NO. 44279-5-II

IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON,

DIVISION II

STATE OF WASHINGTON,

Respondent,

vs.

VERNE L. JACKSON,

Appellant.

BRIEF OF RESPONDENT

AMIE HUNTER
WSBA # 31375
Deputy Prosecutor
for Respondent

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I. STATE'S RESPONSE TO ASSIGNMENT'S OF ERROR

1. The procedure for juror challenges done in open court at a sidebar does not violate the defendant's right to a public trial under the experience and logic test and does not constitute a closure of the courtroom.

2. The Defendant was present at all critical stages of the proceedings.

3. The use of sidebar conference for-cause and peremptory challenges are purely legal matters not implicating the public trial right.

II. ISSUES PERTAINING TO ASSIGNMENTS OF ERROR

1. Whether for-cause challenges done in open court at a sidebar was a closure of the courtroom in violation of the public's right to an open trial?

2. Whether peremptory challenges done in open court at the clerk's bench was a closure of the courtroom in violation of the public's right to an open trial?

3. Whether the juror challenge process at sidebar is historically done in this method?

4. Whether the juror challenge process at sidebar is logically related to the public's right to a fair trial?

5. Whether the defendant's presence in open court and opportunity to consult with counsel mean he was present for voir dire, even though he did not stand next to counsel at sidebar?

6. If there was a violation of Jackson's right to present, was it harmless as he heard all the juror's responses and his counsel made the for-cause challenges and used all his peremptory challenges?

7. Whether sidebar conferences for juror selection involved purely legal matters implicating the right to a public trial?

III. PROCEDURAL HISTORY

The appellant was charged by amended information with Rape of a child in the first degree and child molestation in the first degree against K.G.S.[1] CP 8-9. These charges were based upon K.G.S's statements the defendant touched K.G.S's penis and performed oral sex on K.G.S.

After various pre-trial proceedings, not germane to this appeal, the appellant proceeded to jury trial before Judge Pro Tem Dennis Maher and was convicted as charged. CP 45. The instant appeal timely followed.

IV. STATEMENT OF FACTS

The relevant facts to appellant's issues deal solely with voir dire. Voir dire was done in open court with the defendant present. 2RP 8.[2] The court introduced the parties, asked preliminary questions and invited the State to question the jury. 2RP 7-12. At a mid-morning break for the jury, the Court considered for-cause challenges by the parties. 2RP 55-64. The defendant was present and the courtroom was not closed. At no time did the defendant speak or raise any independent objection separate from defense counsel. 2RP 55-64.

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[1] Due to the nature of the case, the State refers to the persons involved by their initials, and respectfully requests this Court employ its usual practice and do the same in any opinion it may issue.

[2] For continuity, the State adopts the same numbering for the verbatim report of proceedings as proposed by the defendant. The voir dire proceedings are referred to as 2RP.

After the State and defense counsel finished their questions, the parties completed the juror selection at the bench. 2RP 133. While no conversation was recorded, the clerk's struck juror list indicates each side struck six jurors in preemptory challenges and two jurors were stricken for cause. Supp CP 84-86.

The court stuck Mrs. Castillo, juror number 32. CP 86. It appears from the record Ms. Castillo's mother was a victim of sexual abuse who warned all her children about inappropriate touching and what to look for. 2RP 54-55. Ms. Castillo indicated it would be hard to separate her emotions from the process, especially since she has a son. 2RP 100.

The court also struck for cause Gary Herold, juror number 10. In watching the video of proceedings, it appears during defense counsel's voir dire, Mr. Herold indicated he could not give a fair opinion given the nature of the charges. 2RP 128-29, Video of proceedings 10/16/12 at 1:40 pm.

After the parties consulted briefly with the judge at the bench, both counsel stood in front of the clerk's desk and went through the process of preemptory challenges. Video of proceedings 10/16/12 at 1:45:33-2:01 pm. The challenges were made in silence, through writing, later captured in the struck juror list. Supp CP 84-86, Video of proceedings 10/16/12 at 1:47:40-2:01 pm. The defendant, sitting mere feet away, never objected to

the process of selecting the jury and it was done in open court. 2RP 133-34, Video of proceedings at 1:45:33-2:01 pm.

