

COA NO. 44569-7-II

IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON
DIVISION TWO

STATE OF WASHINGTON,

Respondent,

v.

RICHARD CARPENTER,

Appellant.

ON APPEAL FROM THE SUPERIOR COURT OF THE
STATE OF WASHINGTON FOR PIERCE COUNTY

The Honorable Ronald E. Culpepper, Judge
The Honorable Katherine M. Stolz, Judge

BRIEF OF APPELLANT

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A. ASSIGNMENTS OF ERROR

1. The court violated appellant's constitutional right to a public trial during the jury selection process.
2. The court violated appellant's right to counsel under the Sixth Amendment of the United States Constitution in denying appellant's motion to discharge counsel.
3. The court improperly influenced appellant not to testify, in violation of the Fifth, Sixth, and Fourteenth Amendments to the United States Constitution.

Issues Pertaining to Assignments of Error

1. Whether the court violated appellant's constitutional right to a public trial when it conducted the peremptory challenge portion of the jury selection process in private without analyzing the requisite factors to justify closure?
2. Whether the court erred in failing to appoint new counsel due to inadequate inquiry into the nature and extent of appellant's conflict with his attorney and breakdown in communication?
3. Whether the court improperly influenced appellant not to testify in his own defense, resulting in the involuntary waiver of this right?

B. STATEMENT OF THE CASE

The State charged Richard Carpenter with first degree robbery, theft of a motor vehicle, and second degree possession of stolen property.¹ CP 34-35. Jane Preszler testified that she returned home after running errands and parked her car in front of her garage. 1RP² 134, 139-40. She put some groceries into a refrigerator in the garage. 1RP 141-42. As she walked back to the open car door, a man jumped in the car and shut the door. 1RP 142, 149. Preszler pulled the door open and hit the man with her hands. 1RP 149. She said she got a good look at the man. 1RP 150, 235-36. But he was wearing a hood around his face. 1RP 235. The man put the car in reverse and drove off, in the process hitting Preszler with the driver's side door and knocking her to the ground. 1RP 150-51, 159, 237.

Police found the car a short time later. 1RP 163, 183-84, 279. Preszler's purse and charge cards were inside. 1RP 175-76. Shortly thereafter, police contacted Carpenter, who was jogging along a street. 1RP 250, 264-65, 279-80. He bore a similar description to the perpetrator,

¹ The State also charged Carpenter with driving with a suspended license. CP 35-36. That count was later dismissed on the State's motion. CP 154-56.

² 1RP - four consecutively paginated volumes consisting of 3/6/12, 3/28/12, 1/8/13 (vol. I), 1/9/13 (vol. II), 1/10/13, 1/14/13, 1/15/13 (vol. III), 1/16/13, 1/17/13, 1/28/13, 3/8/13 (vol. IV); 2RP - 4/27/12; 3RP - 5/11/12; 4RP - 5/18/12, 9/21/12; 5RP - 6/8/12; 6RP - 9/11/12; 7RP - 10/5/12; 8RP - 1/8/13, 1/9/13 (voir dire).

although he was not wearing the blue-hooded sweatshirt described by Preszler. 1RP 250-51, 268. Upon apprehension, police recovered Preszler's checkbook and money (some of which was in the checkbook) from Carpenter's pants pockets. 1RP 251, 284-89.

Police brought Preszler to the scene, where she identified Carpenter as the perpetrator. 1RP 166-69, 189-90, 239-40. A police officer told Carpenter he was under arrest for robbery because the witness identified him. 1RP 283. Although he had not been told the gender of the person who identified him, Carpenter said "She picked me?" 1RP 283-84.

At trial, Carpenter told the judge he wanted to testify in his own defense. 1RP 315. Following an extended colloquy with the judge, he ultimately declined to do so. 1RP 333-41. Although the jury was instructed on first degree theft as a lesser offense to first degree robbery, the jury found Carpenter guilty as charged. CP 104, 106-07, 121-23. The court sentenced Carpenter to 46 months confinement. CP 145. This appeal follows. 157-71.

C. ARGUMENT

1. THE COURT VIOLATED CARPENTER'S RIGHT TO A PUBLIC TRIAL WHEN IT CONDUCTED A PORTION OF THE JURY SELECTION PROCESS IN PRIVATE.

Peremptory challenges were exercised on a piece of paper in a manner that did not allow for meaningful public scrutiny. The court erred in conducting this portion of the jury selection process in private without justifying the closure under the standard established by Washington Supreme Court and United States Supreme Court precedent. This structural error requires reversal of the convictions.

- a. Peremptory Challenges Were Exercised On Paper With No Contemporaneous Announcement Of Those Challenges In Open Court.

Jury selection took place on January 8 and 9, 2013. 8RP. The venire panel was questioned on the record in the courtroom. 8RP 7-125. At the close of questioning, the court asked the attorneys if they were ready to exercise challenges. 8RP 125. The court informed the prospective jurors "this part does not require audience participation. The attorneys are going to be going back and forth exercising challenges; so you're free, if you want to, to talk among yourselves quietly, if you want to stand up and stretch." 8RP 125. Following what the transcript designates as a "pause" in the proceedings, the prosecutor asked "May we approach, Your Honor; or do you want us to just hand it up? 8RP 126. The court

asked "Are you done with it?" 8RP 126. The prosecutor replied "Yes."
8RP 126. The court told the prosecutor to "[h]and it" to the court clerk.
8RP 126.

The "it" referred to by the prosecutor and the court was a peremptory challenge sheet, upon which the attorneys exercised their peremptory challenges by writing them down on a sheet of paper. CP 187. When the process was finished, the court announced on the record who would serve as jurors for the trial and excused the rest. 8RP 126. At no time did the court announce in open court which party had removed which potential jurors. A document containing this information was filed. CP 187. But the public was never told in open court that such a document had been filed.

b. The Public Trial Right Attaches To The Peremptory Challenge Process Because It Is An Integral Part Of Jury Selection.

The federal and state constitutions guarantee the right to a public trial to every defendant. U.S. Const. amend VI; Wash. Const. art I, § 22. Additionally, article I, section 10 expressly guarantees to the public and press the right to open court proceedings. State v. Easterling, 157 Wn.2d 167, 174, 137 P.3d 825 (2006). Whether a trial court has violated the defendant's right to a public trial is a question of law reviewed de novo. Easterling, 157 Wn.2d at 173-74.

The right to a public trial is the right to have a trial open to the public. In re Pers. Restraint of Orange, 152 Wn.2d 795, 804-05, 100 P.3d 291 (2004). This is a core safeguard in our system of justice. State v. Wise, 176 Wn.2d 1, 5, 288 P.3d 1113 (2012). The open and public judicial process helps assure fair trials, deters misconduct by participants, and tempers biases and undue partiality. Wise, 176 Wn.2d at 5-6.

Furthermore, "[t]he requirement of a public trial is for the benefit of the accused; that the public may see he is fairly dealt with and not unjustly condemned, and that the presence of interested spectators may keep his triers keenly alive to a sense of their responsibility and to the importance of their functions." State v. Bone-Club, 128 Wn.2d 254, 259, 906 P.2d 325 (1995) (quoting In re Oliver, 333 U.S. 257, 270 n. 25, 68 S. Ct. 499, 92 L. Ed. 682 (1948)).

