Miranda* warning indicates the right to remain silent exists prior to the advisement because it refers to the right to "remain" silent. This is a logical error. Rather, the *Miranda* language merely implies a presumption that the defendant is actually silent at the point the right accrues under *Miranda* and the suspect is advised of that right. Unacknowledged in the *Easter* court's flawed analysis of the *Miranda* language is the ambiguity that arises due to the fact that once the right attaches, there will ordinarily still be some period of time, short or long, before the officer is able to advise the suspect of his rights.

Thus, even the federal circuit courts of appeal are divided on the admissibility of post-arrest, pre-*Miranda* statements by suspects. See Christopher Macchiaroli, "To Speak Or Not To Speak: Can Pre-*Miranda* Silence Be Used As Substantive Evidence Of Guilt?" 33-Mar Champion 14 (2009). The federal circuits are also divided on the admissibility of pre-arrest, pre-*Miranda* statements, with even fewer circuits holding them inadmissible. See Macchiaroli, 33-Mar Champion 14 (2009).

In any case there the State is unaware of any authority that holds that the right of compelled self-incrimination applies in situations that are non-custodial, or do not involve compulsory process. Nor does the defendant cite any such authority. Where the right had not yet attach it did not exist, and any therefore any comments on the defendant's conduct could not violate the not-yet-existent right.

Moreover, "Evidence of flight is admissible if it creates 'a reasonable and substantive inference that defendant's departure from the scene was an instinctive or impulsive reaction to a consciousness of guilt or was a deliberate effort to evade arrest and prosecution.'" *State v. Freeburg*, 105 Wn. App. 492, 497, 20 P.2d 984 (2001) (quoting *State v. Nichols*, 5 Wn. App. 657, 660, 491 P.2d 677 (1971)). See also *State v. McDaniel*, 155 Wn. App. 829, 853-54, 230 P.3d 245 (2010).

Here, the evidence did not constitute an improper comment on the defendant's invocation of his rights. That is because the Detective did not comment on the defendant's exercise of his rights. Rather, the prosecutor admitted a statement of the defendant's made against penal interest. Espey admitted that he found out pretty early that the officers were looking for him. This was evidence that he was avoiding the officers which served as evidence of Espey's consciousness of his own guilt.

Detective Laliberte's question and Espey's answer was relevant to whether he had intentionally been avoiding contact with the officers as indicative of his consciousness of guilt. Espey's explanation for why he didn't contact the officers was similarly relevant to that issue. It was also relevant for purposes of impeaching other self-serving statements Espey made in the interview.

The detective did not comment on Espey's exercise of his rights. Espey made the comments, and it is not improper for him to do so. It would have been improper to admit Espey's comments only if Espey had declined to answer the question. However, he did not, instead preferring to give self-serving and unconvincing statements as to why he was avoiding law enforcement.

The detective asked Espey when he contacted defense attorney Mosley because it showed that Espey knew the officers were looking for

him. *See Ex. C, p. 15.* Espey claimed attorney Mosley checked and told him there weren't any warrants for him. *See Ex. C, p. 15.*

Moreover, the discussion in the interview pertained to Espey's actions at a time when he was not in custody so that his rights to remain silent and his rights to counsel had not yet attached at the point they were talking about in the interview.

The interview was relevant to show that Espey was attempting to avoid law enforcement. This served as evidence of consciousness of his guilt.

In the interview Espey also made a number of inculpatory statements that provided further evidence of his guilt. Espey admitting that he decided to go to Campbell's residence to confront him. *See Ex. C, p. 5.* Espey stated that Mario and others followed him over to Campbell's house. *See Ex. C, p. 6.* Espey claimed that he knocked on the door and Campbell told him to come in before he realized who it was. *See Ex. C, p. 7.*

Espey claimed that he went to grab Campbell, but that another guy named Casey slipped underneath Espey and grabbed Campbell and that the two started fighting and going at it right there. *See Ex. C, p. 8.* Espey claimed he didn't believe in having two on one [in a fight], so he just stood back and watched. *See Ex. C, p. 9.* Espey claimed that he then left in his

truck. *See* Ex. C, p.11. But when asked if he got any licks in, Espey stated that he probably did the way he grabbed Campbell. *See* Ex. C, p. 11. Espey later claimed that he grabbed Campbell by his shirt collar. *See* Ex. C, p. 16.

The detective asked Espey to tell his side of the story. The interview didn't take place until after Espey was arrested. It was clear from statements Espey made in the interview that he was aware of the specific charges against him for some time before his arrest and that as a result he may have tailored his responses in the interview to attempt to exculpate himself. He emphasized that he didn't commit a robbery because he didn't take anything. *See* Ex. C, *passim*. He emphasized that he didn't commit burglary because he knocked on the door and Campbell told him to come in. *See* Ex. C, p. 7, p. 26.

The credibility of Espey's statements was a significant issue. Central to that credibility was when and why Espey said what he did.

Espey's statements were relevant evidence. It was not improper to admit the interview, nor was it improper for the prosecutor to argue that evidence in closing. In neither circumstance was it a comment on Espey's exercising of his rights. Accordingly, the claim should be denied as without merit.

D. CONCLUSION.

Where durable, non-consumable tangible items were stolen from Campbell, the probable cause was not stale. There nexus between the crimes against Campbell and the green Cadillac he was driving when arrested was also a sufficient to support the search of the vehicle for evidence.

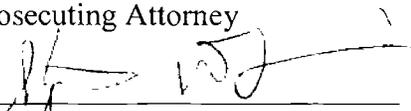
The court did not violate Espey's right to a public trial where it heard challenges for cause to jurors off the record, but the record adequately demonstrated why the jurors were removed.

The interview of Espey was admissible, and there was no improper comment on the exercise of Espey's rights where the references to Espey not contacting police and making contact occurred at a time when Espey was not in custody, so that his rights did not yet attach. Additionally, the evidence was relevant for purposes of determining Espey's credibility in his claims.

For all these reasons, the defense claims are without merit and should be denied.

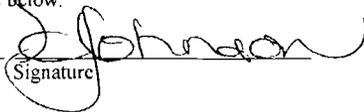
DATED: September 4, 2013.

MARK LINDQUIST
Pierce County
Prosecuting Attorney


STEPHEN TRINEN
Deputy Prosecuting Attorney
WSB # 30925

Certificate of Service:

The undersigned certifies that on this day she delivered by ^{file}~~US-mail~~ or ABC-LMI delivery to the attorney of record for the appellant and appellant c/o his attorney true and correct copies of the document to which this certificate is attached. This statement is certified to be true and correct under penalty of perjury of the laws of the State of Washington. Signed at Tacoma, Washington, on the date below.

9/4/13 
Date Signature

PIERCE COUNTY PROSECUTOR

September 04, 2013 - 2:50 PM

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