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COURT OF APPEALS
OF THE STATE OF WASHINGTON
DIVISION III

STATE OF WASHINGTON,

Respondent,

v.

CARLOS HERNANDEZ, II

Appellant.

BRIEF OF RESPONDENT

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I. ASSIGNMENTS OF ERROR

1. The bailiff's decision to keep spectators out of the courtroom deprived Mr. Hernandez of his right to a public trial.
2. The trial court erred in failing to allow Mr. Hernandez to be heard on his attorney's withdrawal.

II. ISSUES RELATED TO ASSIGNMENTS OF ERROR

1. Was there a closure that affected Mr. Hernandez's right to a public trial?
2. If there was closure, and the trial court failed to remedy the closure, was the failure invited?
3. Is the issue of Mr. Crowley's withdrawal moot when there is no effective remedy the court can provide?
4. Is there a sufficient record on appeal to review the issue of Mr. Crowley's withdrawal?
5. Should the appellate court disregard *State v. Berrysmith*?
6. Does an allegation of completely speculative prejudice that trial court judges disregard as a matter of routine mean the court should reverse and remand?

III. STATEMENT OF THE CASE

For the most part the State agrees that Mr. Hernandez's statement of the case is sufficient for these issues. The State adds the following facts.

Four members of the prosecutor's family wished to watch the trial. Trial RP 108. The bailiff turned them away during jury selection without the knowledge of the trial judge because the bailiff felt the courtroom was too crowded. Trial RP 109. The family members went down to the prosecutor's office. A prosecutor came into the courtroom, interrupted the proceedings, and informed the judge of what happened. Trial RP 105. The bailiff indicated no other persons had been turned away. Trial RP 113. The judge corrected the situation and asked for any motions from the defense. The defense attorney expressly declined to make a mistrial motion. Trial RP 113.

After the State received the appellant's brief in this case the State moved the trial court under its RAP 7.2 authority over the record to allow the State to have a copy of Mr. Crowley's declaration so that it could designate it in the record if need be. St. Supp. CP 283-303. Mr. Hernandez resisted the State's motion and the trial court denied it. St. Supp. CP 304-309.

IV. ARGUMENT

A. Courtroom Closure

1. *There was no courtroom closure within the meaning of article 1 §10 of the U.S. Constitution.*

“[A] closure ‘occurs when the courtroom is completely and purposefully closed to spectators so that no one may enter and no one may leave.’” *State v. Stark*, 183 Wn. App. 893, 902, 334 P.3d 1196 (2014) (emphasis added), citing *State v. Sublett*, 176 Wn.2d 58, 71, 292 P.3d 715 (2012) (plurality opinion). The focus is whether the trial court’s request “completely and purposefully closed [the courtroom] to spectators so that no one may enter and no one may leave.” *Id.* at 903. There was no trial court request for anyone to leave or be kept out in in this case.

The alleged courtroom closure was brief and inadvertent. The trial judge did not approve of the closure nor did he even know of its existence, and corrected it as soon as it was brought to his attention. In addition no one else besides the four members of the prosecutor’s family was turned away, and then only for a short time. A trivial closure that was inadvertent does not violate the public trial right. *State v. Erickson*, 146 Wn. App. 200, 189 P.3d 245 (2008), citing *State v. Brightman*, 155 Wn.2d 506, 517, 122 P.3d 150 (2005), and *Snyder v. Coiner*, 510 F.2d 224, 230 (4th Cir. 1975). *Erickson* held that a trivial closure is one that is brief and inadvertent, and has no effect on the proceedings. That is the fact pattern

here. The observers who were kept out were simply there to watch their family member, the prosecutor; there was no effect on the case.

2. Any error regarding the remedy for the alleged closure was invited.

This case raises a question that so far has gone unanswered by Washington Appellate Courts. What is a trial court supposed to do when an improper closure of the courtroom has been discovered prior to the jury verdict? All of the case law on the subject comes in the context of a closure where the problem with it was raised after trial. Assuming for the sake of argument that Mr. Hernandez's public trial rights were violated, he invited any error as to his remedy when he expressly rejected a mistrial. Mr. Hernandez's argument assumes that closure, whenever recognized, would be incurable by the trial court and would force the trial court to continue a trial that would be pointless, with the defendant already guaranteed a retrial upon conviction, but an acquittal that will stand under the double jeopardy clause if the verdict goes his way. Such a rule would be inefficient and unfair.

