

RECEIVED
SUPREME COURT
STATE OF WASHINGTON
Jun 24, 2013, 2:56 pm
BY RONALD R. CARPENTER
CLERK

RECEIVED BY E-MAIL

NO. 85809-8

IN THE SUPREME COURT OF THE STATE OF WASHINGTON

STATE OF WASHINGTON,

Respondent,

v.

WILLIAM GLEN SMITH,

Petitioner.

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

The Honorable James Warne, Judge

SUPPLEMENTAL BRIEF OF PETITIONER WILLIAM SMITH

CASEY GRANNIS
Attorney for Petitioner

NIELSEN, BROMAN & KOCH, PLLC
1908 East Madison
Seattle, WA 98122
(206) 623-2373

ORIGINAL

TABLE OF CONTENTS

| | Page |
|--|------|
| A. <u>ISSUE</u> | 1 |
| B. <u>STATEMENT OF THE CASE</u> | 1 |
| C. <u>ARGUMENT</u> | 4 |
| 1. THE TRIAL COURT VIOLATED SMITH'S CONSTITUTIONAL RIGHT TO A PUBLIC TRIAL IN HOLDING CONFERENCES ON EVIDENTIARY MATTERS IN AN AREA INACCESSIBLE TO THE PUBLIC..... | 4 |
| a. <u>Conferences Held In A Hallway Behind The Courtroom In An Area Inaccessible To The Public Constitutes A Closure For Public Trial Purposes.</u> | 5 |
| b. <u>The Public Trial Right Attaches To Evidentiary Conferences On What Evidence The Trier Of Fact Will Be Able To Consider</u> | 7 |
| c. <u>The Remedy Is A New Trial Because The Trial Court Did Not Do A Bone-Club Analysis</u> | 15 |
| d. <u>Smith Did Not Waive His Right To Public Trial Or Invite The Error</u> | 16 |
| D. <u>CONCLUSION</u> | 20 |

TABLE OF AUTHORITIES

Page

WASHINGTON CASES

| | |
|---|---------------|
| <u>Dreiling v. Jain,</u> 151 Wn.2d 900, 903–04, 93 P.3d 861 (2004)..... | 10 |
| <u>In re Pers. Restraint of Morris,</u> 176 Wn.2d 157, 288 P.3d 1140 (2012)..... | 17 |
| <u>In re Pers. Restraint of Orange,</u> 152 Wn.2d 795, 100 P.3d 291 (2004)..... | 16 |
| <u>In re Pers. Restraint of Thompson,</u> 141 Wn.2d 712, 10 P.3d 380 (2000)..... | 18 |
| <u>State v. Bone-Club,</u> 128 Wn.2d 254, 906 P.2d 325 (1995)..... | 5, 10, 12, 15 |
| <u>State v. Brightman,</u> 155 Wn.2d 506, 122 P.3d 150 (2005)..... | 15 |
| <u>State v. Duckett,</u> 141 Wn. App. 797, 173 P.3d 948 (2007)..... | 9 |
| <u>State v. Easterling,</u> 157 Wn.2d 167, 137 P.3d 825 (2006)..... | 4, 12 |
| <u>State v. Grisby,</u> 97 Wn.2d 493, 647 P.2d 6 (1982), <u>cert. denied</u> , 459 U.S. 1211, 103 S. Ct. 1205, 75 L. Ed. 2d 446 (1983)... | 20 |
| <u>State v. Leyerle,</u> 158 Wn. App. 474, 242 P.3d 921 (2010)..... | 5, 6 |
| <u>State v. Lormor,</u> 172 Wn.2d 85, 257 P.3d 624 (2011)..... | 5 |
| <u>State v. Madsen,</u> 168 Wn.2d 496, 229 P.3d 714 (2010)..... | 16 |

TABLE OF AUTHORITIES (CONT'D)

Page

WASHINGTON CASES (CONT'D)

State v. Momah,
167 Wn.2d 140, 217 P.3d 321 (2009),
cert. denied, 131 S. Ct. 160, 178 L. Ed. 2d 40 (2010) 18

State v. Paumier,
176 Wn.2d 29, 288 P.3d 1126 (2012)..... 13, 16

State v. Sadler,
147 Wn. App. 97, 193 P.3d 1108 (2008)..... 7

State v. Strode,
167 Wn.2d 222, 217 P.3d 310 (2009)..... 20

State v. Sublett,
176 Wn.2d 58, 292 P.3d 715 (2012)..... 5, 7-9, 13, 14

State v. Wise,
176 Wn.2d 1, 288 P.3d 1113 (2012)..... 4, 11, 14-17

FEDERAL CASES

In re Oliver,
333 U.S. 257, 68 S. Ct. 499, 92 L. Ed. 682 (1948)..... 10

Presley v. Georgia
558 U.S. 209, 130 S. Ct. 721, 175 L. Ed. 2d 675 (2010)..... 16

