

FILED  
JAN 23, 2013  
Court of Appeals  
Division III  
State of Washington

NO. 26964-7-III

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

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STATE OF WASHINGTON,

RESPONDENT,

v.

DAVID WHITMER,

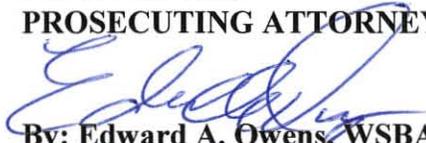
APPELLANT.

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RESPONDENT'S SUPPLEMENTAL BRIEF  
REGARDING THE APPLICABILITY OF  
*STATE v. WISE*

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A. IDENTITY OF RESPONDENT

The State of Washington was the Plaintiff in the Superior Court, and is the Respondent herein. The State is represented by the Grant County Prosecutor's Office.

B. RELIEF SOUGHT

The State is asking this court to affirm the decisions of the Superior Court and uphold the conviction of the Appellant.

C. STATEMENT OF FACTS

The facts of this case have been adequately described in prior briefing that was submitted May 11, 2010.

D. SUPPLEMENTAL BRIEFING IN RESPONSE TO  
*STATE v. WISE*.

After reading *State v. Wise*, \_\_\_\_\_ Wn.2d \_\_\_\_\_, 288 P.3d 1113 (2012), the State still argues that the facts in the case at hand are different than those of *Wise*. In the case at hand the jurors were not taken to a secluded Judge's chambers as they were in *Wise*. As stated in the brief submitted to the court in this case, the jurors were taken to a room that is sometimes used as a jury room during trials. During times when there are

no jury trials the room is open to the public. There is no sign on the door prohibiting entrance as there is when the jury is in deliberation. The room is located within the courtroom itself and is outside the hearing of potential jurors. There is no record that the public was prohibited from going into the room and listening to the questioning of the jurors. There is a door on the other side of the room which leads to the clerk's office. On that door there is no sign on the door prohibiting entrance as there is when a jury is in deliberation. In fact, during court docket dates the room is used by all attorneys for numerous reasons, including counseling with clients, filling out paperwork with clients, plea bargaining, as well as other matters.

The State would also like to point out that there is nothing in the record indicating that the jury room was closed to any persons, other than potential jurors, who may have wanted to go and listen to the questioning of the three jurors. There is no evidence that there were others in the courtroom besides the jury panel, judge, defendant, defense counsel and the prosecutor. The trial judge made it clear, on the record, why the questioning was going to take place in the jury room. The court instructed it was just making sure the jury panel would not be tainted by any possible information spoken by another potential juror. The jury room was and is open to the public unless otherwise stated.

In *Wise* there was absolutely no access available to anyone to go into the Judge's chambers without the Judge's permission. The chambers were being used as an extension of the courtroom which was closed off to anyone, thus closing the courtroom.

Those are not the facts in this matter. The court took all involved parties and questioned only three jurors in a room that is open to the public when juries are not deliberating. The questioning was done in order to have a fair and untainted jury. There is absolutely no record that this room was closed to anyone except potential jurors for the case.

The State argues that to find that the court violated the Defendant's public trial right that the court in fact must be closed. But that is not the case here. The fundamental idea of a fair and open trial was not violated, thus no structural error. This would be no different than if the court took the jury to view a crime scene inside a house, at a bank, or in a school, as that scene is still open to the court. The difference is that the courtroom has moved. Just because it has moved does not meet the court's rigid doctrine that the public trial right has been violated.

The majority in *Wise* refuses to consider or permit any after-the-fact inquiry into whether closure was justified. Again, this rigid approach blinds others to what may have occurred at jury trial.

A trial itself takes on its own life during the entire process. Our courts have never taken such a rigid stance on any possible violations of this type. The State would agree that a closure of a court could and does have the possible ability to render a verdict unfair.

With this rigid ruling that the failure to engage in the Bone-Club inquiry, itself, is transformed into the most serious type of constitutional error, for which there is no remedy except a new trial. Such a rigid stance takes away all authority to the trial court itself. A judge, during trial, has the best first-hand information to analyze the facts of the case. In the case at hand, the trial court knew his courtroom and knows what is closed, such as his chambers, and what is not, such as a room included in the courtroom. The court did not do a Bone-Club analysis because the court was not closing the courtroom.

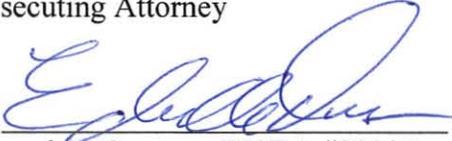
E. CONCLUSION

Moving a juror to a room within the court was not a closure of the trial and thus would not and should not be considered a structural error. The Defendant should not be allowed to benefit from second guessing a

trial court's observations and knowledge of its courtroom. To do so would be unfair to our judicial process of fairness.

Dated this 23<sup>rd</sup> day of January 2013.

D. ANGUS LEE  
Prosecuting Attorney

By:   
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Chief Deputy Prosecuting Attorney

COURT OF APPEALS OF THE STATE OF WASHINGTON  
DIVISION III

STATE OF WASHINGTON,	)	
	)	
Respondent,	)	No. 26964-7-III
	)	
vs.	)	
	)	
DAVID WHITMER,	)	DECLARATION OF SERVICE
	)	
Appellant.	)	
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Under penalty of perjury of the laws of the State of Washington, the undersigned declares:

That on this day I served a copy of the Respondent's Supplemental Brief Regarding the Applicability of *State v. Wise* in this matter by e-mail on the following party, receipt confirmed, pursuant to the parties' agreement:

Nielsen, Broman & Koch, PLLC  
[sloanej@nwattorney.net](mailto:sloanej@nwattorney.net)

Dated: January 23, 2013.

  
\_\_\_\_\_  
Kaye Burns