The trial court violated Carpenter's right to a public trial in holding peremptory challenges in private. The right to a public trial encompasses jury selection. Presley v. Georgia, 558 U.S. 209, 723-24, 130 S. Ct. 721, 175 L. Ed. 2d 675 (2010); Wise, 288 P.3d at 1118 (citing State v. Brightman, 155 Wn.2d 506, 515, 122 P.3d 150 (2005)). "The peremptory challenge process, precisely because it is an integral part of the voir dire/jury impanelment process, is a part of the 'trial' to which a criminal defendant's constitutional right to a public trial extends." People v. Harris,

10 Cal. App.4th 672, 684, 12 Cal. Rptr. 2d 758 (Cal. Ct. App. 1992) (peremptory challenges conducted in chambers violate public trial right, even where such proceedings are reported), review denied, (Feb 02, 1993). This Court recognizes the right to a public trial attaches to the portion of jury selection involving peremptory challenges. State v. Wilson, 174 Wn. App. 328, 342-43, 346, 298 P.3d 148 (2013); State v. Jones, 175 Wn. App. 87, 97-101, 303 P.3d 1084 (2013).

In Wilson, this Court held the public trial right was not implicated when the bailiff excused the two jurors solely for illness-related reasons before voir dire began. Wilson, 174 Wn. App. at 347. In reaching that holding, the court distinguished the administrative removal of jurors before the voir dire process began to later portions of the jury selection process that implicated the public trial right, including the peremptory challenge process. Id. at 342-43.

This Court recognized "both the Legislature and our Supreme Court have acknowledged that a trial court has discretion to excuse jurors outside the public courtroom for statutorily-defined reasons, *provided such juror excusals do not amount to for-cause excusals or peremptory challenges traditionally exercised during voir dire in the courtroom.*" Id. at 344 (emphasis added). A trial court is allowed "to delegate hardship and other administrative juror excusals to clerks and other court agents,

provided that the excusals are not the equivalent of peremptory or for cause juror challenges." Id. (emphasis added). Wilson's public trial argument failed because he could not show "the public trial right attaches to any component of jury selection that does not involve 'voir dire' or a similar jury selection proceeding involving the exercise of 'peremptory' challenges and 'for cause' juror excusals." Id. at 342.

In Jones, this Court held the trial court violated the right to public trial when, during a court recess off the record, the trial court clerk drew four juror names to determine which jurors would serve as alternates. Jones, 175 Wn. App. at 91. It recognized "both the historic and current practices in Washington reveal that the procedure for selecting alternate jurors, like the selection of regular jurors, generally occurs as part of voir dire in open court." Id. at 101. This Court likened the selection of alternate jurors to the phases of jury selection involving for cause *and peremptory challenges*. Id. at 98 ("Washington's first enactment regarding alternate jurors not only specified a particular procedure for the alternate juror selection, but it specifically instructed that alternate jurors be called in the same manner as deliberating jurors and subject to for-cause and peremptory challenges in open court.").

Both Jones and Wilson applied the experience and logic test set forth in State v. Sublett, 176 Wn.2d 58, 292 P.3d 715 (2012). Jones, 175

Wn. App. at 96-102; Wilson, 174 Wn. App. at 335-47. In Jones, there was a public trial violation because alternate juror selection was akin to the jury selection process involving regular jurors, including the peremptory challenge process. In Wilson, there was no public trial violation because the administrative removal of jurors for hardship was not akin to other portions of the jury selection process, including the peremptory challenge process. Both cases support Carpenter's argument that the public trial right attaches to the peremptory challenge process because it is an integral part of the jury selection process.

The "experience" component of the Sublett test is satisfied here. Historical evidence reveals "since the development of trial by jury, the process of selection of jurors has presumptively been a public process with exceptions only for good cause shown." Press-Enterprise Co. v. Superior Court of California, Riverside County, 464 U.S. 501, 505, 104 S. Ct. 819, 78 L. Ed. 2d 629 (1984). The criminal rules of procedure show our courts have historically treated the peremptory challenge process as part of voir dire on par with for cause challenges. Wilson, 174 Wn. App. at 342. CrR 6.4(b) contemplates juror voir dire as involving peremptory and for cause juror challenges. Id. CrR 6.4(b) describes "voir dire" as a process where the trial court and counsel ask prospective jurors questions to assess their ability to serve on the defendant's particular case and to enable counsel to

exercise intelligent "for cause" and "peremptory" juror challenges. Id. at 343.

This stands in sharp contrast with CrR 6.3, which contemplates administrative excusal of some jurors appearing for service before voir dire begins in the public courtroom. Id. at 342-43. In further contrast, a trial court has discretion to excuse jurors outside the public courtroom under RCW 2.36.100(1), but only so long as "such juror excusals do not amount to for-cause excusals or *peremptory challenges* traditionally exercised during voir dire in the courtroom." Id. at 344 (emphasis added).

The "logic" component of the Sublett test is satisfied as well. "Our system of voir dire and juror challenges, including causal challenges and peremptory challenges, is intended to secure impartial jurors who will perform their duties fully and fairly." State v. Saintcalle, 178 Wn.2d 34, 74, 309 P.3d 326 (2013) (Gonzalez, J., concurring). "The peremptory challenge is an important 'state-created means to the constitutional end of an impartial jury and a fair trial.'" Saintcalle, 178 Wn.2d at 62 (Madsen, C.J., concurring) (quoting Georgia v. McCollum, 505 U.S. 42, 59, 112 S. Ct. 2348, 120 L. Ed. 2d 33 (1992)).

While peremptory challenges may be exercised based on subjective feelings and opinions, there are important constitutional limits on both parties' exercise of such challenges. McCollum, 505 U.S. at 48-50.

A prosecutor is forbidden from using peremptory challenges based on race, ethnicity, or gender. Batson v. Kentucky, 476 U.S. 79, 86, 106 S. Ct. 1712, 90 L. Ed. 2d 69 (1986); Rivera v. Illinois, 556 U.S. 148, 153, 129 S. Ct. 1446, 173 L. Ed. 2d 320 (2009); State v. Burch, 65 Wn. App. 828, 836, 830 P.2d 357 (1992).

The peremptory challenge component of jury selection matters. It is not so inconsequential to the fairness of the trial that it is appropriate to shield it from public scrutiny. Discrimination in the selection of jurors places the integrity of the judicial process and fairness of a criminal proceeding in doubt. Powers v. Ohio, 499 U.S. 400, 411, 111 S. Ct. 1364, 113 L. Ed. 2d 411 (1991).

The public trial right encompasses circumstances in which the public's mere presence passively contributes to the fairness of the proceedings, such as deterring deviations from established procedures, reminding the officers of the court of the importance of their functions, and subjecting judges to the check of public scrutiny. Brightman, 155 Wn.2d at 514; Leyerle, 158 Wn. App. at 479. An open peremptory process of jury selection acts as a safeguard against discriminatory removal of jurors. Public scrutiny discourages discriminatory removal from taking place in the first instance and, if such a peremptory challenge

is exercised, increases the likelihood that the challenge will be denied by the trial judge.