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)..... 8

Rovinsky v. McKaskle,
722 F.2d 197 (5th Cir. 1984) 11, 16

Waller v. Georgia,
467 U.S. 39, 104 S. Ct. 2210, 81 L. Ed. 2d 31 (1984)..... 15

TABLE OF AUTHORITIES (CONT'D)

Page

RULES, STATUTES AND OTHER AUTHORITIES

| | |
|---------------------------------|---|
| ER 404(b)..... | 2 |
| U.S. Const. Amend. VI..... | 4 |
| Wash. Const. art. 1, § 10..... | 4 |
| Wash. Const. art. I, § 22 | 4 |

A. ISSUE

Whether the trial court violated petitioner's constitutional right to a public trial in holding numerous conferences on evidentiary matters in an area inaccessible to the public?

B. STATEMENT OF THE CASE

The Cowlitz County Prosecutor's Office charged William Smith with 10 counts of third degree rape against A.C., one count of fourth degree assault with sexual motivation against P.J.J., and one count of second degree perjury. CP 56-60. An additional count of fourth degree assault involving another woman, P.S., was severed. RP 35-36, 43-44.

On twelve occasions during the testimony of the witnesses at trial, the court considered arguments and ruled on the admissibility of certain evidence in the hallway outside the courtroom. RP 218-21, 255-60, 270-72, 294-97, 315-23, 326-28, 346-47, 399-403, 446-50, 451-52, 543-46. An affidavit supplied by the court reporter, which is part of the record on appeal, states "hall conferences in Cowlitz County Superior Court are conferences between parties outside the hearing of the jury and anyone else in the courtroom but captured on the record via a hallway audio/video feed. When a hall conference is called for, the judge throws a switch at the bench, which deactivates both the witness stand video feed, and the judge's bench audio feed. This in turns activates an audio/video feed to

the hallway directly behind the courtroom. The parties then simply step through a door from the courtroom into the hall for the conference and the record continues to be captured. Neither the defendant nor the public are present during these hall conferences."¹ The judge and the attorneys were present during these conferences; the public was not. App. A.

The trial conferences, to which defense counsel did not object, are summarized as follows:

1) clarification of prior ruling on admissibility of ER 404(b) evidence under common scheme rationale; court rules prior incident of groping another woman's breast (P.S.) falls within prior ruling (RP 218-21);

2) following defense argument, court overrules the prosecutor's relevancy objection regarding whether P.S. talked to A.C. on the phone (RP 228-29);

3) argument regarding admissibility of opinion testimony on A.C.'s mental abilities and maturity level; court excludes opinion testimony but allows circumstantial evidence of A.C.'s mental abilities (RP 255-60);

4) argument whether the defense can impeach A.C. with a prior inconsistent statement through deputy; court allows the prior inconsistent statement (RP 270-72);

5) argument regarding admissibility of detective's opinion of handwriting on computer media recovered from Smith's car, court rules detective not qualified to offer opinion (RP 294-97);

¹ The affidavit and corresponding table summary of who was present during the conferences is attached as Appendix A.

6) the prosecutor moves to exclude Smith's statement to detective that sex was consensual as hearsay, resulting in argument on the issue (RP 311-15); court recesses and then rules in courtroom that statement can be elicited because offered only to show it was made, not for its truth (RP 315-23);

7) argument regarding whether photograph taken of A.C. by police is relevant; court rules photograph is inadmissible (RP 326-28);

8) argument regarding admissibility of Smith's written statement; court rules it is admissible (RP 346-47);

9) argument regarding admissibility of A.C.'s statement made to physician regarding identity of perpetrator; court rules inadmissible; court also allows the defense to impeach A.C. through prior inconsistent statement (RP 399-403);

10) argument regarding whether foundation laid for admissibility of nude photographs of A.C.; court rules photographs are admissible (RP 446-50);

11) the prosecutor moves to admit two receipts for sexual items found in Smith's residence; court rules they are admissible (RP 451-52).

12) argument regarding whether the prosecutor could ask Smith on cross examination if he told his wife he did not have sex with A.C.; court rules the prosecutor can ask the question to show Smith lied (RP 543-46).²

The jury convicted on four counts of third degree rape and the perjury count, but acquitted on the remaining counts. CP 58-69. Smith

² The first hallway discussion involved when to take a recess. RP 204-05. No argument is made in this supplemental brief that this instance violated the right to a public trial.

argued on appeal that the trial court violated his right to a public trial by holding the conferences in the hallway. The Court of Appeals disagreed. Slip op. at 8-9. This Court granted review.