Here the Court specifically asked defense counsel if he had any motions to make, and defense counsel expressly declared he was not moving for a mistrial. Trial RP 113-14. If he had moved for a mistrial and the court had granted it, then the case would have started over with an open courtroom. Instead Mr. Hernandez declined to start over with an

open courtroom, and is now asking for a new trial when things did not go his way. The Court could not grant a mistrial sua sponte, or on the State's motion. (nor did the State make such a motion). No doubt if it had Mr. Hernandez would now be complaining about a double jeopardy violation for a mistrial without manifest necessity.

“There is great potential for abuse when ‘a party does not object because a party so situated could simply lie back, not allowing the trial court to avoid the potential prejudice, gamble on the verdict, and then seek a new trial on appeal.’” *State v. Strine*, 176 Wn.2d 742, 749, 293 P.3d 1177 (2013) (quoting *State v. Weber*, 159 Wn.2d 252, 271-72, 149 P.3d 646 (2006)). “A conscious decision not to raise a constitutional issue at trial effectively serves as an affirmative waiver.” *State v. Walton*, 76 Wn. App. 364, 884 P.2d 1348 (1994). Allowing this issue to go forward under these circumstances would provide a perverse incentive to both the prosecution and defendant. “The prosecutor owes a duty to defendants to see that their rights to a constitutionally fair trial are not violated.” *State v. Monday*, 171 Wn.2d 667, 676, 257 P.3d 551 (2011). If a prosecutor recognizes an error made by the court that threatens a defendant's constitutional fair trial rights, it is incumbent upon the prosecutor to object and bring the issue to the court's attention. That is what a prosecutor did in this case when he learned of a problem. If all a defendant has to do is

assent to the court's error, then take his chances for a verdict, with a reversal already in the bag on appeal, a prosecutor would be much better off remaining silent and hoping no one, including appellate counsel, picks up on the error, and the defendant would be incentivized to assent to the error, and not raise the objection if he catches the problem. This perverse set of incentives, advocated by the appellant here, undermines the primacy of trial and the values of judicial economy, as well as the rights of defendants.

The Supreme Court recently addressed invited error in the public trial context in *In re Pers. Restraint of Salinas*, __ Wn.2d __, __ P.3d __ (2018). In *Salinas* defense counsel asked for the courtroom to be closed during voir dire. The trial judge did not sua sponte request the closure, nor did the State request the closure while the defendant silently stood by. Instead the defense actively requested it in complete absence of support from the State. The Court ruled that this was invited error and the defendant could not complain about it. In this case Mr. Hernandez did not request the alleged closure, thus he did not invite that error; however, in this case the inappropriate closure was recognized and brought to the court and counsel's attention, thus the real question becomes what remedy should the trial court have provided. If there was error in the remedy, Mr. Hernandez invited it, and cannot complain about it now.

Possible remedies for a closed courtroom that is recognized prior to verdict would be to restart the trial (a mistrial) or to redo the portion that was closed in open court. In this case, given where the court was in the process when the closure was recognized, that would have essentially amounted to the same thing, a restart of voir dire. This is not a case of counsel missing an objection. This is a case where it is clear the defense knew of the remedy, and elected not to exercise it. This was reasonable, because all he really would have gained would be a restart of voir dire.

Assuming Mr. Hernandez's public trial rights were violated, the violation was cured as soon as the trial court became aware of the problem and opened up the court. Mr. Hernandez reasonably elected to not exercise his remedy for the past violation. He cannot seek it now.

B. The Court's handling of Mr. Crowley's withdrawal is not reversible error.

1. This issue is moot.

"A case is moot if a court can no longer provide effective relief." *State v. Ross*, 152 Wn.2d 220, 228, 95 P.3d 1225 (2004) (quoting *State v. Gentry*, 125 Wn.2d 570, 616, 888 P.2d 1105 (1995)). An appellate court provides effective relief of trial error by remanding for a trial free from the error that was complained about in the appeal. This is true even with structural error. For example, a trial conducted in a closed courtroom can

be redone in an open courtroom. Here the error complained about is that Mr. Hernandez did not get a chance to present his side of the facts to a judge regarding Mr. Crowley's withdrawal. Presumably Mr. Hernandez believes that had he been able to present his side of the story the Court would not have allowed Mr. Crowley to withdraw; Mr. Crowley would have been his attorney and Mr. Crowley, through his brilliance, would have achieved a better result. Assuming this to be true, the remedy is to order a new trial, reverse Mr. Crowley's permission to withdraw from the case, and remand for a new trial with Mr. Crowley as defense counsel. This the Court cannot do. Mr. Crowley resigned in lieu of discipline from the Washington State Bar.¹ He cannot represent anyone in Washington Courts. While the appellate court can remand for a new trial, it will be with a defense attorney other than Mr. Crowley. That is precisely what Mr. Hernandez got the first time around, a trial with an attorney other than Mr. Crowley. There is nothing the appellate court can say or do that will make the second trial different than the first, thus there is no effective remedy the appellate court can provide.