V. ARGUMENT

I. The Trial Court Did Not Violate the Appellant's Right to a Public Trial nor Public's Open Trial Right.

The appellant argues the trial court violated the Defendant's right to a public trial and the public's trial right when it conducted for-cause and peremptory challenges at a sidebar. The appellant alleges this practice violated Article 1, section 22 of the Washington constitution as well as the Sixth Amendment of the United States constitution. However, the practice complained of did not amount to a closure of the courtroom, dealt only with legal issues, and acquiesced to by the appellant. As such, this Court should reject any claim of error.

a. Engaging in a Sidebar Conference Does Not Constitute a "Closure" of the Courtroom.

The State disputes the appellant's claim that the courtroom was closed by the trial judge and the attorneys stepping to the bench to conduct legal argument out of the hearing of the jury and silently conducting peremptory challenges at the clerk's bench. Instead, this was merely a form of sidebar conference, while the actual courtroom remained open to

the public. If there was no closure of the courtroom, the cases cited by the appellant have no application.

The question of whether a defendant's right to a public trial or the public's right is violated is an issue reviewed de novo on appeal. State v. Wilson, 174 Wn.App. 328, 354, 296 P.3d 148 (Div 2, 2013). Moreover, it is the defendant's burden to prove a violation. State v. Sublett, 176 Wn.2d 58, 75, 292 P.3d 715 (2012). There is a three step process to determine whether there is a violation of the public trial right or defendant's right to a public trial.

First, "Was the courtroom closed?" Second, consider "whether the proceeding at issue implicated that public trial right, thereby constituting a closure at all." State v. Wilson, 174 Wn.App. 328, 335 citing State v. Sublett, 176 Wn.2d 58, 71, 292 P.3d 715 (2012). "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." Id. Additionally, a defendant does not, "have a right to a public hearing on purely ministerial or legal issues that do not require the resolution of disputed facts." State v. Sadler, 147 Wn.App. 97, 114, 193 P.3d 1108 (Div 2, 2008). Upon the inquiry of whether there is a public trial right, a court should ask, "[d]oes the proceeding fall within a specific category of trial proceedings that our Supreme Court has already established

implicates the public trial right? Lastly, if the proceeding does not fall within such a specific category, does the proceeding satisfy Sublett's 'experience and logic' test?" Id.

In State v. Gregory, 158 Wn.2d 759, 147 P.3d 1201 (2006), the Supreme Court noted there was a distinction between full closures of a courtroom, which require an analysis under State v. Bone-Club, 128 Wn.2d 254, 900 P.2d 235 (1995), and acts by the trial court that do not amount to a full closure. The court held that because the action at issue, the exclusion of one person from the courtroom, was not a full closure, Bone-Club did not apply and the defendant's right to a public trial was not violated. Gregory, 158 Wn.2d at 816.

Additionally, a closure of the courtroom occurs when the public does not have access to the room in which the proceedings occur. State v. Wise, 176 Wn.2d 1, 12, 288 P.3d 1113 (2012). It does not matter if the court removes the proceedings to another location or the public is removed from the room, it is the removal that makes it a closure. Id., State v. Leyle, 158 Wn.App. 474, 483, 242 P.3d 921 (Div 2, 2010). The Defendant does not cite to any authority for the proposition that actions occurring inside the open courtroom in full view of the public, but without running commentary constitute closures. As such, the defendant fails to meet his burden that a closure occurred.

b. Under the experience and logic test, a sidebar conference for juror challenges is not a violation of the public trial right.

It is well-settled that parts of the jury selection process implicate the public trial right. Id. citing to State v. Wise, 176 Wn.2d 1, 11, 288 P.3d 1113, State v. Momah, 167 Wn.2d 140, 217 P.3d 321 (2009), State v. Strode, 167 Wn.2d 222, 227, 232, 217 P.3d 310 (2009), State v. Paumier, 176 Wn.2d 29, 34-35, 288 P.3d 1126. However, not every part of the jury selection process implicates a public right and whether a right attaches to a proceeding is not dependent on the label given to the proceeding. Id. State v. Sublett, 176 Wn.2d 58, 72-73, 292 P.3d 715 (2012). In State v. Wilson, 174 Wn.App 328, Division Two declared the pre-selection excusal of potential jurors did not implicate the defendant's public trial right as it did not meet the experience and logic test.