C. ARGUMENT

1. THE TRIAL COURT VIOLATED SMITH'S CONSTITUTIONAL RIGHT TO A PUBLIC TRIAL IN HOLDING CONFERENCES ON EVIDENTIARY MATTERS IN AN AREA INACCESSIBLE TO THE PUBLIC.

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. Article I, section 10, which commands "[j]ustice in all cases shall be administered openly," 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). The right to public trial is a core safeguard in our system of justice. State v. Wise, 176 Wn.2d 1, 5, 288 P.3d 1113 (2012).

The Court of Appeals rejected Smith's public trial claim, relying on a purported distinction between legal and ministerial issues, to which the right to public trial supposedly did not attach, and the resolution of disputed facts and other adversarial proceedings, to which the public trial right attached. Slip op. at 8-9.

The Supreme Court has since recognized the kind of distinction made by the Court of Appeals does not "adequately serve to protect

defendants' and the public's right to an open trial." State v. Sublett, 176 Wn.2d 58, 72, 292 P.3d 715 (2012). The proceedings at issue are adversarial trial proceedings bound up with witness testimony and the exclusion or admission of evidence. The private conferences were an integral part of the trial process. The values served by the right to public trial are implicated here. This Court should reverse the Court of Appeals because Smith's right to a public trial attached to the closed evidentiary conferences and the closures occurred without considering the requisite factors under State v. Bone-Club, 128 Wn.2d 254, 906 P.2d 325 (1995).

a. Conferences Held In A Hallway Behind The Courtroom In An Area Inaccessible To The Public 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). Another type of closure occurs where a proceeding takes place in a location inaccessible to the public, such as a judge's chambers. Lormor, 172 Wn.2d at 93; Wise, 176 Wn.2d at 12.

The hallway at issue here is an area inaccessible to the public. 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). The trial in Leyerle, like Smith's case, took place in the Cowlitz

County Superior Court. The record in Leyerle was "silent regarding whether or to what extent the proceeding in the hallway was accessible by the public," but the hallway proceeding was deemed a closure because "the presumptively appropriate public forum for proceedings in this case was the public courtroom." Leyerle, 158 Wn. App. at 484 n.9. Members of the public expect trial proceedings to take place in the courtroom. They should not have to hunt the trial down in another location.

The record in Smith's case is better. The hallway at issue is located directly behind the courtroom and the public is not present at these proceedings. App. A. Members of the public are no more able to access a hallway behind the courtroom and listen to an intentionally private discussion between the judge and attorneys than they are able to enter a locked courtroom or access the judge's chambers. The practical impact is the same — the public is denied the opportunity to scrutinize events.

The Court of Appeals inaccurately described these events as "sidebar conferences." Slip op. at 8-9. Sidebar conferences take place in the courtroom, at the side of the bench. These conferences took place outside the courtroom, completely removed from public observation. App. A.

b. The Public Trial Right Attaches To Evidentiary Conferences On What Evidence The Trier Of Fact Will Be Able To Consider.

The Court of Appeals in Smith's case, relying on an earlier line of decisions from that court, held no public trial right attaches to hearings on purely ministerial or legal issues that do not require the resolution of disputed facts, as opposed to "adversary proceedings." Slip op. at 8 (citing State v. Sadler, 147 Wn. App. 97, 114, 193 P.3d 1108 (2008)).

This Court repudiated that analytical approach in Sublett: "We decline to draw the line with legal and ministerial issues on one side, and the resolution of disputed facts and other adversarial proceedings on the other. The resolution of legal issues is quite often accomplished during an adversarial proceeding, and disputed facts are sometimes resolved by stipulation following informal conferencing between counsel. The distinction made by the Court of Appeals will not adequately serve to protect defendants' and the public's right to an open trial." Sublett, 176 Wn.2d at 72 (C. Johnson, J., lead opinion). The crooked line drawing used in cases like Sadler is the result of an improper conflation of the right to public trial and the defendant's right to be present at critical stages of the proceeding. Sublett, 176 Wn.2d at 137-40 (Stephens, J., concurring).

This Court in Sublett employed the "experience and logic" test to address whether a trial court violated the right to a public trial by

considering a jury question in camera. Id. at 70-74. It held there was no public trial violation because "resolution of the jury's question did not implicate the core values the public trial right serves." Id. at 72.