2. *The record on review is insufficient to determine this issue, and Washington case law is unfavorable to Mr. Hernandez.*

¹ https://www.nwwsba.org/LegalDirectory/LegalProfile.aspx?Usr_ID=000000019868 (last visited January 3, 2018). (See Also Opposition to Motion to State's Motion to Obtain Sealed Documents, St. Supp. CP 304-308.)

The reasons for Mr. Crowley's withdrawal are contained in his sealed declaration. Mr. Hernandez did not include the declaration in his designation of clerk's papers under RAP 9.6. The State moved, under RAP 7.2 in the trial court, to obtain a copy of the declaration so it could evaluate it and designate it in the clerk's papers if appropriate. Mr. Hernandez resisted the State's motion and the Court denied it. (*See* State's supplemental designation of clerk's papers, 283-309.). The State never responded substantively to this issue in the trial court, and the motion for new trial was never heard. Thus Mr. Crowley's declaration is not in the record on review. The party seeking review is responsible for perfecting the record, including designating the necessary clerk's papers. RAP 9.6; *Dash Point Vill. Assocs. v. Exxon Corp.*, 86 Wn. App. 596, 612, 937 P.2d 1148 (1997). Thus Mr. Hernandez is responsible for the lack of Mr. Crowley's declaration in the record.

Mr. Hernandez asks the Court to speculate as to what is in Mr. Crowley's declaration, disregard Washington case law, and remand. The leading Washington case on this issue is *State v. Berrysmith*, 87 Wn. App. 268, 944 P.2d 397 (1997). In *Berrysmith* defense counsel believed his client was going to perjure himself and requested to withdraw in camera. *Berrysmith* objected on the grounds that he had not had an opportunity to be heard on counsel's withdrawal. The Court noted conflicting out of

jurisdiction authority on the issue. It held the true issue before the Court was whether counsel had a sufficient factual basis to believe the client was going to perjure himself, and was thus justified in withdrawing under the RPC's. *Id.* at 275. This was purely a legal question, not a factual one where the defendant needed to be present. *Id.*

Mr. Hernandez does not factually distinguish *Berrysmith*, and indeed refuses to put the facts of this case before the Court. He simply asks the Court to follow out of state case law that the *Berrysmith* Court rejected. He does not establish how the benefits of departing from *Berrysmith* outweighs the values of horizontal stare decisis. *See In re Pers. Restraint of Arnold*, 198 Wn. App. 842, 396 P.3d 375 (2017). Nor can the court evaluate the motion to withdraw under the out of state cases. It may be that the reasons for Mr. Crowley's withdrawal had nothing to do with Mr. Hernandez. Maybe he was ill and simply could not provide effective representation, but did not want to make a public statement about his condition, a situation that Mr. Hernandez would know nothing about and would have nothing to add to. Any guess is pure conjecture.

Mr. Hernandez speculates that what is contained in Mr. Crowley's declaration is prejudicial to him, and without the opportunity to rebut it judges will hold it against him. First, this is pure speculation. Without knowing what the declaration says there is no way to analyze any potential

prejudice. Second, trial judges are routinely required and expected to put aside distasteful information to provide a fair trial. A Superior Court judge may hear horrific things in a suppression hearing that under the law he has to exclude, and then conduct a fair trial compartmentalizing this information. At worst, Mr. Crowley's declaration is no different.

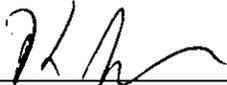
V. CONCLUSION

There was no courtroom closure that affected Mr. Hernandez's open court rights. Even if there was, and the trial court erred in not granting a mistrial, Mr. Hernandez invited that error. The issue regarding Mr. Crowley's withdrawal is moot, as there is no effective relief the Court can provide. This Court should not depart from *Berrysmith*, especially on an empty factual record, and Mr. Hernandez's complaints of prejudice are both speculative and unfounded. The trial court should be upheld.

Dated: January 17th, 2018.

Respectfully submitted:

GARTH DANO
Prosecuting Attorney

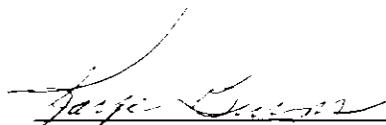
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CERTIFICATE OF SERVICE

That on this day I served a copy of the Brief of Respondent in this matter by e-mail on the following parties, receipt confirmed, pursuant to the parties' agreement:

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