The experience and logic test is helpful because it allows the court to consider "the actual proceeding at issue for what it is, without having to force every situation into predefined factors." Sublett at 73. In Wilson, the court determined there were no cases holding preliminary juror excusals were historically open to the public, nor that the right attached prior to voir dire. Wilson at 342. Moreover, the preliminary excusals were not so similar to the trial as to attach the same rights. Id. at 245. Lastly, that the defendant's right to be present was not absolute, his

presence would be useless or of little benefit, and it did not relate to his opportunity to defend against the charge. Id. at 348-349. Wilson opens up the possibility that not every part of voir dire implicates the public trial right. While the opinion does distinguish preliminary excusals from for-cause and peremptory challenges, the court's analysis did not consider the questions presented today. Wilson does create a stepping stone to a case directly on point.

Division Three has directly decided the issue at hand. In State v. Love, Nos. 30809-0-III, 308103-III, 2013 WL 5406434, *3 (Div 3, September 24, 2013), the trial judge invited the attorneys to the bench to discuss challenges for cause at the end of voir dire. Defense counsel struck two jurors for cause and the parties assented to the trial judge's suggestion to two alternates. Id. At that point, the transcript indicated "(Peremptory challenge process is being conducted.") and the record of jurors showed who made peremptory challenges. Id. However, there was no other record of the proceedings for peremptory challenges. Id.

Division Three used the experience and logic test outlined in Sublett. Division Three assumed a courtroom closure, leaving the issue of whether such sidebars done in open court are closures for another day. Id. *4. Instead, Division Three found there was no authority suggesting that challenges for cause are normally made in public and challenges typically

present solely a legal issue. Id. Moreover, peremptory challenges were not historically made public. Id. *4-5. Division Three went back to the 1976 case of State v. Thomas, 16 Wn. App 1, 553 P.2d 1357 (Div 1, 1976), for the position that peremptory challenges are often conducted in private and there was no prejudice to the defendant. Id., State v. Thomas, 16 Wn. App 1, 13. As such, the history confirmed there was little evidence of the public exercise of challenges and some evidence they are conducted privately. Id. *5.

Mr. Love's challenge also failed under the logic test. Division Three found the purpose of the public trial right "to ensure a fair trial, remind the officers of the court of the importance of their functions and to encourage witnesses to come forward and discourage perjury" were not served by public challenges. Id. The court found peremptory challenges presented no question of public oversight and for-cause challenged presented issues of law for the judge to decide. Id. The court relied on the presence of a written record to satisfy the public interest and ruled the record need not be in public earshot. The court ultimately found Mr. Love did not meet his burden and the sidebar did not close the courtroom. Id.

In the present case, the parties went to the bench to present for-cause challenges. The factual basis for any challenge was elicited in open court and was recorded. 2RP 54-55, 100, 128-29. It appears from the

facts the challenges were made by the defendant as those jurors were biased toward the State because of the nature of the charges. The challenges were recorded on the Juror struck list and any decision by the court was a legal one. Under the authority of State v. Love, the defendant fails under both the experience and the logic prong. These challenges are not historically ones done in open court, and public challenges do not assist in the public trial right.

Moreover, in the present case the process adopted by the trial court for peremptory challenges served the values inherent in the constitutional provision for the open administration of justice. The record of peremptory challenges is important open administration of justice to assess whether there is a pattern of race-based challenges. See Batson v. Kentucky, 476 U.S. 79, 106 S.Ct. 1712, 90 L.Ed.2d 69 (1986); State v. Sadler, 147 Wn.App. 97, 114-118, 193 P.3d 1108 (Div 2, 2008). Peremptory challenges are generally left to the discretion of the attorney making the challenge, unless there is a pattern of racial motivation to the challenges. State v. Vreen, 99 Wn. App. 662, 669, 994 P.2d 905 (Div 3, 2000). When a Batson challenge is made, a court must make a factual determination if there is a racially motivated basis for such challenge. Because there is a factual determination, courts have held that Batson hearings must be open to the public. Sadler, 147 Wn.App. 97, 115. However, when there is no

Batson challenge, and when a record is made about how the peremptory challenges were exercised, the openness required for a public trial is met.

Lastly, the Defendant cites to State v. Irby, 170 Wn.2d 874, 246 P.3d 796 (2011), for the position Jackson was denied his right to be present at a critical stage in the proceeding. See App Brf at 13-16. In Irby, the parties discussed juror questionnaires and cause challenges over email, outside the defendant's presence. Id. at 877-78. The court focused on the defendant's right to consult with counsel about the for cause challenges in distinguishing the email conference from a sidebar. Id. at 882-83. The court was particularly swayed because Irby did not have the opportunity to give advice or suggestions to his lawyers. Id. at 883.