The first part of the test, the experience prong, asks "whether the place and process have historically been open to the press and general public." Sublett, 176 Wn.2d at 73 (quoting Press-Enterprise Co. v. Superior Court, 478 U.S. 1, 8, 106 S. Ct. 2735, 92 L. Ed. 2d 1 (1986)). The logic prong asks "whether public access plays a significant positive role in the functioning of the particular process in question." Id.

The lead opinion concluded none of the values served by the public trial right were violated under the facts of that case because "[n]o witnesses or testimony are involved at this stage." Sublett, 176 Wn.2d at 77. In addition, placing the question, answer and any objection on the record satisfied served the appearance of fairness and reminded the prosecutor and the judge of their responsibility because the writing will become part of the public record and subject to public scrutiny and appellate review. Id. Overall, the lead opinion reasoned "[t]his is not a proceeding so similar to the trial itself that the same rights attach, such as the right to appear, to cross-examine witnesses, to present exculpatory evidence, and to exclude illegally obtained evidence." Id.

The jury question conference was too far removed from the trial process itself to implicate the public trial right. The same cannot be said of the evidentiary conferences at issue here. Argument and rulings on what evidence the trier of fact will be allowed to consider — what facts will be in play in reaching a verdict — is directly connected with the trial testimony. Unlike the jury question conference in Sublett, witnesses and testimony were involved in the evidentiary conferences in Smith's case because the subject matter of those conferences involved what testimony and evidence the jury would be allowed to consider.

The judge resolved legal issues in these closed hallway conferences in an adversarial setting. Sublett, 176 Wn.2d at 72. The parties argued about what facts the jury would be allowed to consider in determining whether the State had proven its case beyond a reasonable doubt, each side seeking to gain advantage over the other in this respect.

Having the evidentiary conferences open to the public serves the interests of the public trial right. The right to a public trial "fosters public understanding and trust in the judicial system." State v. Duckett, 141 Wn. App. 797, 803, 173 P.3d 948 (2007). Conversely, "[p]roceedings cloaked in secrecy foster mistrust and, potentially, misuse of power." Dreiling v. Jain, 151 Wn.2d 900, 908, 93 P.3d 861 (2004).

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. 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. Id. at 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." Bone-Club, 128 Wn.2d at 259 (quoting In re Oliver, 333 U.S. 257, 270 n. 25, 68 S. Ct. 499, 92 L. Ed. 682 (1948)).

When a trial judge hears arguments and rules on what testimony and other evidence the trier of fact will be allowed to consider, there exists the potential for abuse of power. Law may not be followed. One side may be unfairly disadvantaged. The jury may receive evidence it should not have received, or denied evidence that it should have been allowed to consider. Contemporaneous public observation of these potentially critical moments 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 — the time of the trial. The public cannot trust what it cannot observe. The "logic" prong is satisfied.

Smith's case is similar to Rovinsky v. McKaskle, where the judge conducting a criminal trial held two hearings in chambers on the state's

motion to restrict the cross-examination of two witnesses without advancing any reasons for doing so. Rovinsky v. McKaskle, 722 F.2d 197, 198 (5th Cir. 1984). The Fifth Circuit held the right to public trial forbids courts to conduct hearings in camera on matters arising in the course of a criminal trial, absent overriding need to foreclose public attendance, articulated in the court's findings at the time of closure. Rovinsky, 722 F.2d at 199.³ The motions to limit cross-examination were heard during the course of trial, and "[a]ny necessity that the motions be heard outside the jury's presence did not require that they be heard behind closed doors. Prejudice could readily have been prevented without excluding the press and public by, for example, sequestering the jury." Id. at 201.

There is no meaningful difference between the closed motion hearing in Rovinsky and the closed evidentiary conferences in Smith's case. Both involve whether and to what extent evidence will be made available to the trier of fact, to the advantage or detriment of one side or the other. "The right to a public trial does not turn on whether the inquiry of a hearing is factual or doctrinal, substantive or procedural, but on the

³ The defendant in Rovinsky objected to the closure, and the court stated "[s]idebar conferences in which the defendant's counsel participates without objection do not violate the right to a public trial." Rovinsky, 722 F.2d at 198, 201. Under Washington precedent, a defendant does not waive his right to challenge an improper closure by failing to object to it. Wise, 176 Wn.2d at 15, 18.

relationship of the issue raised at the hearing to the merits of the charge, the outcome of the prosecution, and the integrity of the administration of justice." Id. at 201.