The Supreme Court recently issued an opinion that was fractured on how to deal with the persistence of racial discrimination in the peremptory challenge process, but all nine justices united in the recognition that the problem exists. See Saintcalle, 178 Wn.2d at 49 (Wiggins, J., lead opinion) (overwhelming evidence that peremptory challenges often facilitate racially discriminatory jury selection), at 60 (Madsen, C.J., concurring) ("Like my colleagues, I am concerned about racial discrimination during jury selection."); at 65 (Stephens, J., concurring) (writing separately "to sound a note of restraint amidst the enthusiasm to craft a new solution to the problem of the discriminatory use of peremptory challenges during jury selection."); at 69 (Gonzalez, J., concurring) ("This splintered court is unanimous about one thing: Racial bias in jury selection is still a problem."); at 118 (Chambers, J., dissenting) ("Batson, by design, does nothing to police jury selection against unconscious racism or wider discriminatory impacts. I am skeptical — given that we have never reversed a verdict on a Batson challenge — that [Batson] does much to police discriminatory purpose itself.").

Justice Wiggins bemoaned the fact that in 42 cases decided since Batson, Washington appellate courts never reversed a conviction based on

a trial court's erroneous denial of a Batson challenge. Saintcalle, 178 Wn.2d at 45-46. If discrimination during the peremptory process is not prevented at the trial level, the error will rarely be remedied on appeal. That is what history has taught us.

In light of these justified concerns, it cannot be plausibly maintained that the peremptory challenge process, as it unfolds in real time at the trial level, gains nothing from being open to the public. The public nature of trials is a check on the judicial system, provides for accountability and transparency, and assures that whatever transpires in court will not be secret or unscrutinized. Wise, 176 Wn.2d at 6. "Essentially, the public-trial guarantee embodies a view of human nature, true as a general rule, that judges [and] lawyers . . . will perform their respective functions more responsibly in an open court than in secret proceedings." Id. at 17 (quoting Waller v. Georgia, 467 U.S. 39, 46 n.4, 104 S. Ct. 2210, 81 L. Ed. 2d 31 (1984)). The peremptory challenge process squarely implicates those values.

Division Three of the Court of Appeals recently held no public trial violation occurred during the peremptory challenge phase because the record did not show peremptory challenges were actually exercised at sidebar instead of in open court. State v. Love, 176 Wn. App. 911, 309

P.3d 1209, 1212 (2013).³ In extended dicta, Division Three opined that, even if the record showed peremptory challenges were exercised at sidebar, the peremptory challenge process did not need to be open to the public under the "experience and logic" test. Love, 309 P.3d at 1212-14. That discussion was dicta because it was unnecessary to resolve the issue. See In re Marriage of Roth, 72 Wn. App. 566, 570, 865 P.2d 43 (1994) ("Dicta is language not necessary to the decision in a particular case."). Dicta lack precedential value. Campbell v. Reed, 134 Wn. App. 349, 359, 139 P.3d 419 (2006). Moreover, dicta are often ill-considered and should not be transformed into a rule of law. State v. Shove, 113 Wn.2d 83, 88, 776 P.2d 132 (1989); State ex rel. Hoppe v. Meyers, 58 Wn.2d 320, 329, 363 P.2d 121 (1961).

Division Three's dicta in Love is ill-considered and should not be followed for the reasons already articulated in this brief. The experience prong of the "experience and logic" test is met because the relevant court rule envisions both for cause and peremptory challenges taking place in open court. Wilson, 174 Wn. App. at 342-44; Jones, 175 Wn. App. at 98, 101. Division Three ignored what Jones and Wilson have to say on the issue.

³ A petition for review has been filed in Love.

Its reliance on State v. Thomas, 16 Wn. App. 1, 13, 553 P.2d 1357 (1976) as a basis to conclude peremptory challenges do not meet the "experience" prong of the "experience and logic" test is misplaced. Love, 309 P.3d at 1213. Thomas rejected the argument that "Kitsap County's use of secret – written – peremptory jury challenges" violated the defendant's right to a fair and public trial where the defendant had failed to cite to any supporting authority. Thomas, 16 Wn. App. at 13. Thomas, however, predates Bone-Club by nearly 20 years. Much has changed in public trial jurisprudence since then and Carpenter cites plenty of authority to back up his argument.

Moreover, Thomas noted in 1976 that secret peremptories were used "in several counties" according to a Bar Association directory. Thomas, 16 Wn. App. at 13 & n.2. There are 39 counties in Washington. The implication, then, is that only several of the 39 counties used secret peremptories as of 1976.⁴ That hardly shows an established historical practice of secret peremptory challenges in this state. Quite the contrary.

Turning to the "logic" prong, Division Three's bald assertion that the exercise of peremptory challenges "presents no questions of public oversight" is simply wrong. Love, 309 P.3d at 1214. The reasons why it

⁴ The source of the court's information is actually dated 1968. Thomas, 16 Wn. App. at 13 n.2.

is wrong, including the benefit of public oversight to deter discriminatory removal of jurors during the peremptory process, have already been set forth in this brief.

c. The Private Peremptory Challenge Proceeding Constitutes A Closure For Public Trial Purposes.

One type of "closure" is "when the courtroom is completely and purposefully closed to spectators so that no one may enter and no one may leave." State v. Lormor, 172 Wn.2d 85, 93, 257 P.3d 624 (2011). Physical closure of the courtroom, however, is not the only situation that violates the public trial right. Another type of closure occurs where a proceeding takes place in a location inaccessible to the public, such as a judge's chambers or hallway. Lormor, 172 Wn.2d at 93 (chambers); State v. Leyerle, 158 Wn. App. 474, 477, 483, 484 n.9, 242 P.3d 921 (2010) (moving questioning of juror to hallway outside courtroom was a closure).

Here, the peremptory challenge portion of the jury selection process was conducted in private. The piece of paper passed between the attorneys was inaccessible to the public at the time the peremptory challenges were exercised. The procedure in this case violated the right to a public trial to the same extent as any in-chambers conference or other courtroom closure would have. Though the courtroom itself remained open to the public, the proceedings were not. Jurors were allowed to

remain in the courtroom while challenges were exercised, which demonstrates the challenges were done in a way that those in the courtroom would not be able to overhear.

Whether a closure — and hence a violation of the right to public trial — has occurred does not turn only on whether the courtroom has been physically closed. A closure occurs even when the courtroom is not physically closed if the proceeding at issue takes place in a manner that renders it inaccessible to public scrutiny. See State v. Slert, 169 Wn. App. 766, 774 n.11, 282 P.3d 101 (2012) ("if a side-bar conference was used to dismiss jurors, the discussion would have involved dismissal of jurors for case-specific reasons and, thus, was a portion of jury selection held wrongfully outside Slert's and the public's purview."), review granted, 176 Wn.2d 1031, 299 P.3d 20 (2013). Members of the public are no more able to approach the bench or attorney's tables and observe an intentionally private jury selection process than they are able to enter a locked courtroom, access the judge's chambers, or participate in a private hearing in a hallway. The practical impact is the same — the public is denied the opportunity to scrutinize events.

Perhaps the public could see the attorneys pushing a sheet of paper back and forth, but the public could not *hear* or otherwise meaningfully observe what was happening as it was taking place. The public could not

hear which jurors were peremptorily struck, who struck them, and in what order they were struck before the final jury was seated. See People v. Williams, 52 A.D.3d 94, 98, 858 N.Y.S.2d 147 (N.Y. App. Div. 2008) (sidebar conferences, by their very nature, are intended to be held in hushed tones).

When jury selection occurs in this manner, the public is unable to observe what is taking place in any meaningful manner because the public cannot hear what is going on. There is no functional difference between conducting this aspect of the jury selection process at a private conference in the courtroom and doing the same in chambers or in a physically closed courtroom. In each instance, the proceeding takes place in a location inaccessible to the public. As a practical matter, the judge might as well have conducted the peremptory challenge processes in chambers or dismissed the public from the courtroom altogether because the public was not privy to what occurred.

