

IN THE COURT OF APPEALS FOR THE STATE OF WASHINGTON
DIVISION II

IN RE THE PERSONAL RESTRAINT PETITION OF:

STEVEN CRAIG CEARLEY,

PETITIONER.

REPLY IN SUPPORT OF PERSONAL RESTRAINT PETITION

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A. INTRODUCTION

Steven C. Cearley filed a timely collateral challenge to his judgment of convictions for five counts of first degree child rape and one count of first degree child molestation, as well as his “exceptional” minimal sentences for his convictions. The State opposes all of Cearley’s claims, disputing most of his sworn, extra-record evidence—sometimes with its own evidence and sometimes not.

The State’s response misunderstands the roll of an appellate court evaluating a factual dispute in a PRP. The State argues its new evidence is more persuasive—urging this Court to resolve the many disputed facts in its favor. Where the State has not presented disputing evidence, it simply argues that Cearley’s facts should not be believed or do not warrant relief. Contrary to the State’s position, where a post-conviction claim is based on disputed extra-record facts this Court cannot find the facts, but must instead remand for an evidentiary hearing. Where the State has not presented disputing evidence, then Cearley’s facts must be taken as true and relief granted.

In this reply, Cearley distinguishes between the claims where an evidentiary hearing is necessary and the claims where relief should be granted.

B. ARGUMENT

Standard of Review:

A PRP differs from an appeal, except that they both start in an appellate court. However, unlike assignments of error in an appeal, claims in a PRP are often based on unadjudicated facts. As a result, when material facts are contested this Court must remand to a trial court for a hearing. This Court is not free, as the State's response repeatedly suggests to sort through the facts, relying on the some and rejecting others.

In Washington, a PRP is required to contain a description of the evidence upon which the petitioner's claim of unlawful restraint is premised and the evidence proffered to support those allegations. RAP 16.7(a). An evidentiary hearing will be ordered if the pleadings raise a *prima facie* claim of constitutional error which cannot be resolved on the existing record. RAP 16.11(b); *In re PRP of Williams*, 111 Wash.2d 353, 365, 759 P.2d 436 (1988). Washington courts have three options regarding constitutional issues raised in a personal restraint petition:

1. If a petitioner fails to meet the threshold burden of showing actual prejudice arising from constitutional error, the petition must be dismissed;
2. If a petitioner makes at least a *prima facie* showing of actual prejudice, but the merits of the contentions cannot be determined solely on the record, the court should remand the petition for an evidentiary hearing;

3. If a petitioner makes a *prima facie* claim of error and the facts are not disputed, the court should grant the PRP without remanding the cause for further hearing.

RAP 16.11(a); RAP 16.12; *In re PRP of Rice*, 118 Wash.2d 876, 828 P.2d 1086 (1992); *In re PRP of Hews*, 99 Wash.2d 80, 88, 660 P.2d 263 (1983).

The Washington Supreme Court has compared review of the factual support for a PRP to ruling on a motion for summary judgment. *State v. Harris*, 114 Wash.2d 419, 435-436, 789 P.2d 60 (1990) (describing review of evidence submitted in support of incompetency to be executed claim and comparing that review to a PRP). In other words, the appellate court is required to order an evidentiary hearing if competent evidence is submitted which raises a triable issue. In determining whether the plaintiff has set forth a *prima facie* case, the court must treat the allegations as true. *Lewis v. Bours*, 119 Wash.2d 667, 670, 835 P.2d 221 (1992) (describing appellate review of an order granting summary judgment).

Washington appellate courts are not fact-finding courts. *See Ruse v. Dep't of Labor & Indus.*, 138 Wash.2d 1, 5, 977 P.2d 570 (1999).

Credibility determinations are reserved to factfinders, not the Washington State appellate courts. *State v. Walton*, 64 Wash. App. 410, 415-16, 824 P.2d 533 (1992).

Most of Cearley's claims involve now-disputed facts. As a result, this Court should remand those claims for either an evidentiary hearing or should remand the entire PRP for a hearing and determination on the

merits, unless this Court first determines that relief on some other claim is merited. This reply focuses on the need for a hearing, not how that hearing should turn out.