A *pre-trial proceeding* that determines what evidence will be made available to the trier of fact trial is subject to the public trial right. Bone-Club, 128 Wn.2d at 257 (public trial right extends to pretrial suppression hearing). *Trial proceedings* that determine what evidence will be made available to the trier of fact, such as the ones at issue in Smith's case, are no less worthy of protection.

In Easterling, the right to public trial was violated where the trial court entertained a co-defendant's motions for severance and dismissal in a closed courtroom without justifying the closure. Easterling, 157 Wn.2d at 179-80, 182. Such motions pertain to legal matters, as did the evidentiary conferences in Smith's case. The Court emphasized its "interest in protecting the transparency and fairness of criminal trials by ensuring that all stages of courtroom proceedings remain open unless the trial court identifies a compelling interest to be served by closure." Id. at 178.

While making a record of a closed proceeding ameliorates lingering concerns when the proceeding itself does not serve public trial

interests,⁴ the later availability of a record of a closed proceeding does not satisfy the right to a public trial when the right attaches to that proceeding. See 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"). A contrary rule would eviscerate the public trial right, as it would allow proceedings to be closed with impunity so long as a record of the closed proceeding was later made available to the public.

Turning to the "experience" prong, no court rule or statute addresses the issue of whether trial judges are to hold evidentiary arguments and rulings in an open or closed setting. History is silent or indeterminate on whether such an event takes place inside the courtroom or outside the courtroom. The driving force behind the closed hallway conferences here was not Washington or national historical practice but the arbitrary circumstance of the particular configuration of the courtroom in Cowlitz County Superior Court. See slip op. at 4-5 n.2 (prosecutor's explanation for hallway conferences).

There are no closed evidentiary conferences during a bench trial. Private conferences are triggered by the presence of a jury and the attendant desire to keep the jury from hearing them. But that distinction

⁴ Sublett, 176 Wn.2d at 77.

cannot be dispositive. First, some judges hold private conferences on such matters during jury trials, while others send the jury away and consider the matter in open court. The right to public trial should not turn on the whim of an individual judge. Second, treating the presence of the jury as dispositive of the "experience" prong leads to the anomalous result that the same type of proceeding — argument and ruling on evidentiary matters — is sometimes protected by the right to public trial (bench trials) and other times not (jury trials). That kind of distinction flies in the face of our jurisprudence that the public trial values attaches to all trials, not just some.

The Court recognizes "the failure of any test to identify a closure with accuracy." Sublett, 176 Wn.2d at 75. The experience and logic test is a "useful tool" for determining whether the public trial right attaches to a particular process. Id. However, its utility is questionable when the proceeding at issue implicates the core values of the public trial right, regardless of whether the experience prong is met.

"A public trial helps assure that the trial is fair; it allows the public to see justice done, and it serves to hold the justice system accountable." Wise, 176 Wn.2d at 17. Few aspects of a trial can be more important to these goals than a determination during the trial itself of what testimony and evidence the jury will be allowed to consider as it decides a defendant's fate. "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. (quoting Waller v. Georgia, 467 U.S. 39, 46 n.4, 104 S. Ct. 2210, 81 L. Ed. 2d 31 (1984)). The right to public trial attaches to the evidentiary conferences in Smith's case.

c. The Remedy Is A New Trial Because The Trial Court Did Not Do A Bone-Club Analysis.

If a proceeding is subject to the right to a public trial, the trial court's failure to conduct a Bone-Club inquiry before excluding the public violates the defendant's public trial rights. State v. Brightman, 155 Wn.2d 506, 515-16, 122 P.3d 150 (2005). *Before* a closure occurs, it must consider the five factors identified in Bone-Club on the record. Wise, 176 Wn.2d at 12.⁵ There is no indication the court in Smith's case considered the Bone-Club factors before conducting the private conferences at issue here. Appellate courts do not comb through the record or attempt to infer

⁵ 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; (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.

the trial court's balancing of competing interests where it is not apparent in the record. Wise, 176 Wn.2d at 12-13.

Interests in efficiency and juror convenience are not compelling interests that overcome the right to a public trial. See In re Pers. Restraint of Orange, 152 Wn.2d 795, 810, 100 P.3d 291 (2004) (courtroom management and convenience were not compelling interests that the closure was essential to protect); State v. Madsen, 168 Wn.2d 496, 509, 229 P.3d 714 (2010) (courts "must not sacrifice constitutional rights on the altar of efficiency."). No alternatives to the closures were considered even though an obvious one existed: having the jurors step out the courtroom while the proceedings remained in open court. Rovinsky, 722 F.2d at 201; see Presley v. Georgia 558 U.S. 209, 214-16, 130 S. Ct. 721, 175 L. Ed. 2d 675 (2010) (trial court must consider reasonable alternatives to closure).

