NO. 26084-4-III

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

STATE OF WASHINGTON,

Respondent,

v.

MICHAEL DAVID LINDSEY,

Appellant.

FILED
JAN 24, 2013
Court of Appeals
Division III
State of Washington

ON APPEAL FROM THE SUPERIOR COURT OF
KLICKITAT COUNTY, STATE OF WASHINGTON
Superior Court No. 05-1-00056-4

SUPPLEMENTAL BRIEF OF RESPONDENT

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A. ISSUE PRESENTED

Was the court's questioning of two potential jurors in the judge's chambers over the lunch hour a closure of the courtroom in violation of Mr. Lindsey's right to a public trial?

B. STATEMENT OF THE CASE

The facts relevant to this supplemental brief are as follows: At approximately 12:00 pm on the first day of trial, the court interrupted jury selection to announce the lunch recess. RP 56. Jurors were instructed not to discuss the case among themselves or with anyone else and were told to be back at 1:15 pm. *Id.* When jury selection recommenced, the court announced "We are back on the record and for the record, counsel, jurors' number 62 and 17 have been excused for cause. Mr. West, you are free to go. Thank you for coming. And Ms. Hearn, no, number 4 not 62. Ms. Hearn was ill and has been excused for cause. Number 17 and number 4." RP 56. Jurors 4 and 17 were questioned by the court individually and in chambers over the lunch hour. Both counsel were present but Mr. Lindsey was not. The questioning was not put on the record. RP 345-46. Counsel made no objections to the procedure. RP 345.

C. ARGUMENT

1. THE QUESTIONING OF JURORS IN CHAMBERS OVER THE LUNCH HOUR WAS STRUCTURAL ERROR THAT IS PRESUMED TO HAVE BEEN PREJUDICIAL. THE DEFENDANT IS ENTITLED TO A NEW TRIAL.

Additional briefing was requested by this Court after the Washington State Supreme Court ruled on *State v. Wise*, ___ Wash. ___, 288 P.3d 1113 (2012). Prior to the decision in *Wise*, the State's argument in this case were as follows: 1) that there was no mention of closing the courtroom and therefore the questioning of the jurors in chambers did not equate to a "closure of the courtroom," 2) that the questioning of the jurors in chambers was not problematic as it was not initiated by any party or the court and the defendant did not object to the procedure, and 3) that the questioning of at least one of the jurors was administrative and therefore the defendant's right to a public trial wasn't violated. The State also suggested that, prior to a final ruling, the case be remanded for a reference hearing to clarify the Court's reasoning for holding the in-chambers conference. *Wise* appears to render all of the State's previous arguments unpersuasive.

In *Wise*, ten jurors were questioned in chambers after the Court announced to the panel that if any of them felt uncomfortable discussing a topic, they could be taken back into chambers to be questioned further.

Wise, 288 P.3d at 1116. The Prosecutor, Defense Attorney, and the Judge were present for the in chambers questioning, which addressed matters including personal health and relationships with witnesses. *Id.* The Court made no mention of the defendant's right to a public trial on the record, did not discuss alternatives to closure, and did not consider any of the other factors laid out in *State v. Bone-Club*, 128 Wn.2d 254, 906 P.2d 325 (1995). *Id.*

In holding that the defendant's right to a public trial was violated, the *Wise* court restated and clarified several prior holdings; many of which are particularly relevant to this appeal.

The court first reiterated that an alleged public trial violation may be raised for the first time on appeal and is not deemed waived by the defendant's acquiescence to the procedure that creates the violation. *Wise*, 288 P.3d at 1116, 1120. The Court clarified that questioning of jurors in a location that is not ordinarily accessible to the public is a closure of the courtroom. *Wise*, 288 P.3d at 1118. The Court confirmed that courts are required to consider the *Bone-Club* factors before closing any trial proceeding that should be public, adding that a post hoc determination is not sufficient to cure a failure to do so. *Id.* Finally, the Court noted that a trial court's failure to consider the *Bone-Club* factors on the record prior to the closure of a trial, it is structural error and is presumed to be prejudicial.

Wise, 288 P.3d at 1118, 1122. The only appropriate remedy for such an error is remand for a new trial. *Id.*

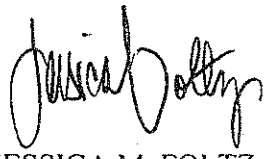
The State concedes that pursuant to *Wise*, the questioning of the jurors in chambers in this case constituted a closure of Mr. Lindsey's trial. Because the Court failed to consider the *Bone-Club* factors on the record prior to the closure, Mr. Lindsey's right to a public trial was violated. A new trial is warranted.

D. CONCLUSION

For the foregoing reasons, the State concedes that this case should be remanded in order for a new trial to be held.

Respectfully submitted this 25 day of January, 2013.

LORI LYNN HOCTOR
Prosecuting Attorney



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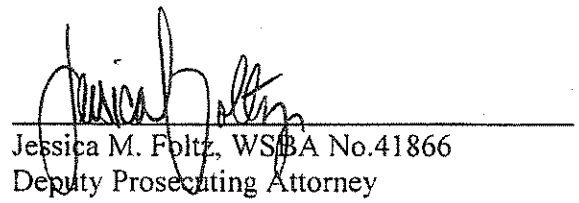
COURT OF APPEALS OF WASHINGTON
DIVISION III

STATE OF WASHINGTON, Plaintiff, v. MICHAEL DAVID LINDSEY, Defendant.	COURT OF APPEALS NO. 26084-4-III DECLARATION OF MAILING

I, Jessica M. Foltz, state that on January 23, 2013, I sent a copy of the State's Supplemental Brief of Respondent in this case to: Susan Gasch at gaschlaw@msn.com. Email service was per agreement.

I certify under penalty of perjury under the laws of the State of Washington that the foregoing is true and correct.

DATED this 23 day of January, 2013.



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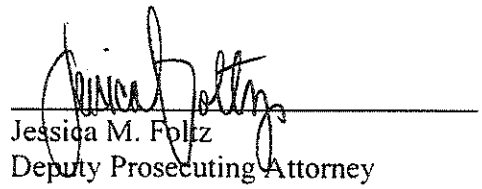
COURT OF APPEALS OF WASHINGTON
DIVISION III

STATE OF WASHINGTON, Respondent, v. MICHAEL DAVID LINDSEY, Appellant.	COURT OF APPEALS NO. 26084-4-III DECLARATION OF MAILING

I, Jessica M. Foltz, state that on January 23, 2013, I deposited in the United States mails by first class mail, proper postage affixed a copy of the State's Supplemental Brief of Respondent to: Michael David Lindsey, #847863, Stafford Creek Corrections Center, 191 Constantine Way, Aberdeen, WA 98520.

I certify under penalty of perjury under the laws of the State of Washington that the foregoing is true and correct.

DATED this 23 day of January, 2013.



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