Trial Errors:

1. THE VICTIM ADVOCATE “COACHED” THE VICTIM DURING HER TESTIMONY.

In his PRP, Cearley stated that he witnesses the victim advocate signaling the complaining witness how to answer certain questions during her testimony. In response, the State disputes the claim and provides a contesting declaration from the victim advocate. As a result, Cearley’s first claim presents a classic dispute of material facts.

The State briefly appears to argue that Cearley’s claim of error is not worthy of a hearing—even if what Cearley says is true. However, the State certainly cannot be arguing that a victim advocate should be permitted to influence a complaining child witness on how to answer questions on the stand. No person is allowed to signal to a witness how to answer. When the witness is a child, the potential harm is increased because it is impossible to know whether the child was influenced or what she would have otherwise stated. Influencing a child to change a “no” to a “yes,” cannot be said to be just a regular part of the trial process and not a “serious” error. Cearley certainly admits that not every interaction or friendly act by the victim advocate toward the alleged victim necessitates

reversal or even a hearing. Clearly a reviewing court must evaluate the prejudice based on the totality of the circumstances. However, Cearley has easily passed the threshold to merit a hearing.

Further, the State claims that this issue cannot be raised in a PRP, but instead requires an objection at trial. That argument is of no moment. Cearley is not required to act as his own lawyer at trial, posing objections missed by his counsel, at the risk of later waiving those claims. Instead, a PRP allows a defendant to raise a claim of error that does not appear in the record by alleging facts supporting the claim of error—exactly what Cearley has done. *In re Pers. Restraint of Brett*, 142 Wash.2d 868, 881–84, 16 P.3d 601 (2001) (granting PRP based upon *Strickland* showing).

This Court should remand this claim for an evidentiary hearing where a factfinding court.

2A-C. MR. CEARLEY’S RIGHT TO AN OPEN AND PUBLIC TRIAL

The State argues that the use of a confidential questionnaire never violates the right to an open and public trial, citing *State v. Beskurt*, 176 Wash.2d 441, 293 P.3d 1159 (2013). The State reads far too much into that narrow, largely fact-bound opinion. The use of private questionnaires can violate the right to a public and open trial when counsel is requested to treat the questionnaires as private and where oral voir dire does not reveal the contents.

Just as importantly, Cearley frames his public trial claim in a manner not advanced or considered in *Beskurt*. Cearley complains that *his* right to a public trial was waived without any input from him. As a result, this Court can reverse on narrow, factually uncontested grounds—that Cearley did not authorize the waiver of his right to a public trial. The State has not disputed Cearley factual recitation that he did not authorize a waiver. Or, this Court can remand in order to have a complete record about the use of the questionnaires during trial. Cearley starts with the narrow approach.

The right to a public trial was Cearley’s personal right. *State v. Strode*, 167 Wash.2d 222, 229 n.3, 217 P.3d 310 (2009) (the “right to a public trial is set forth in the same provision as the right to a trial by jury, and it is difficult to discern any reason for affording it less protection than we afford the right to a jury trial. It seems reasonable, therefore, that the right to a public trial can be waived only in a knowing, voluntary, and intelligent manner. Personal constitutional rights, like the right to a jury trial, to testify, or to appeal, can only be waived by a defendant.

Cearley was never asked if he wished to waive his public trial right. If he had been asked, he would not have waived the right. Just like counsel cannot waive the right to a jury on his client’s behalf, the Court’s and counsel’s failure to inform Cearley of his right to a public trial constitutes reversible error where Cearley would not have waived the right, if asked.

Mr. Cearley was prejudiced by the loss of a constitutional right. As a result, this Court can reverse on this narrow ground alone.

More broadly, recent cases have made it abundantly clear that the private questioning of jurors without first conducting a hearing mandates reversal even without an objection. *State v. Wise*, 176 Wash.2d 1, 288 P.3d 1113 (2012), and *State v. Paumier*, 176 Wash.2d 29, 288 P.3d 1126 (2012), have made the “waiver” exception recognized in *State v. Momah*, 167 Wash.2d 140, 217 P.3d 321 (2009), extremely narrow. See *Wise*, at 15 (“At bottom, *Momah* presented a unique confluence of facts: although the court erred in failing to comply with *Bone-Club*, the record made clear—without the need for a post hoc rationalization—that the defendant and public were aware of the rights at stake and that the court weighed those rights, with input from the defense, when considering the closure.”). The unique facts found in *Momah* do not exist in this case.