What took place in private should have taken place in open court so that the public could observe the peremptory challenge process as it was taking place. The ultimate composition of the jury was announced in open court. 8RP 126. But the selection process was actually closed to the public because which party exercised which peremptory challenge and the order in which the peremptory challenges were made were not subject to

public scrutiny. The sequence of events through which the eventual constituency of the jury "unfolded" was kept private. Harris, 10 Cal. App.4th at 683 n.6.

The State may claim there was no closure and thus no public trial violation because the peremptory challenge sheet was filed. CP 187. That claim fails because the Supreme Court has repeatedly found a violation of the public trial right where the record showed what happened in private. See, e.g., State v. Paumier, 176 Wn.2d 29, 32-33, 288 P.3d 1126 (2012) (public trial violation where in-chambers questioning of prospective jurors "was recorded and transcribed by the court"); Wise, 176 Wn.2d at 7-8 (public trial violation where prospective jurors questioned in chambers where "[t]he questioning in chambers was recorded and transcribed just like the portion of voir dire done in the open courtroom.").

Contemporaneous public observation of this critical moment in a criminal trial fosters public trust in the process and holds both the judge and the attorneys accountable at a time when it matters most — before the jury is seated. Once the jury is seated, the damage is done. It is unrealistic to expect that any post hoc concerns voiced by the public about a peremptory challenge will result in any action being taken after the trial is under way with a sworn jury. Attorneys and trial judges know this. Any improper challenges are effectively insulated from remedial oversight.

The deterrent effect of public scrutiny is undermined when all the public is left with is an after-the-fact record of what happened.

Moreover, even to voice a concern, members of the public would need to know the sheet documenting peremptory challenges had been filed and that it was subject to public viewing. The court here made no such announcement. Further, members of the public would have to recall the identity and race of challenged prospective jurors to determine whether they had been improperly targeted — a herculean task when it must be done after jury selection has already taken place and prospective jurors excused.

The bottom line is that the Bone-Club factors must be considered *before* the closure takes place. Wise, 176 Wn.2d at 12. A proposed rule that a *later* recitation of what occurred in private suffices to protect the public trial right would eviscerate the requirement that a Bone-Club analysis take place *before* a closure occurs.

- d. The Convictions Must Be Reversed Because The Court Did Not Justify The Closure Under The Bone-Club Factors.

Before a trial court closes the jury selection process off from the public, it must consider the five factors identified in Bone-Club on the record. Wise, 176 Wn.2d at 12. Under the Bone-Club test, (1) the proponent of closure must show a compelling interest for closure and,

when closure is based on a right other than an accused's right to a fair trial, a serious and imminent threat to that compelling interest; (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 258-60; Wise, 176 Wn.2d at 10.⁵

There is no indication the court considered the Bone-Club factors before the peremptory challenge process took place in private. 8RP 125-26. The trial court errs when it fails to conduct the Bone-Club test before closing a court proceeding to the public. Wise, 176 Wn.2d at 5, 12. The court here erred in failing to articulate a compelling interest to be served by the closure, give those present an opportunity to object, weigh alternatives to the proposed closure, narrowly tailor the closure order to

⁵ The Bone-Club components are comparable to the requirements set forth by the United States Supreme Court in Waller. Orange, 152 Wn.2d at 806; see Waller, 467 U.S. at 48 ("[T]he party seeking to close the hearing must advance an overriding interest that is likely to be prejudiced, the closure must be no broader than necessary to protect that interest, the trial court must consider reasonable alternatives to closing the proceeding, and it must make findings adequate to support the closure."); Presley, 558 U.S. at 214 ("trial courts are required to consider alternatives to closure even when they are not offered by the parties.").

protect the identified threatened interest, and enter findings that specifically supported the closure. Orange, 152 Wn.2d at 812, 821-22. Appellate courts do not comb through the record or attempt to infer the trial court's balancing of competing interests where it is not apparent in the record. Wise, 176 Wn.2d at 12-13.

The violation of the public trial right is structural error requiring automatic reversal because it affects the framework within which the trial proceeds. Id. at 6, 13-14. "Violation of the public trial right, even when not preserved by objection, is presumed prejudicial to the defendant on direct appeal." Id. at 16. Carpenter's convictions must be reversed due to the public trial violation. Id. at 19.

The State may try to argue the issue is waived because defense counsel did not object to conducting the peremptory challenge process in private. That argument fails. A defendant does not waive his right to challenge an improper closure by failing to object to it. Id. at 15. The issue may be raised for the first time on appeal. Id. at 9. Indeed, a defendant must have knowledge of the public trial right before it can be waived. In re Pers. Restraint of Morris, 176 Wn.2d 157, 167, 288 P.3d 1140 (2012). Here, there was no discussion of Carpenter's public trial right before the peremptory challenges were exercised at sidebar. There is no waiver.

2. THE COURT ERRED IN DENYING CARPENTER'S REQUEST TO DISCHARGE COUNSEL IN THE ABSENCE OF ADEQUATE INQUIRY.

Criminal defendants have the right to assistance of counsel. U.S. Const. amend. VI; Wash. Const., art. I, § 22. Although indigent defendants do not have an absolute right to counsel of choice, substitution of counsel is required where there is a conflict of interest, an irreconcilable conflict or a complete breakdown in communication between the attorney and the defendant. In re Pers. Restraint of Stenson, 142 Wn.2d 710, 723-24, 16 P.3d 1 (2001); State v. Varga, 151 Wn.2d 179, 200, 86 P.3d 139 (2004). The trial court here abused its discretion in failing to appoint new counsel because it failed to conduct an adequate inquiry into the nature and extent of the conflict and breakdown in the relationship.

a. Carpenter's Request For New Counsel Was Denied Without Inquiry.

On May 11, 2012, defense counsel requested that Carpenter be housed at Western State Hospital so that a defense expert could conduct a competency evaluation.⁶ 3RP 1-5. Carpenter had refused to cooperate with the defense evaluator on a previous occasion. 3RP 2. Counsel noted he was trying to ascertain whether Carpenter's lack of communication and cooperation with counsel was due to stubbornness or malingering as

⁶ This hearing encompassed several cause numbers, including 11-1-05021-3, which forms the basis of a linked appeal under 44562-0-II. 3RP 1.

opposed to a real emotional or mental problem. 3RP 1-3. Counsel represented he did not have a relationship with Carpenter and the two could not communicate. 3RP 5. The court declined to send Carpenter to Western State and urged the defense expert to talk with Carpenter as soon as possible. 3RP 9.

Carpenter then said "Judge, can I make a request of a, a new attorney please?" 3RP 9. The court responded "Uh, you have to put it in writing, uh, Mr. Carpenter, uh, so I can review it and the State can respond to it." 3RP 9. Defense counsel asked the court to set May 18 for a motion to remove counsel in addition to addressing the competency issue. 3RP 10. The court agreed. 3RP 10. Carpenter asked to whom he would need to write. 3RP 10. The court told him "Just file it, just write something and file it with the Court, we'll pick it up." 3RP 11.