The violation of the public trial right is structural error requiring automatic reversal because it affects the framework within which the trial proceeds. Wise, 176 Wn.2d at 6, 13-14. Smith's convictions must be reversed due to the public trial violation. Id. at 19.

d. Smith Did Not Waive His Right To Public Trial Or Invite The Error.

The issue is a manifest error affecting a constitutional right that may be raised for the first time on appeal. Id. at 9, 18 & n.11; Paumier,

176 Wn.2d at 36. Smith did not waive his right to challenge the improper closures by failing to object to them. Wise, 176 Wn.2d at 15. A defendant must have knowledge of the public trial right before it can be waived. accord In re Pers. Restraint of Morris, 176 Wn.2d 157, 167, 288 P.3d 1140 (2012). As there was no discussion of Smith's public trial right, his failure to object is meaningless. There is no waiver.

Nor is there invited error. It is apparent that holding hallway discussions due to the configuration of the courtroom was an accepted matter of routine in the Cowlitz County Superior Court for judges and the attorneys who came before them.⁶ The trial judge directed the parties to the hallway on the first occasion, thus signaling that was how the judge wanted to handle matters outside of the jury's presence.⁷ RP 204.

⁶ See slip op. at 4-5 n.2 ("The State represented during oral argument that the practical configuration of the courtroom *required the judge* to conduct sidebars in the hallway outside to avoid the jury overhearing the conference. The practical configuration of the courtroom *prompted the judge and attorneys* to go outside because they could not record a conversation at the bench without the jury overhearing. It was a matter of convenience. Rather than having the jury exit the courtroom, the judge and attorneys would step outside to discuss the evidentiary and legal matters that arose during trial. Microphones were setup [sic] outside specifically for this purpose.") (emphasis added).

⁷ The first hallway conference involved the taking of a recess and it is not argued that it implicated the right to public trial, but the event is significant because the trial court initially instigated the procedure of going to the hallway to address a matter outside of the courtroom. RP 204.

Thereafter, the judge and the attorneys followed the judge's lead in heading to the hallway.

"The basic premise of the invited error doctrine is that a party who sets up an error at trial cannot claim that very action as error on appeal and receive a new trial." State v. Momah, 167 Wn.2d 140, 153, 217 P.3d 321 (2009), cert. denied, 131 S. Ct. 160, 178 L. Ed. 2d 40 (2010). In Smith's case, the parties followed the judge's lead and so did not induce the error. For the invited error doctrine to apply, the defendant must knowingly set up the error. In re Pers. Restraint of Thompson, 141 Wn.2d 712, 724-25, 10 P.3d 380 (2000). Smith was not advised of his right to a public trial and so did not knowingly set up a public trial violation.

Drawing on the invited error doctrine, the Court in Momah declined to find a structural error for holding voir dire in private because "Momah affirmatively assented to the closure, argued for its expansion, had the opportunity to object but did not, actively participated in it, and benefited from it. Moreover, the trial judge in this case not only sought input from the defendant, but he closed the courtroom after consultation with the defense and the prosecution." Momah, 167 Wn.2d at 151, 153-154. Momah was well aware of his right to a public trial and he made deliberate, tactical choices to forego that right in order to protect his right to an impartial jury. Id. at 145, 155-56.

That confluence of factors is missing from Smith's case. Smith did not affirmatively advocate for the hallway conferences, he was not given the opportunity to object to the procedure, the court did not seek input from Smith or consult with either side about the propriety of the hallway conferences, the closures did not benefit Smith's right to a fair trial, nor does the record show a deliberate tactical choice to engage in the private conferences as a means to protect Smith's right to a fair trial.⁸

The State suggests defense counsel engaged in the hallway conferences "to avoid needlessly irritating the jury by requiring them to march in and out of the courtroom repeatedly." Brief of Respondent at 13. The record does not show this motivation on the part of defense counsel. Removing jurors from the courtroom while the evidentiary conferences took place in open court would not have impacted the fairness of the trial. Jurors would not have held that inconvenience against Smith because they

⁸ Defense counsel requested a hallway conference on the last of the 12 occasions at issue here. RP 543. The other 11 occasions involved (1) the judge directing the attorneys to the hallway (RP 255, 270, 399); (2) the prosecutor affirmatively requesting a hallway conference (RP 451); (3) the prosecutor following the judge's suggestion of going out to the hallway (RP 311); (4) defense counsel following the judge's suggestion of going out to the hallway (RP 218); (5) defense counsel deferring to the judge's desire (RP 229: "Hallway, if we need to."); (6) the prosecutor prompting the conference (RP 326); or (6) the record not showing a request that the discussion take place in the hallway (RP 294: "Your honor, I'll object and ask for a sidebar"; RP 346: ("We might want to discuss this"); RP 446: "If we could have a conference?").