State v. Beskurt, 176 Wash.2d 441, 293 P.3d 1159 (2013), which held that in that case the use of a questionnaire did not violate the public trial right easily be distinguished. *Beskurt* involved a questionnaire which defense counsel possessed and was not restricted in its use. Oral voir dire made the contents of questionnaire entirely public. The Court stated:

At most, the questionnaires provided the attorneys and court with a framework for that questioning. In some instances, the court began by reiterating a prospective juror's questionnaire response and then asked that person to elaborate in open court. And in other instances, some jurors were not questioned at all from their written responses.

Nothing suggests the questionnaires substituted actual oral voir dire. Rather, the answers provided during oral questioning prompted, if at all, the attorneys' for cause challenges, and the trial judge's decisions on those challenges all occurred in open court. The public had the opportunity to observe this dialogue. The sealing had absolutely no effect on this process. The order was entered after the fact and after voir dire occurred; it did not in any way turn an open proceeding into a closed one.

176 Wn.2d 447.

In this case, the questionnaire was never available for public inspection. In addition, the record does not establish that the entire questionnaire was reviewed in its entirety with every juror during oral voir dire. Most questionnaires, unlike the situation described in *Beskurt*, supplement oral voir dire. Questionnaires save time and allow the court and parties to ask more questions of prospective jurors. Jury questionnaires are designed to expedite oral voir dire. Colquitt, Joseph, *Using Jury Questionnaires; (Ab)using Jurors*, 40 CONN. L. REV. 1 (2007).

Because questionnaires are usually part of the overall voir dire process, some information on the questionnaires usually stays private, unlike the situation in *Beskurt*. Unlike *Beskurt*, which was a direct appeal and so supplementation of the record was not permitted, this Court can remand for a hearing.

Washington courts, including *Beskurt*, have not distinguished between public access to the courtroom and to documents in the court file. *Seattle Times Co. v. Ishikawa*, 97 Wash.2d 30, 36, 640 P.2d 716 (1982);

Dreiling v. Jain, 151 Wash.2d 900, 908, 93 P.3d 861 (2004); *Tacoma News, Inc. v. Cayce*, 172 Wash.2d 58, 256 P.3d 1179 (2011) (excluding pretrial discovery documents that are never introduced in the case). In both cases, there is a presumption of openness which can be overcome in certain circumstances. In any case, a hearing must precede a closure or sealing order.

Beskurt did not hold otherwise. Instead, *Beskurt* simply held, based on the facts of that case, that the questionnaire was available to be viewed by the public at the time of trial and, in any event, it was possible to learn the contents of the questionnaire (questions and answers) by attending the open oral voir dire.

In this case, the questionnaire was never available for public inspection. Even if the public had been allowed to attend, the oral voir dire would have only revealed some—but hardly all—of what was contained in records which even current counsel cannot view.

To the extent that the facts that distinguish this case from *Beskurt* are contested, this Court should remand for an evidentiary hearing.

3. MR. CEARLEY WAS DENIED THE RIGHT TO BE PRESENT

A “side bar” conference held in secret and then fully revealed on the record in open court does not implicate the right to an open and public trial. Instead, it is a matter of convenience. The slight delay in making the private conversation fully public allows a judge not to have to excuse the

jury every time a legal matter must be discussed, but where jurors should not hear that discussion. However, that is not what Cearley complains about in this case. Cearley is not arguing that private side-bars should be prohibited. Instead, he argues that the content of side-bars must be made public shortly thereafter. When a significant portion of the trial is conducted at side-bars not later placed on the record, a violation of the right to a public and open trial takes place.

A significant portion of Mr. Cearley's trial was conducted in chambers and at sidebar. Both Mr. Cearley and the public were excluded from these parts of trial. Although the Court tried to summarize some of these sidebar hearings on the record at the end of many of the trial days, oftentimes the Court did this the next day, missing some of them. None appear to have been contemporaneously recorded. In short, significant parts of the trial were conducted in secret—neither the public nor Cearley himself were able to learn—then or now—what happened during these parts of trial.

By remanding this claim for a hearing, the parties will be given an opportunity to recreate just how much of trial was kept from Cearley and the public during the secret side bars. At a hearing, the factfinding court can attempt to establish how many sidebars took place; what was discussed at the side bars; why what happened at those sidebars was not later placed on the record; and whether the court considered other options.