In State v. Slert, 169 Wn.App. 766, 774-75, the trial court held part of voir dire in the judge's chambers to review the jury's answers to questionnaires and dismiss jurors for cause. Neither the defendant nor public were allowed access. Id. at 774. The court found because the dismissals were held outside the presence of the courtroom, there was a closure of the court at a critical stage of the proceeding. Id. at 774-75. Division Two noted in determining whether Slert had a right to be present that there was no record the defendant had the opportunity to consult with counsel before agreeing to the dismissals. Id. at 775.

Mr. Jackson argues he was not present for part of the jury selection and under Irby this is a violation of his right to a public trial. There is no authority cited by the Defendant that the failure to stand next to counsel during all stages constitutes a lack of presence on his part or that constitutes a closure. The record shows Mr. Jackson was present for all the proceedings in open court. Most important, Jackson listened to the entire questioning of the jury panel, sat next to counsel during the State's voir dire and had the opportunity to consult with counsel at every stage prior to the sidebar. Under State v. Slert, 169 Wn.App. 766, 775, 282 P.3d 101 (Div 2, 2012) and State v. Irby 170 Wn.2d 874, 246 P.3d 796 (2011), because Jackson had the opportunity (whether he used it or not), he was not denied his right to a public trial. Additionally, since there was no decision-making by the judge nor contested issues involving the peremptory challenges it was not a critical stage of the proceedings.[3]

Given these authorities, the Court should find that the sidebar conferences at issue do not amount to an actual closure of the courtroom. There is no authority to support a claim that a sidebar between the judge and attorneys, which cannot be heard by the jury or the public, violates the

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[3] A defendant does not have a constitutional right to peremptory challenges. State v. Vreen, 99 Wn.App. 662, 668, 994 P.2d 905 (Div 3, 2000) citing Batson v. Kentucky, 476 U.S. 79, 98, 106 S.Ct 1712, State v. Persinger, 62 Wnn.2d 362, 365-66, 382 P.2d 497 (1963). Even though these rights are important, there is nothing bestowing a defendant anything other than the opportunity to use the challenges. Id. It is the denial of the opportunity that constitutes reversible error. Id.

right to a public trial. This Court should find the courtroom was not closed and there was no violation of the right to a public trial.

Should the court consider the defendant's absence from the sidebar as a violation of his right to be present, the violation is subject to a harmless error analysis. See State v. Irby, 170 Wn.2d 874, 885-86 (2011). In Irby, the court determined that because Irby did not have the right to listen and question their statements, the State could not show the removal of the potential jurors had no effect on the verdict. Id. at 886.

Unlike Irby, Jackson heard all the answers by the jurors. He was present to give comment to counsel about their suitability to act as jurors, and the record supports it was the defense that struck the two jurors for cause in the sidebar. 2RP 54-55, 100, 128-29, Video of Proceedings. There is nothing to think, had Jackson been standing next to counsel, the verdict would have been different.

c. The Sidebar Conferences at Issue Were Purely Legal, and Do Not Implicate the Right to a Public Trial.

The Washington Supreme Court has held that where a courtroom is closed during significant portions of trial, the constitutional right to a public trial is violated. In State v. Marsh, 126 Wn. 142, 145, 217 P. 705 (1923), the superior court, among other irregularities, closed the entire proceeding to the public. In State v. Bone-Club, 128 Wn.2d 254, 256-57,

906 P.2d 325 (1995), the trial court summarily granted the State's request to clear the courtroom for the pretrial testimony of an undercover detective. In State v. Brightman, 155 Wn.2d 506, 511, 122 P.3d 150 (2005), the trial court ordered that the courtroom be closed for the entire 2 ½ days of voir dire, excluding the defendant's family and friends. In In re Pers. Restraint of Orange, 152 Wn.2d 795, 100 P.3d 291 (2004), the trial court summarily ordered the defendant's family and friends excluded from *all* voir dire proceedings. And, in State v. Easterling, 157 Wn.2d 167, 172-73, 137 P.3d 825 (2006), the trial court ordered the defendant and his attorney excluded from pretrial motions regarding the co-defendant.

