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Court of Appeals  
Division III  
State of Washington  
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COA No. 31487-1-III

COURT OF APPEALS, DIVISION III  
OF THE STATE OF WASHINGTON

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STATE OF WASHINGTON,

Respondent,

v.

ADAM EDWIN POWELL,

Appellant.

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REPLY BRIEF OF APPELLANT

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## I. RIGHT TO PUBLIC TRIAL VIOLATION

The proceeding involved jury selection so the public trial right is implicated. *State v. Wise*, 176 Wn.2d 1, 16-19, 288 P.3d 1113 (2012). The unrecorded conferences between counsel and the judge were not proper sidebars or their equivalent. *State v. Smith*, 181 Wn.2d 508, 515-17, 334 P.3d 1049 (2014).

Neither the judge nor the prosecutor could recall what was discussed at any of the sidebar conferences. (CP 1064, 1066). On January 30, 2013, two unrecorded sidebars were held at 12:21 and 12:22 p.m. (1/30/13 RP 524-25). At the hearing on the motion to settle the record, the judge found these sidebars likely concerned scheduling. (CP 1083-86). No one, however, could recall for certain what was discussed. (CP 1053-63). Defense counsel thought the first unrecorded sidebar involved a prospective juror who was a relative of a testifying deputy and he would not have asked to excuse that juror without getting Mr. Powell's approval. (CP 1055-56). This is not a mundane scheduling issue. Rather, excusing a juror for cause implicates the jury selection process, which must be open and public. *Wise, supra*.

The same principle applies to the January 31, 2013 unrecorded sidebar at 2:44 p.m. (CP 1057). Defense counsel

inferred from the context that it involved excusing a juror for cause because of his personal trauma and experience with issues critical to Mr. Powell's case, thus prompting him to ask that the juror be excused for cause. (CP 1057, 1058). The court itself noted this sidebar was not later put on the record. (CP 1089-93). Again, excusing a juror is not a mundane issue and was not a subject of a "proper sidebar." *State v. Whitlock*, 188 Wn.2d 511, 513-14, 396 P.3d 310 (2017).

Two other sidebars on February 1, 2013, at 11:06 and 11:22 a.m. are at issue. As to the first sidebar at 11:06, defense counsel speculated it had to do with the court's denial of his challenge of a juror for cause. (CP 1059). Defense counsel thought the court wanted to put his comments on the record, but they apparently were not. (*Id.*). The second sidebar at 11:22 was held after the court indicated it was reversing its ruling as to excusing a juror. (2/1/13 RP 751; CP 1060, 1093-94). Defense counsel also surmised the State intended to bring a *Batson* challenge, which the court said would be decided with the jury out. (CP 1060, 1096).

These two sidebars involved a challenge for cause and a *Batson* challenge. They were not mundane issues pertaining to scheduling, housekeeping, and decorum. They were substantive

issues, not just everyday issues implicating little public interest, such as scheduling, housekeeping, and decorum, which are indeed the subject of “proper sidebars.” *Whitlock*, 188 Wn.2d at 513-14. The unrecorded sidebars at 11:06 and 11:22 a.m. on February 1, 2013, involved discussion of substantive issues that resulted in a closure where the public was excluded despite its interest in an open jury selection process. *Id.* at 521-22.

Although the State claims the four sidebars at issue were memorialized promptly, they were not. It took a motion to settle the record on appeal to memorialize what took place. But recollection of them was either nonexistent or based on inference alone. This failure to make a record in open court is the reason why sidebars should be recorded or promptly memorialized as required by *Whitlock*. 188 Wn.2d at 523-24.

Mr. Powell’s conviction is for second degree murder and the courtroom closures here cannot be *de minimis* as argued by the State. *State v. Schierman*, \_\_\_ Wn.2d \_\_\_, 415 P.3d 106 (2018). They were not inadvertent as they were unrecorded at the direction of the trial judge, involved substantive issues, and were neither contemporaneously transcribed nor timely memorialized in open court. 415 P.3d at 126. With no one able to remember what

actually took place at the sidebars, it cannot be said they involved no juror questioning. 415 P.3d at 125. More importantly, however, they were not contemporaneously transcribed and immediately thereafter memorialized in open court, crucial requirements for finding a *de minimis* violation. 415 P.3d at 126.

Moreover, *Whitlock* is not distinguishable because it was a bench trial with no expediency justification for holding an evidentiary conference outside the courtroom. Just as in *Whitlock*, there was no expediency justification as the challenged sidebars occurred during jury selection and the circumstances were the same as for a bench trial. There is no distinction, much less a critical one as argued by the State.

The improper sidebars resulted in courtroom closure without a *Bone-Club* analysis. Without it, a closure will almost never be considered justified. *Whitlock*, 188 Wn.2d at 520-21. The court's closure, at its direction, was not justified and was structural error requiring reversal. *Id.* at 524.

## II. SUFFICIENCY OF THE EVIDENCE AND EXCEPTIONAL SENTENCE

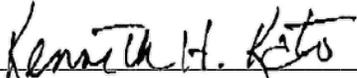
Mr. Powell rests on his opening brief with respect to the sufficiency of the evidence issue and challenge to imposition of an

exceptional sentence.

### III. CONCLUSION

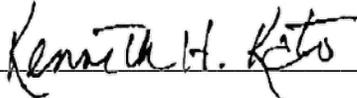
Based on the foregoing facts and authorities, Mr. Powell respectfully urges this Court to reverse his conviction and remand for new trial.

DATED this 6<sup>th</sup> day of November, 2018.

  
\_\_\_\_\_  
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### CERTIFICATE OF SERVICE

I certify that on November 6, 2018, I served a copy of the reply brief by USPS on Adam Powell, # 364246, 191 Constantine Way, Aberdeen, WA 98520; and through the eFiling portal on David Trefry at his email address.

  
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**November 06, 2018 - 9:56 AM**

**Transmittal Information**

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