were instructed to decide the case based on the evidence and a rational thought process, not emotion. CP 71-73; RP 160. Jurors are presumed to follow instructions, and it cannot be assumed they will violate their oath on the slightest provocation. State v. Grisby, 97 Wn.2d 493, 509, 647 P.2d 6 (1982), cert. denied, 459 U.S. 1211, 103 S. Ct. 1205, 75 L. Ed. 2d 446 (1983).

Smith's counsel participated in the closed proceedings. This case is closer to Strode, where the defendant did not object and actively participated in the closed proceedings without losing his public trial right. State v. Strode, 167 Wn.2d 222, 224, 229 & n.3, 231-36, 217 P.3d 310 (2009) (Alexander, C.J., lead opinion, Fairhurst, J., concurring). No waiver occurred there and none should be found here. Id.

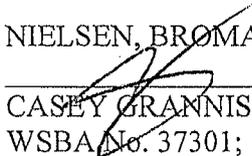
D. CONCLUSION

Smith respectfully requests that this Court reverse the Court of Appeals, reverse the convictions, and remand for a new trial.

DATED THIS 24th day of June, 2013.

Respectfully submitted,

NIELSEN, BROMAN & KOCH, PLLC


CASEY GRANNIS
WSBA No. 37301;
Office ID No. 91051
Attorneys for Petitioner

APPENDIX A

SHARON A. BALL
COURT TRANSCRIBER

August 13, 2009

John A. Hays
Attorney at Law
1402 Broadway
Longview, WA 98632

RE: State of Washington v. William G. Smith
Cowlitz County Cause No. 08-1-00302-4
Court of Appeals No. 38868-5-11

Mr. Hays:

This affidavit is in response to your recent phone request to me. Your request was that I specify each participant in the hall conferences during the appellant's trial. Mr. Smith's verbatim includes thirteen hall conferences.

As you are aware, hall conferences in Cowlitz County Superior Court are conferences between parties outside the hearing of the jury and anyone else in the courtroom but captured on the record via a hallway audio/video feed. When a hall conference is called for, the judge throws a switch at the bench, which **deactivates** both the witness stand video feed, and the judge's bench audio feed. This in turn **activates** an audio/video feed to the hallway directly behind the courtroom. The parties then simply step through a door from the courtroom into the hall for the conference and the record continues to be captured. Neither the defendant nor the public are present during these hall conferences.

After reviewing RAP 9.2 - Verbatim Report of Proceedings, I believe these hallway conferences fall somewhere between RAP 9.2(f)(1)(C) and RAP 9.2(f)(1)(D). In other words, between a sidebar designated as on or off the record and a chamber conference where, if recorded, the presence or absence of persons participating in the conference must be noted.

On August 12, 2009, I spoke with the manager assigned to this case at the Court of Appeals for advice on how to appropriately reflect the information you requested. She did not have any information with which to assist me and referred me back to you for your advice.

After discussion with you and your assistant and in an effort to maintain the pagination of the current verbatim report of proceedings, I have developed the table on the following page. This table shows which parties participated in each hall conference and on which pages of the verbatim the conference is transcribed.

111 ALDERWOOD LANE
LONGVIEW, WA 98632-5801
(360) 751-0199 FAX: (360) 423-5466
kensharonball@comcast.net

**SHARON A. BALL
COURT TRANSCRIBER**

| HALL CONFERENCE NUMBER | REPORT OF PROCEEDINGS PAGE NUMBER | PARTICIPANTS |
|------------------------------|---|--|
| 1 | 204-205 | Judge Warne, Mr. Smith, Mr. Ladouceur |
| 2 | 218-221 | Judge Warne, Mr. Smith, Mr. Ladouceur |
| 3 | 229-229 | Judge Warne, Mr. Smith, Mr. Ladouceur |
| 4 | 255-260 | Judge Warne, Mr. Smith, Mr. Ladouceur |
| 5 | 270-272 | Judge Warne, Mr. Smith, Mr. Ladouceur |
| 6 | 294-297 | Judge Warne, Mr. Smith, Mr. Ladouceur |
| 7 | 311-315 | Judge Warne, Mr. Smith, Mr. Ladouceur |
| 8 | 326-328 | Judge Warne, Mr. Smith, Mr. Ladouceur |
| 9 | 346-347 | Judge Warne, Mr. Smith, Mr. Ladouceur |
| 10 | 399-403 | Judge Warne, Mr. Smith, Mr. Ladouceur & the Court Clerk, momentarily |
| 11 | 446-450 | Judge Warne, Mr. Smith, Mr. Ladouceur |
| 12 | 451-452 | Judge Warne, Mr. Smith, Mr. Ladouceur |
| 13 | 544-546 | Judge Warne, Mr. Smith, Mr. Ladouceur |

The Mr. Smith noted herein is Mr. James Smith, the prosecuting attorney not Mr. William Smith, the defendant.