More recently, in State v. Strode, 167 Wn.2d 222, 217 P.3d 310 (2009), the court held that private questioning of a subset of jurors violated the right to a public trial where the court failed to balance the Bone-Club factors before holding voir dire in chambers. In State v. Momah, 167 Wn.2d 140, 217 P.3d 321 (2009), the court held that, even if there was error in conducting a portion of the voir dire outside the courtroom, the defendant had invited the error by his conduct, so he was not entitled to a new trial.

However, unlike the procedures at issue in those cases, the brief sidebar conferences in the instant case are not "proceedings" that implicate the right to a public trial. In the cases cited above, all or part of an

important substantive proceeding was removed from public view. See Bone-Club (pretrial testimony); Orange, (voir dire); Brightman (voir dire); Easterling (pretrial hearing); Strode (voir dire of selected jurors); Momah (voir dire of selected jurors). Here, a brief conversation occurred in a sidebar, in plain view of the entire courtroom. This brief contact does not qualify as "proceeding" or "hearing" that can fairly be characterized as a significant part of the appellant's trial. Instead, this discussion was a non-factual discussion about legal matters. Such matters do not trigger analysis under Bone-Club and do not implicate the right to public trial.

In similar situations, the Supreme Court has recognized that sidebars are not truly proceedings to which the defendant or the public must be granted access. For example, in In re Personal Restraint of Lord, 123 Wn.2d 296, 306, 868 P.2d 835 (1994), the Supreme Court considered an argument that the defendant had a right to be present at numerous conferences between the lawyers and the judge, including a pretrial hearing in which the court deferred ruling on an ER 609 motion, granted a motion to allow a haircut and trial clothing for the defendant, settled on the wording of the jury questionnaires and the pretrial instructions, and set a time limit on the testing of certain evidence. Lord, 123 Wn.2d at 306. The court also considered whether defendant had the right to be present during a proceeding where the court announced its rulings on evidentiary

matters which had previously been argued, ruled that the jurors could take notes, and directed the State to provide the defense with summaries of its witnesses' testimony. Id. The Supreme Court rejected the claim a criminal defendant had a right to be present at these purely legal discussions between the court and counsel, holding:

> The core of the constitutional right to be present is the right to be present when evidence is being presented. United States v. Gagnon, 470 U.S. 522, 526, 105 S.Ct. 1482, 84 L.Ed.2d 486 (1985) (per curiam). Beyond that, the defendant has a "right to be present at a proceeding 'whenever his presence has a relation, reasonably substantial, to the fullness of his opportunity to defend against the charge....' " Gagnon, 470 U.S. at 526 (quoting Snyder v. Massachusetts, 291 U.S. 97, 54 S.Ct. 330, 78 L.Ed. 674, 90 A.L.R. 575 (1934)). The defendant therefore does not have a right to be present during in-chambers or bench conferences between the court and counsel on legal matters, United States v. Williams, 455 F.2d 361 (9th Cir.), cert. denied, 409 U.S. 857 (1972), at least where those matters do not require a resolution of disputed facts. People v. Dokes, 79 N.Y.2d 656, 584 N.Y.S.2d 761, 595 N.E.2d 836 (1992) (right to be present during hearing on admissibility of prior conviction).

Id.

Furthermore, in In re Personal Restraint of Pirtle, 136 Wn.2d 467, 484, 965 P.2d 593 (1998), the Supreme Court held a criminal defendant need not be present for discussions about the wording of jury instructions, ministerial matters, legal issues, and whether the jury should be sequestered. In Pirtle the court also held that, although the defendant

should perhaps have been present for a hearing where juror misconduct was discussed, his absence was immaterial where the motion was later argued and decided in his presence. Pirtle, 136 Wn.2d at 484.

Decisions from the Court of Appeals are similar. In a recent case, the court observed:

> The public trial right applies to the evidentiary phases of the trial, and to other adversary proceedings. . . . The right to public trial is linked to the defendant's constitutional right to be present during the critical phases of trial; thus, a defendant has a right to an open court whenever evidence is taken, during a suppression hearing, ... during voir dire, and during the jury selection process. . . . A defendant does not, however, have a right to a public hearing on purely ministerial or legal issues that do not require the resolution of disputed facts.

State v. Sadler, 147 Wn. App. 97, 114, 193 P.3d 1108 (2008) (citations and internal quotations omitted).