On May 18, defense counsel went over some of the history involving efforts to determine Carpenter's competency to stand trial. 4RP 4-6. Counsel reiterated, "I have not been able to converse with Mr. Carpenter regarding the facts of the case" and "his ability to work with his attorney is zero, and I have no ability to unless Mr. Carpenter's behavior changes." 4RP 5, 6. The court questioned whether that was due to a competency problem or Carpenter's decision not to work with counsel. 4RP 6. Counsel responded that he was still seeking a definitive answer to

that question. 4RP 6. The court found Carpenter competent after noting two previous evaluators had found him so. 4RP 7, 13-14. The court announced the need to set a trial date. 4RP 14. The prosecutor noted an omnibus hearing had not yet occurred. 4RP 14.

The court then stated, "Mr. Carpenter last week said something about he wanted to fire Mr. DePan. I haven't seen anything in writing about that, though." 4RP 14. Carpenter pointed out he was not allowed to have a pencil or kites. 4RP 14-15. The court responded, "Well, at this point I'm not going to allow Mr. Carpenter to discharge Mr. DePan. I think this is just partly his way of trying to manipulate getting what he wants. Mr. Carpenter, you're going to have to work with Mr. DePan. We're going to set a trial date probably within 60 days or so." 4RP 15.

b. The Standard Of Review And Requisite Factors In Determining Whether The Trial Court Abused Its Discretion.

A trial court has the discretion to grant or deny a motion for substitution of counsel. Stenson, 142 Wn.2d at 733. Constitutional considerations, however, provide a check on the exercise of this discretion. United States v. Nguyen, 262 F.3d 998, 1003 (9th Cir. 2002). The denial of a motion to substitute counsel implicates the defendant's Sixth Amendment right to counsel. Bland v. Cal. Dep't of Corrections, 20 F.3d 1469, 1475 (9th Cir. 1994), overruled on other grounds by Schell v. Witek,

218 F.3d 1017 (9th Cir. 2000). In reviewing a trial court's refusal to appoint new counsel for error, three factors are considered: (1) the adequacy of the trial court's inquiry; (2) the timeliness of the motion; and (3) the extent of the conflict. Stenson, 142 Wn.2d at 724 (adopting test set forth in United States v. Moore, 159 F.3d 1154, 1158-59 (9th Cir. 1998)).

c. A Written Motion For New Counsel Was Not Required.

At the May 11 hearing, the court directed Carpenter to file a written motion for new counsel. 3RP 9, 11. There is no legal requirement that Carpenter's motion be put in writing. CrR 8.2 provides that motions in criminal cases are governed by CR 7(b). CR 7(b)(1) specifies "[a]n application to the court for an order shall be by motion which, *unless made during a hearing* or trial, shall be made in writing." (emphasis added). The court could consider Carpenter's oral motion because it was made during the May 11 hearing.

Furthermore, in light of the constitutional dimension of the request, a formal, written motion is not required; it is enough the defendant provides some clear indication that he or she wishes to substitute counsel. People v. Martinez, 47 Cal.4th 399, 418, 97 Cal. Rptr.3d 732, 213 P.3d 77 (Cal. 2009). Carpenter clearly made a request for new counsel and the trial court expressly recognized that request was being made. 3RP 9.

Once a request for substitute counsel has occurred, inquiry is required. Bland, 20 F.3d at 1475, 1476.

In any event, the court did not deny Carpenter's motion on the ground that it was not made in writing. The court ruled on the motion and denied it based on his belief that "this is just partly his way of trying to manipulate getting what he wants." 4RP 15. As set forth below, the court applied an incorrect legal standard in denying Carpenter's request to discharge counsel.

d. Extent Of Inquiry

The court failed to conduct a sufficient inquiry into Carpenter's request for new counsel. Before ruling on a motion for new counsel, the court must "examine both the extent and nature of the breakdown in communication between attorney and client and the breakdown's effect on the representation the client actually receives." Stenson, 142 Wn.2d at 723-24. An adequate inquiry "must include a full airing of the concerns (which may be done in camera) and a meaningful inquiry by the trial court." State v. Cross, 156 Wn.2d 580, 610, 132 P.3d 80 (2006). The court's inquiry should be such "as might ease the defendant's dissatisfaction, distrust, and concern." United States v. Adelzo-Gonzalez, 268 F.3d 772, 777 (9th Cir. 2001). The inquiry must also provide a "sufficient basis for reaching an informed decision." Adelzo-Gonzalez,

268 F.3d at 777 (quoting United States v. McClendon, 782 F.2d 785, 789 (9th Cir. 1986)). With this goal in mind, the trial court should question the attorney and defendant "privately and in depth" about the extent of the conflict. Nguyen, 262 F.3d at 1004 (quoting Moore, 159 F.3d at 1160).

"Even if present counsel is competent, a serious breakdown in communications can result in an inadequate defense." Nguyen, 262 F.3d at 1003. "Similarly, a defendant is denied his Sixth Amendment right to counsel when he is 'forced into a trial with the assistance of a particular lawyer with whom he [is] dissatisfied, with whom he [will] not cooperate, and with whom he [will] not, in any manner whatsoever, communicate.'" Id. at 1003-04 (quoting Brown v. Craven, 424 F.2d 1166, 1169 (9th Cir. 1970)). An irreconcilable conflict exists where there is a "serious breakdown in communications." Nguyen, 262 F.3d at 1003.

Here, the court's inquiry was insufficiently searching. In fact, there was no inquiry at all. The court did not ask Carpenter or his defense counsel a single question regarding the basis for Carpenter's motion for new counsel. As a result, the court was not in a position to make an informed decision on the matter.

A court necessarily abuses its discretion when its decision is based on the application of an incorrect legal standard. State v. Rafay, 167 Wn.2d 644, 655, 222 P.3d 86 (2009); Dix v. ICT Group, Inc., 160 Wn.2d

826, 833, 161 P.3d 1016 (2007). The court did not apply the correct legal standard in determining Carpenter's motion to discharge counsel. In determining whether to grant a motion for new counsel, the trial court must inquire into the nature and extent of the conflict or breakdown in communication as well as the timeliness of the motion. Stenson, 142 Wn.2d at 724. The court did not do that.

The record demonstrates a serious conflict with appointed counsel to the point where Carpenter would not assist his attorney in his own defense. 3RP 5; 4RP 5, 6. The court did not inquire into the nature of the conflict and the basis for breakdown in communication by asking any pertinent questions of Carpenter. The court denied Carpenter's motion on the ground that "this is just partly his way of trying to manipulate getting what he wants." 4RP 15. The court, however, reached that conclusion without asking why Carpenter wanted new counsel. The record shows Carpenter was a difficult person to deal with, but his request for new counsel still required inquiry.

"Before the [trial] court can engage in a measured exercise of discretion, it must conduct an inquiry adequate to create a sufficient basis for reaching an informed decision." United States v. D'Amore, 56 F.3d 1202, 1205 (9th Cir. 1995). The trial court's inquiry here was inadequate

because it did not inform itself of the extent of the conflict or even the basis for the request.

Such a conclusion is in accord with precedent. In Cross, the Supreme Court found sufficient inquiry where the trial court made "careful review" of the extent of the conflict, which allowed the court to become "fully apprised" of the problem at hand. Cross, 156 Wn.2d at 610. The trial court there denied the defendant's motion to discharge counsel only after making repeated inquiries, conducting an "extensive" *in camera* hearing, and reviewing briefs on the subject. Id. at 605-06, 608, 610. Similarly, the Court in Stenson found sufficient inquiry where the trial court considered exhaustively detailed descriptions of the extent of the reputed conflict given at an *in camera* hearing. Stenson, 142 Wn.2d at 726-29, 731. By way of contrast, the court's inquiry of Carpenter was nonexistent, and so did not allow for the court to make a fully informed decision on his request to discharge assigned counsel.