4A-B. JUROR-WITNESS/SPECTATOR CONTACT DURING TRIAL.

In his PRP, Mr. Cearley presented evidence about improper contact with jurors during a trial recess. Consistent with the law, he asserted that counsel should have brought the matter to the court's attention, especially when the Court was critical of Cearley for photographing what was, in fact, the improper contact. If counsel had done so, a hearing should have been conducted to determine (1) whether there was improper contact with jurors; (2) what was said; (3) and whether the conversation/comments were prejudicial. *See, e.g., Remmer v. United States*, 347 U.S. 227, 229, 74 S.Ct. 450, 451, 98 L.Ed. 654 (1954); *United States v. Greer*, 620 F.2d 1383, 1385 (10th Cir.1980); *United States v. Doe*, 513 F.2d 709, 711 (1st Cir.1975). Mr. Cearley now seeks remand for an evidentiary hearing to explore the three above-listed issues, as well as why counsel failed to bring the matter to the trial court's attention; and whether that failure was constitutionally deficient.

The State responds to this claim of error in several ways. The State asserts that no contact took place between jurors and trial participants. The State argues that, even if such contact took place, Cearley was in the wrong for photographing the improper contact. Finally, the State posits that trial counsel made a reasonably competent decision not to ask the court to conduct a hearing. Each of the State's arguments depends on facts that can only be established or resolved at an evidentiary hearing.

The central problem with the State's response is that it fails to acknowledge that contact with jurors by third parties during a criminal trial presumptively violates a defendant's right to an impartial jury. *Remmer, supra*. Obviously, not every contact is, in fact, prejudicial. However, the only way to sort prejudicial from non-prejudicial contacts is for the trial court to conduct a hearing to “determine the circumstances, the impact thereof upon the juror, and whether or not [the contact] was prejudicial, in a hearing with all interested parties permitted to participate.” *Id.* at 230.

The State has properly disputed whether such contact took place. However, the factual dispute calls for a hearing. Because resolution of the factual dispute necessarily involves a credibility determination, an evidentiary hearing is required.

The State further invites this Court to speculate that Cearley's counsel possessed some reasonable tactical decision not to ask the trial court to inquire about the contact with jurors, attempting to paint Cearley as in the wrong and counsel as seeking to avoid additional blame being placed on Cearley. However, Cearley did nothing wrong. In any event, the necessary inquiry was not Cearley's attempt to photographically preserve the error, but the improper contact with jurors—who did so, what was said, and why. Although it is Cearley's position that there is no reasonable explanation for trial counsel's failure to bring the matter to the court's

attention and ask for a hearing, the reasons for counsel's failure can also be explored at a hearing.

As a result, this Court should remand for a hearing.

5. FAILURE TO REQUEST A PSYCHOLOGICAL EVALUATION OF THE VICTIM.
6. FAILURE TO RETAIN AN EXPERT ON CHILD ABUSE INTERVIEW TECHNIQUES.

These two related claims should also be remanded for an evidentiary hearing where Cearley will be entitled to litigate the discovery issue (Claim 5) and is entitled to expert assistance (Claim 6). Although both claims depend on additional and currently unavailable proof in order to succeed, neither is frivolous or speculative. Instead, Cearley marshaled the proof reasonably available to him at this stage in support of each claim.

Cearley produced evidence that the complaining witness, A.D.M., was a "severely emotionally disturbed child." *See* Appendix D to PRP. Thus, he has met the low evidentiary threshold for a hearing.

An expert testifying about child interview protocols could have told the jury that AD.M.'s initial denials were not necessarily because of reluctance to tell the truth. Instead, the expert could have testified that she was coerced under an onslaught of leading questions in a room full of powerful adults including her principal. CP 283- 313. The inconsistent

testimony that she gave at trial was proof that the story she told at trial was not her own, but rather an account of an imagined series of events. As a result, Cearley has made out a prima facie claim of ineffective assistance of counsel. At a minimum, he is entitled to an evidentiary hearing.