Also, in State v. Rivera, 108 Wn. App. 645, 32 P.3d 292 (2001), the court held that a defendant had no right to be present at a chambers conference where jurors complained about the hygiene of another juror, because the matter was purely ministerial. In State v. Bremer, 98 Wn. App. 832, 835, 991 P.2d 118 (2000), the court similarly held a defendant had no right to be present at a chambers conference between the court and counsel regarding proposed jury instructions because the inquiry was legal and did not involve resolution of questions of fact. In State v. Walker, 13

Wn. App. 545, 536 P.2d 657 (1975), the court held that Walker had a right to be present at a post-trial motion to determine his competency because factual matters were determined. However, the court also noted that the defendant "need not be present during deliberations between court and counsel or during arguments on questions of law." Walker, 13 Wn. App. at 557 (cited with approval in Lord, 123 Wn.2d at 306 n.3).

Here, the sidebar conferences dealt strictly with a purely legal questions of for-cause challenge of two jurors and the factual basis was heard in open court. The State asks this Court to reject the appellant's argument on this point.

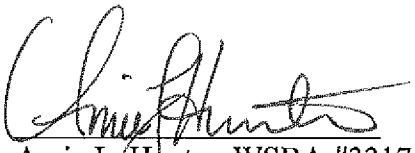
VI. CONCLUSION

Based on the preceding argument, the State respectfully requests the Court to deny the instant appeal and uphold the appellant's

convictions. The appellant's claims of error are either not supported the law and the record. As such, the Court should uphold the judgment and sentence of the trial court.

Respectfully submitted this 26 day of November, 2013.

Susan I. Baur
Prosecuting Attorney
Cowlitz County, Washington

By: 
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Deputy Prosecuting Attorney

Time	Spea	Note
9:01:33 AM		**STATE OF WASHINGTON VS VERNE LEE JACKSON** **#11-1-01337-2 DATE: 10/16/2012** **Presiding: JUDGE PRO TEM DENNIS P MAHER** **Clerk: LEAH D IVERSON** **Bailiff: BRAD LINK** **State represented by: AMIE HUNTER** **Deft represented by: RICHARD SURYAN** **Charges: 1st DEGREE RAPE OF A CHILD; 1st DEGREE CHILD MOLESTATION** .
9:01:35 AM		Ct convenes; parties ready to proceed
9:02:33 AM		State moves to exclude witnesses, no objection, Ct grants State's motion
9:02:43 AM		State moves to exclude accusations re witness
9:03:30 AM		Defense - responsive argument
9:05:59 AM		State - rebuttal argument
9:08:09 AM		Discussion follows
9:10:05 AM		Ct grants motion re any information in which he was subject of investigation
9:10:34 AM		State responds, moves to limit further testimony
9:11:05 AM		Ct rules - grants motion
9:11:23 AM		State addresses interview; discussion follows
9:11:43 AM		Ct rules - will allow limited testimony; discussion follows
9:16:42 AM		Ct reserves ruling; discussion follows re delay in reporting
9:18:03 AM		State moves to limit cross exam related to alcoholism
9:18:28 AM		Defense responds and discussion follows
9:20:28 AM		Ct denies State's motion; Ms Hunter requests clarification
9:20:51 AM		State moves to limit cross exam as to witness RUSH; Defense - responsive argument
9:22:06 AM		Ct grants motion
9:22:16 AM		State moves to limit cross exam related to alcohol as to witness RUSH, Ct denies motion
9:22:42 AM		State reserves remaining motions
9:22:52 AM		Defense has no motions in limine
9:23:48 AM		Ct recesses (Bailiff calls in jury, jurors seated in order by clerk)
9:45:27 AM		Ct reconvenes; Ct addresses jurors
9:47:05 AM		Ct - preliminary instructions
9:47:14 AM		Clerk administers **JURORS OATH ON QUALIFICATIONS**
9:47:33 AM		Ct resumes preliminary instructions
9:49:39 AM		Ct introduces parties
9:50:11 AM		Ct reads charging information

APPENDIX "A"