"A trial judge is unable to intelligently deal with a defendant's request for substitution of attorneys unless he is cognizant of the grounds which prompted the request. The defendant may have knowledge of conduct and events relevant to the diligence and competence of his attorney which are not apparent to the trial judge from observations within the four corners of the courtroom." People v. Marsden, 2 Cal.3d 118, 123,

465 P.2d 44 (Cal. 1970). To get to the bottom of things, the trial court needed to question Carpenter and defense counsel about the basis for the request to discharge counsel.

e. Timeliness

An untimely motion for new counsel weighs against finding error in its denial. Stenson, 142 Wn.2d at 732. The trial court did not specify untimeliness as a factor in denying Carpenter's request for new counsel. Nor would it have been proper to do so. A trial date had not yet been set when the court denied Carpenter's request. 4RP 14-15.

f. Extent Of Conflict

The third factor to consider is the extent of the conflict between defendant and counsel. Stenson, 142 Wn.2d at 723-24. Where, as here, inquiry into the extent of the conflict is inadequate, there is no way for the reviewing court to fairly determine whether proper grounds existed to justify discharge of counsel. Schell v. Witek, 218 F.3d 1017, 1027 (9th Cir. 2000); Bland, 20 F.3d at 1477.

A simple loss of trust in counsel is generally insufficient reason to appoint new counsel, but substitution is required where that loss of trust stems from an irreconcilable conflict. Varga, 151 Wn.2d at 200. Mere lack of accord is insufficient, but refusal to substitute counsel where there

is a complete collapse in the attorney-client relationship violates the defendant's right to counsel. Cross, 156 Wn.2d at 606.

"Even if present counsel is competent, a serious breakdown in communications can result in an inadequate defense." Nguyen, 262 F.3d at 1003. "Similarly, a defendant is denied his Sixth Amendment right to counsel when he is 'forced into a trial with the assistance of a particular lawyer with whom he [is] dissatisfied, with whom he [will] not cooperate, and with whom he [will] not, in any manner whatsoever, communicate.'" Id. at 1003-04 (quoting Brown, 424 F.2d at 1169). An irreconcilable conflict exists where there is a "serious breakdown in communications." Nguyen, 262 F.3d at 1003.

There was a serious breakdown in communication here. 3RP 5; 4RP 5, 6. When addressing the extent of conflict, the reviewing court examines the extent and nature of the breakdown in the relationship and its effect on the representation actually presented. Stenson, 142 Wn.2d at 724. An adequate inquiry conducted by the trial court, by augmenting the record on appeal, makes it possible for the reviewing court to fairly evaluate the extent of the conflict. Schell, 218 F.3d at 1027. Again, "[b]efore the [trial] court can engage in a measured exercise of discretion, it must conduct an inquiry adequate to create a sufficient basis for reaching an informed decision." D'Amore, 56 F.3d at 1205. The trial

court's inquiry here was inadequate because it did not fully inform itself of the extent of the conflict.

g. The Remedy Is Reversal Of The Convictions Or, In The Alternative, Remand For An Evidentiary Hearing.

The court erred in denying Carpenter's motion to discharge counsel without conduct an adequate inquiry into the matter. The erroneous denial of a motion to substitute counsel requires reversal and remand for a new trial. Nguyen, 262 F.3d at 1005; Moore, 159 F.3d at 1161. In the event this Court declines to reverse the convictions, the alternative remedy is remand for an evidentiary hearing to determine (1) the nature and extent of the conflict and breakdown between Carpenter and his attorney, and (2) whether that conflict deprived Carpenter of his constitutional right to assistance of counsel. Schell, 218 F.3d at 1027; RAP 12.2 ("The appellate court may reverse, affirm, or modify the decision being reviewed and take any other action as the merits of the case and the interest of justice may require.").

3. CARPENTER'S WAIVER OF HIS RIGHT TO TESTIFY WAS RENDERED INVOLUNTARY BY THE TRIAL COURT'S INTERFERENCE.

Carpenter told the court he wanted to testify in his own defense. The trial court, unsatisfied with that answer, badgered Carpenter into giving up his right to testify. Carpenter's waiver of his right to testify was

tainted by the court's improper influence and therefore involuntary. Reversal of the convictions and a new trial is required.

a. The Trial Court Intruded Into Carpenter's Decision On Whether To Testify.

Before the State called its last witness, the judge asked Carpenter if he wanted to testify. 1RP 315. Carpenter said he did. 1RP 315. The judge asked him if he understood that he would be subject to cross-examination. 1RP 315. Carpenter said he understood. 1RP 315. The judge asked defense counsel if he had talked with Carpenter about testifying. 1RP 315. Counsel indicated he had not yet done so but would talk with his client later that morning. 1RP 315-16. The judge said "I assume you may want to discuss with him whether or not his testifying is advisable under the circumstances or not." 1RP 316.

After the State rested its case, the judge and prosecutor stepped out of the courtroom while Carpenter and his attorney discussed whether Carpenter would testify in his own defense. 1RP 329-30. Following this discussion, counsel put on the record, in the presence of the prosecutor and judge, that Carpenter was told he could be impeached with a prior conviction for theft. 1RP 330. Counsel advised Carpenter not to testify because the latter was unwilling to follow basic direction from counsel in testifying and he confused facts from other cases that were detrimental to

the present case. 1RP 330-31. In spite of this advice, according to counsel, Carpenter "*said he would like to testify in this case.*" 1RP 331 (emphasis added).

Counsel asked that Carpenter's spit hood be removed before he testified.⁷ 1RP 331. There was some discussion of where Carpenter would physically be located while he testified. 1RP 331-32. Carpenter asked "What would be the point of -- I don't understand what would be the point of me testifying?" 1RP 332. The judge responded, "Well, sir, it's your right to testify. Your attorney, on the record, is advising you that it is not in your best interest to testify." 1RP 332. Carpenter indicated he preferred being where he had been or standing while he testified. 1RP 332. The judge explained why neither option was suitable and that he would be in a restraint chair while testifying due to past behavior that presented security concerns.⁸ 1RP 332-33.

The court continued:

The Court: Now, you do understand that counsel, Mr. Depan, has outlined the risks of your testifying. One, you have a prior conviction for theft which is a crime of dishonesty which, under the court rules, can be allowed to - - the State can bring that up in cross-examination. You've been convicted of a crime of dishonesty. The jury is

⁷ Carpenter was outfitted with a spit hood outside the presence of the jury because he previously spat on staff. 1RP 33, 218-19, 314, 317-19.

⁸ Carpenter had been placed in a restraint chair due to disruptive behavior. 1RP 108, 111, 124.

entitled to weight that and weighing whether or not you are a credible witness.

Mr. Depan's other concern is that you have several other cases pending. Those cases are, you know -- nothing concerning those cases is to come into court in this case. In the event you are unable, or you mention any of the existence of the other cases, you can be seen to have opened the door to the Prosecution cross-examining you about those cases. That would be extremely prejudicial to you; and it is not something that I, or your attorney or Mr. Howe, want to see occur which means that you need to think before you answer.

The Defendant: Yeah.

The Court: You do not need to bring in any of the facts of the other cases. We are only dealing with the crimes charged in this case.

The Defendant: What about an appeal?