7. COUNSEL WAS REPEATEDLY DISRESPECTFUL AND RUDE.

The State argues that defense counsel is free to treat his client (and his job defending his client) as abhorrent and no corrective action is ever available. Even if counsel's actions toward his client during trial send an unmistakable message to jurors that the defendant is guilty, the defendant has no legal recourse. A reviewing court, according to the State, can only find ineffectiveness based on the words spoken to the jury.

The State is mistaken. The law is not so limited. Granted, Cearley faces a higher bar to prove both that counsel's behavior fell below the standard expected for reasonably competent counsel and that he was prejudiced. However, those facts can only be established by an evidentiary hearing where the trial participants, most importantly Cearley and his trial counsel, can testify about what happened in court and why.

It is important to note that this was not a case where trial counsel conceded that Cearley committed some crime(s), but not the ones charge. Nor was it a case where counsel defended by suggesting that Cearley was such a despicable character that he was a likely target for false accusations

of sexual abuse. As a result, counsel's actions could certainly have communicated that counsel thought Cearley was guilty, but was obligingly fulfilling his constitutional duty.

In any event, this claim should be remanded for a hearing.

8A-B. A JUROR SLEPT THROUGH A MATERIAL PORTION OF TRIAL

The State disputes whether a juror fell asleep for part of Cearley's trial. However, the State tries to avoid a remand hearing by arguing that Cearley had a personal responsibility to raise and argue this issue at trial—once again imposing a duty on Cearley to act as first-chair relegating his counsel to co-counsel whose decisions he had to overrule or face waiver of a claim of error. Undersigned counsel has searched in vain for caselaw supporting this theory. Cearley certainly agrees that counsel could not “gamble and lose”—holding on to the issue to see what verdict the jury would return and then raise the issue post-verdict. But, that is not what happened. Counsel never raised the issue. A reviewing court cannot treat a defendant in the same manner precisely because a defendant is not required to know the law and is frankly not permitted to “overrule” his attorney at trial.

Like the preceding issues, this claim should be remanded for an evidentiary hearing.

9. CUMULATIVE PREJUDICE

If this Court finds multiple errors which, standing alone, do not

warrant relief, then this Court should cumulate the prejudice.

Sentencing Error

10. THE “POSITION OF TRUST” AGGRAVATOR

Mr. Cearley contends that the jury instruction defining the “position of trust” aggravator relieved the State of its obligation to prove all of the elements required by statute—most importantly it failed to require a “nexus” between the position of trust and the crime. The State responds by arguing that the error was invited because trial counsel did not challenge the instruction. While trial counsel’s failure can be explored in an evidentiary hearing, the crux of this claim turns on whether the instruction correctly stated the law. It did not.

The language of the statute is plain: “The defendant used his or her position of trust, confidence, or fiduciary responsibility to facilitate the commission of the current offense.” In other words, the law plainly requires that the position of trust be exploited in the commission of the crime. The language of the instruction stops short of what the statute requires. The instruction given to Cearley’s jurors only required a nexus between the position of trust and “access” to the victim, but did not require the “access” lead to the crime. Common law required a nexus. *State v. Jackmon*, 55 Wn.App. 562, 568–69, 778 P.2d 1079 (1989) (exceptional sentence for abuse of trust not supported where record did not establish that the ex-employee was permitted an unusual degree of access to the company

because of his status). There is no indication that the legislature attempted to write that requirement out of the law.

11. THE HIGH OFFENDER SCORE AGGRAVATOR

Cearley’s exceptional minimum sentence was supported, in part, by facts not found by his jury—namely, his “high offender score.” Cearley admits that *State v. Chambers*, 176 Wash.2d 573, 586, 293 P.3d 1185 (2013), holds that no jury trial is required because this aggravator fits within the “prior conviction” exception. However, Cearley argues that the federal constitution requires a jury trial when the necessary factual finding requires more than simply the fact of a prior conviction. In this case, a trial judge must find both the fact of prior convictions and the fact that the prior convictions and current offenses combine in a manner to result in a “free” crime. As a result, the Sixth Amendment right to a jury trial applies.

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III. CONCLUSION

This Court should remand to the trial court for either an evidentiary hearing or for a determination on the merits. RAP 16.11-.13. Otherwise, this Court should reverse and remand for a new trial and/or for a new sentencing hearing.

DATED this 6th day of May, 2013.

Respectfully Submitted:

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Attached for filing is Mr. Cearley's reply, which has been served on opposing counsel through this email.

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