9:53:39 AM		Ct - general voir dire
9:54:53 AM		Ct reads witness list
10:01:37 AM		Ms Hunter - voir dire on behalf of State
10:45:49 AM		Jurors allowed to recess to lobby
10:46:37 AM		Ct/Counsel question Juror #62667 (Orth)
10:49:47 AM		Juror allowed to recess to lobby
10:50:16 AM		Discussion follows, Defense - challenge for cause
10:50:42 AM		**Juror #62667 (Orth) is excused for cause**
10:51:16 AM		Ct recesses
11:06:22 AM		Ct reconvenes; State - challenge for cause Juror #62615 (Malakowsky), Defense does not object
11:07:16 AM		**Ct excuses Juror #62615 (Malakowsky)**
11:07:33 AM		State - challenge for cause #62443 (Duckworth), Defense does not object, **Ct excuses Juror #62443 (Duckworth)**
11:08:01 AM		Defense - challenge for cause #62524 (Hill), State objects and discussion follows
11:08:49 AM		**Ct grants challenge, Juror #62524 (Hill) is excused for cause**
11:09:35 AM		State addresses medical issues of Juror #62505 (Hanna); discussion follows
11:10:35 AM		Bailiff calls in jurors
11:15:05 AM		Ct enters; State resumes voir dire
12:04:40 PM		Ct cautions jurors
12:06:41 PM		Ct recesses
1:21:47 PM		Ct reconvenes w/jurors; Ct addresses jurors
1:22:01 PM		Mr Suryan - voir dire on behalf of Defense
1:46:11 PM		Peremptory Challenges begin
1:47:41 PM		Ct addresses juror; seats jury of 12 with 2 alternates
2:08:19 PM		Ct addresses/excuses jurors not chosen
2:08:46 PM		**Peremptory Challenges complete**
2:09:35 PM		Ct instructs alternate jurors
2:10:23 PM		Clerk administers **JURY TRIAL OATH**
2:10:59 PM		Ct instructs jury
2:22:52 PM		Ms Hunter - opening statement on behalf of State
2:35:57 PM		Mr Suryan - opening statement
2:38:50 PM		Ct cautions jury; Bailiff removes jury
2:39:42 PM		Ct recesses
3:02:34 PM		Ct reconvenes; Bailiff calls in jury
3:03:39 PM		State calls **KARSEN GUNTER SMITH**, sworn and testifies
3:12:47 PM		Witness identifies Defendant, resumes testimony
3:36:15 PM		Defense - cross exam
3:41:56 PM		State - redirect

3:42:54 PM		Defense - cross exam
3:43:29 PM		Witness steps down;
3:47:17 PM		Ct recesses
3:52:58 PM		Ct reconvenes; Bailiff calls in jury
3:53:45 PM		State calls **STANLEY WARREN MUNGER, P.I.**, sworn and testifies (out of order)
4:01:13 PM		**State offers exhibit #1, no objection, Ct admits**
4:02:03 PM		**State offers exhibit #2, no objection, Ct admits**
4:04:42 PM		State allowed to play audio recording and publish exhibit #2
4:46:29 PM		Audio concluded; Defense - cross exam
4:48:58 PM		Bailiff removes jury regarding State's objection
4:49:39 PM		Mr Hunter state's objection
4:51:37 PM		Discussion follows re scheduling
4:51:55 PM		Discussion follows re Juror #62430 (Davis)
4:52:30 PM		Bailiff calls in jury
4:54:03 PM		Ct sustains objection; Defense has no further questions
4:54:18 PM		Witness steps down; Bailiff removes jury
4:55:05 PM		Ct/Counsel question Juror #62430 (Davis)
4:58:36 PM		Juror is allowed to recess to jury room; discussion follows
5:00:26 PM		Bailiff calls in jury; Ct addresses jury
5:02:44 PM		Bailiff removes jury; Ct recesses for the evening

CERTIFICATE OF SERVICE

Michelle Sasser, certifies that opposing counsel was served electronically via the Division II portal:

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Seattle, WA 98101
wapofficemail@washapp.org
jan@washapp.org

I CERTIFY UNDER PENALTY OF PERJURY UNDER THE LAWS OF THE STATE OF WASHINGTON THAT THE FOREGOING IS TRUE AND CORRECT.

Signed at Kelso, Washington on November 26th, 2013.

Michelle Sasser

COWLITZ COUNTY PROSECUTOR

November 26, 2013 - 1:40 PM

Transmittal Letter

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Court of Appeals Case Number: 44279-5

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Statement of Arrangements

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■ Brief: __Respondent's__

Statement of Additional Authorities

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Objection to Cost Bill

Affidavit

Letter

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Response to Personal Restraint Petition

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