The Court: Well, we have to get the case to a jury. They have to come back and either find you guilty or innocent. At that point, then, once you've been sentenced, you have -- your appeal process can start; but we haven't even got this case to the jury yet.

Now, you want to testify, you're saying. Do you understand what I'm saying the risks are that your attorney has already indicated to you?

The Defendant: *Yes.*

The Court: If you mention any of those other cases, you open the door, yourself; and you throw out the welcome mat so that Mr. Howe can, at that point, cross-examine you about that; and at this point, we don't want any of that to come in. You're the only one that's at risk of bringing it in; so you need to think before you answer and limit yourself to answering the questions that are asked of you. All right? If you start to ramble on and offer information that is not in response to a question, your attorney is probably going to object. Mr. Howe may object; and the Court is going to, you know, instruct the jury to disregard anything you say that is not in response to a question. All right?

Mr. Johnson: Don't testify.

The Defendant: What?

Mr. Johnson: Don't testify.

The Court: Your step--

The Defendant: You don't know what's going on in there, though.

Mr. Johnson: Don't testify.

The Court: Your stepfather has indicated that his advice to you is that testifying is not in your best interest.

The Defendant: But--

Mr. Johnson: Don't testify, please, don't testify.

The Defendant: What?

Mr. Johnson: No.

The Defendant: Jimmie, my son, man.

Mr. Johnson: No, no.

The Court: All right. Mr. Carpenter, do you want to testify or not? It's your right. It's your decision. You can testify if you want, or you can listen to the advice of Mr. Depan and your stepfather and choose not to testify.

The Defendant: Can this be set over?

The Court: Sorry. We're in the middle of trial. We're not setting anything over. Do you want to testify or not?

Mr. Howe: You know, it's not for me to tell the Court how to run its courtroom. I've never done that, but he's obviously emotional. I wouldn't object to giving him ten minutes to think about it, and I'd be happy to step out so that he can discuss it further with his attorney.

The Court: This issue has already been on the table --

Mr. Howe: Okay.

The Court: --but all right. We'll give him another ten minutes. He needs to make up his mind by half past. I have a jury sitting back there, spinning their wheels. He has ten minutes to make up his mind. *So far, he's indicating he wants to testify over the advice of everybody to the contrary.*

You have ten minutes to commit yourself, Mr. Carpenter. Either you're testifying, or you're not; but the choice is yours, and you need to make up your mind. All right. The Court will be at recess until half past.

1RP 333-37 (emphasis added).

Following a recess, the court tried at some length to obtain another clear answer on whether he wanted to testify. 1RP 338-41. Finally, after repeatedly being asked whether he wanted to testify, Carpenter simply answered "no." 1RP 341. The court found Carpenter had waived his right to testify. 1RP 341.

b. The Standard Of Review Is De Novo.

The appellate court reviews de novo whether a constitutional right has been validly waived. State v. Stone, 165 Wn. App. 796, 815, 268 P.3d 226 (2012); State v. Vasquez, 109 Wn. App. 310, 319, 34 P.3d 1255 (2001), aff'd, 148 Wn.2d 303, 59 P.3d 648 (2002). Claimed denials of a constitutional right are likewise reviewed de novo. State v. Lynch, 178 Wn.2d 487, 309 P.3d 482, 484 (2013).

c. The Trial Court Improperly Influenced Carpenter To Waive His Right To Testify.

The constitutional right of a criminal defendant to testify in his or her own behalf is a fundamental right. State v. Thomas, 128 Wn.2d 553, 558, 910 P.2d 475 (1996). "The right to testify has its source in the Fourteenth Amendment's due process clause, in the compulsory process clause of the Sixth Amendment, and as a necessary corollary to the Fifth Amendment's privilege against self-incrimination." Thomas, 128 Wn.2d at 557-58.

The right to testify in one's own behalf is guaranteed by the Fourteenth Amendment as "essential to due process of law in a fair adversary process." Rock v. Arkansas, 483 U.S. 44, 51, 107 S. Ct. 2704, 97 L. Ed. 2d 37 (1987) (quoting Faretta v. California, 422 U.S. 806, 819 n. 15, 95 S. Ct. 2525, 45 L. Ed. 2d 562 (1975)). Due process requires that the criminal defendant have "an opportunity to be heard in his defense — a right to his day in court — [which is] basic in our system of jurisprudence[.]" Rock, 483 U.S. at 51 (quoting Oliver, 333 U.S. at 273).

The right to testify is also guaranteed to state defendants by the compulsory process clause of the Sixth Amendment. Rock, 483 U.S. at 52. The accused's right to call witnesses includes "a right to testify himself, should he decide it is in his favor to do so. In fact, the most important witness for the defense in many criminal cases is the defendant himself." Id. A defendant has the "right to present his own version of events in his own words." Id. Otherwise, the right "to call[] witnesses is incomplete if [the defendant] may not present himself [or herself] as a witness." Id.

Further, "[t]he opportunity to testify is also a necessary corollary to the Fifth Amendment's guarantee against compelled testimony[,] . . . [since] '[e]very criminal defendant is privileged to testify in his own defense, or to refuse to do so.'" Id. at 52-53 (quoting Harris v. New York, 401 U.S. 222, 230, 91 S. Ct. 643, 648, 28 L. Ed. 2d 1 (1971)).

In the present case, defense counsel advised Carpenter not to testify. 1RP 330-31. But "[t]he defendant, not trial counsel, has the authority to decide whether or not to testify." Thomas, 128 Wn.2d at 558. Carpenter said he wanted to testify. 1RP 315, 331.

Waiver of this constitutional right must be knowing, voluntary, and intelligent, but no on-the-record waiver is required. Thomas, 128 Wn.2d at 558-59. It is the responsibility of counsel, not the trial court, to advise the defendant whether or not to testify. In re Pers. Restraint of Lord, 123 Wn.2d 296, 317, 868 P.2d 835, cert. denied, 513 U.S. 849, 115 S. Ct. 146, 130 L. Ed. 2d 86 (1994). The trial court has no duty to inform the defendant of the right to testify before the defendant can validly waive this right. Thomas, 128 Wn.2d at 558-59.

Problems arise when the trial court nonetheless takes on the role of counsel and questions whether a defendant should or should not testify. Carpenter's case provides an apt illustration.

A defendant's decision whether to testify "must be voluntary and not the product of coercion or undue influence" from the trial judge. State v. Silva, 78 Haw. 115, 890 P.2d 702, 710 (Haw. Ct. App. 1995), abrogated on other grounds, Tachibana v. State, 79 Haw. 226, 900 P.2d 1293 (Hawai'i 1995). As our Supreme Court has observed, "a discussion between the trial court and defendant regarding the right to testify might

have the undesirable effect of influencing the defendant's decision not to testify." Thomas, 128 Wn.2d at 560. "[F]or the court to discuss the choice with the defendant could intrude into the attorney-client relationship protected by the Sixth Amendment and might also appear to encourage the defendant to invoke or to waive his Fifth Amendment rights." Lord, 123 Wn.2d at 317 (citing United States v. Goodwin, 770 F.2d 631, 637 (7th Cir. 1985), cert. denied, 474 U.S. 1084, 106 S. Ct. 858, 88 L. Ed. 2d 897 (1986)).

The danger that the judge will appear to encourage the defendant to invoke or to waive the right to testify "is of great significance because the right not to testify counterpoises the right to testify, and the exercise of one is the waiver of the other." United States v. Martinez, 883 F.2d 750, 757 (9th Cir. 1989). In light of these considerations, "the determination of whether the defendant will testify is an important part of trial strategy best left to the defendant and counsel without the intrusion of the trial court, as that intrusion may have the unintended effect of swaying the defendant one way or the other." Thomas, 128 Wn.2d at 560 (quoting United States v. Pennycooke, 65 F.3d 9, 11 (3d Cir. 1995)).

In the present case, Carpenter told the court he wanted to testify in direct response to the court's question on the matter. 1RP 315. After defense counsel consulted with Carpenter on the matter, counsel

announced that Carpenter still intended to testify on his own behalf. 1RP 331.

"Once a defendant decides to testify, the court may not inquire into the defendant's reasons for that decision, except in the rare situation where the circumstances would clearly justify an inquiry. Comments by the court which are intended to discourage a defendant from testifying constitute a significant breach of a defendant's right to present a defense . . . as well as a defendant's right to counsel . . . and the court's obligation to remain impartial." Silva, 890 P.2d at 710-11 (improper for judge to tell defendant to follow his attorney's advice to refrain from testifying); see also United States v. Leggett, 162 F.3d 237, 248 (3rd Cir. 1998) (highly inappropriate for the trial court to tell the defendant that he should listen to defense counsel's advice not to testify); United States v. Arthur, 949 F.2d 211, 216 (6th Cir. 1991) (error for court to repeatedly inform defendant of his right to remain silent and that testifying was against his interest); Goodwin, 770 F.2d at 637 ("The trial judge in this case went beyond his limited function of ensuring that Goodwin's decision not to testify was voluntary when he expressed surprise at her decision, explained some of the pros and cons of her taking the stand, and strongly implied that her only chance for acquittal was to testify.")

After counsel told the court of Carpenter wanted to testify, there was some discussion about the mechanics of where and how Carpenter would testify. 1RP 331-33. So far so good. But then the trial court improperly interjected itself into a decision to testify that had already been made by questioning whether Carpenter understood the potential pitfalls of testifying. 1RP 333-35. Even after Carpenter said he understood these concerns, the court pressed the matter further. 1RP 335. And it did so while recognizing that Carpenter wanted to testify in his own defense: "Now, you want to testify, you're saying." 1RP 335.

After Carpenter's stepfather called out from the gallery not to testify, the court recruited the stepfather into the effort to dissuade Carpenter from testifying. 1RP 335-36. The court then recessed for Carpenter to think the matter over further, while recognizing "So far, he's indicating he wants to testify over the advice of everybody to the contrary." 1RP 337. Following the recess, the court then badgered Carpenter into declaring whether he wanted to testify or not, after it was already known that he wanted to testify. 1RP 337-41. Finally, after a persistent and extended colloquy, Carpenter broke down and said "no" to whether he wanted to testify. 1RP 341.

These circumstances do not show a voluntary waiver of the right to testify free from undue influence of the trial judge. Before the judge

questioned Carpenter, defense counsel had already informed Carpenter of the risks of testifying and Carpenter had made his decision to testify. 1RP 331. That should have been the end of the matter.

The court acted improperly in taking on the role of counsel in relentlessly advising Carpenter about the pitfalls of testifying. "A trial judge must take great care not to assume the functions of trial counsel." Goodwin, 770 F.2d at 637. "The decision to testify is ultimately committed to a defendant's own discretion, preferably in consultation with defense counsel, but neither the existence nor the nature of such consultation should ordinarily be the subject of any judicial scrutiny." Silva, 890 P.2d at 711. "[W]hen a court persuades a defendant to give up testifying, it exceeds its judicial power and authority and invades the province of the attorney-client relationship." Id. at 712. "It matters not that defense counsel may have agreed with the court on the matter of testifying. Defendant was entitled to make the final personal determination of whether or not to do so in consultation with counsel, without the intervention of the court, whatsoever." Id.

Carpenter did not voluntarily give up his constitutional right to testify in his own defense. The trial court's intrusion into the matter rendered his waiver involuntary.

d. The State Cannot Prove This Constitutional Error Was Harmless Beyond A Reasonable Doubt.

Constitutional error is presumed to be prejudicial. Lynch, 309 P.3d at 486. The State has the burden of affirmatively proving the error was harmless beyond a reasonable doubt. State v. Miller, 131 Wn.2d 78, 90, 929 P.2d 372 (1997). The test for determining whether a constitutional error is harmless is whether it appears "beyond a reasonable doubt that the error complained of did not contribute to the verdict obtained." Neder v. United States, 527 U.S. 1, 15, 119 S. Ct. 1827, 144 L. Ed. 2d 35 (1999) (quoting Chapman v. California, 386 U.S. 18, 24, 87 S. Ct. 824, 17 L. Ed. 2d 705 (1967)). The presumption of prejudice may be overcome if and only if the reviewing court is able to express an abiding conviction that the error cannot possibly have influenced the jury adversely to the defendant. State v. Ashcraft, 71 Wn. App. 444, 465, 859 P.2d 60 (1993).

The State cannot overcome the presumption of prejudice here. Without Carpenter's testimony, the jury was left with a one-sided version of events. The State's central evidence went unchallenged by any competing narrative or alternative explanation of what occurred. Significantly, it was left without Carpenter's testimony on his state of mind at the time Preszler was hit with the car door as he drove off, which was directly relevant to whether he was guilty of first degree robbery as

found by the jury or merely the lesser offense of first degree theft. The State cannot affirmatively show the error was harmless beyond a reasonable doubt. It is impossible to conclude, beyond a reasonable doubt, that Carpenter's testimony could not have created a reasonable doubt in the mind of the fact finder and, hence, that the error could not have contributed to the conviction. See Silva, 890 P.2d at 713 (holding trial court's error in dissuading defendant from testifying was not harmless beyond reasonable doubt where record did not show what the defendant would have testified to). The convictions should therefore be reversed.

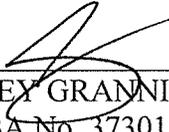
D. CONCLUSION

For the reasons set forth, Carpenter respectfully requests that this Court reverse the convictions and remand for a new trial.

DATED this 16th day of January 2014

Respectfully Submitted,

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**IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON
DIVISION TWO**

STATE OF WASHINGTON)	
)	
Respondent,)	
)	
v.)	COA NO. 44569-7-II
)	
RICHARD CARPENTER,)	
)	
Appellant.)	

DECLARATION OF SERVICE

I, PATRICK MAYOVSKY, DECLARE UNDER PENALTY OF PERJURY UNDER THE LAWS OF THE STATE OF WASHINGTON THAT THE FOLLOWING IS TRUE AND CORRECT:

THAT ON THE 16TH DAY OF JANUARY 2014, I CAUSED A TRUE AND CORRECT COPY OF THE **BRIEF OF APPELLANT** TO BE SERVED ON THE PARTY / PARTIES DESIGNATED BELOW BY DEPOSITING SAID DOCUMENT IN THE UNITED STATES MAIL.

[X] RICHARD CARPENTER
DOC NO. 364204
MONROE CORRECTIONS CENTER
P.O. BOX 777
MONROE, WA 98272

SIGNED IN SEATTLE WASHINGTON, THIS 16TH DAY OF JANUARY 2014.

x *Patrick Mayovsky*

NIELSEN, BROMAN & KOCH, PLLC

January 16, 2014 - 2:35 PM

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Court of Appeals Case Number: 44569-7

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