Please advise me if I need to take any further action on this matter.

I make this statement under the penalty of perjury, under the laws of Washington state.

Sincerely,

Sharon A. Ball
Sharon A. Ball

Eugene, OR
Eugene, OR

August 13, 2009
Date

111 ALDERWOOD LANE
LONGVIEW, WA 98632-5801
(360) 751-0199 FAX: (360) 423-5466
kensharonball@comcast.net



Washington State Court of Appeals
Division Two

950 Broadway, Suite 300, Tacoma, Washington 98402-4454

David Ponzoha, Clerk/Administrator (253) 593-2970 (253) 593-2806 (Fax)

General Orders, Calendar Dates, Issue Summaries, and General Information at <http://www.courts.wa.gov/courts>

August 27, 2009

Susan Irene Baur
Cowlitz Co. Prosecutor's Office
312 SW 1st Ave
Kelso, WA 98626-1799

John A. Hays
Attorney at Law
1402 Broadway St
Longview, WA 98632-3714

CASE #: 38868-5-II

State of Washington, Respondent v. William Smith, Appellant

Counsel:

On the above date, this court entered the following notation ruling:

A RULING SIGNED BY COMMISSIONER SKERLEC:

Appellant's motion to supplement statement of arrangements is granted. The supplemental table is accepted for filing.

Very truly yours,

A handwritten signature in black ink, appearing to read "David Ponzoha". The signature is fluid and cursive, with a long horizontal stroke extending to the right.

David C. Ponzoha
Court Clerk

8-17-09
Granted -
Supplemental tables
accepted.
E. Charles
Cramer

CLERK OF COURT
STATE OF WASHINGTON
BY _____
DATE

1
2
3
4
5
6
7
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25

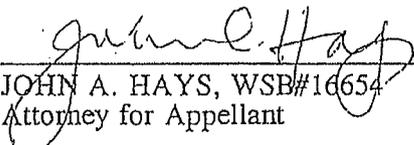
IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON,
DIVISION II

STATE OF WASHINGTON,)
)
 Respondent,)
)
 vs.)
)
 WILLIAM G. SMITH,)
)
 Appellant.)

NO. 38868-5-II
MOTION TO SUPPLEMENT
STATEMENT OF ARRANGEMENTS

1. IDENTITY OF MOVING PARTY: WILLIAM G. SMITH, Appellant, asks for the relief designated in Part 2.
2. STATEMENT OF RELIEF SOUGHT: Appellant seeks permission to supplement the Statement of Arrangements as set out in the attached Affidavit of Sharon Ball, Transcriptionist.
3. FACTS RELEVANT TO MOTION: The facts relevant to this motion are set out in the attached affirmation.
4. GROUNDS FOR RELIEF SOUGHT: Granting this motion will assure the complete administration of justice.

DATED this 15th day of AUGUST, 2009.



JOHN A. HAYS, WSB#16654
Attorney for Appellant

MOTION TO SUPPLEMENT
STATEMENT OF ARRANGEMENTS - 1

John A. Hays
Attorney at Law
1402 Broadway
Longview, WA 98632
(360) 423-3084

1
2
3
4
5
6
7
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25

AFFIRMATION

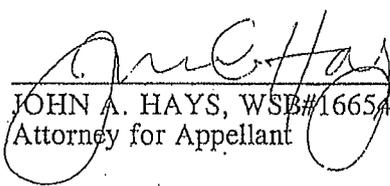
JOHN A. Hays, states the following under the penalty of perjury under the laws of Washington State: I am the attorney of record in this case. Upon preparing the Brief of Appellant in this case (due Friday, August 14th, 2009), I noted that I needed to cite to who was present in the "hall conferences" during the Trial held on November 17th- 20th, 2008. Ms Ball defines "hall conference" in her affidavit.

I contacted the transcriptionist, Sharon Ball, to discuss the best way to incorporate this information in the verbatim without changing the current pagination of the verbatim already filed in Superior Court and with the Court of Appeals. Cheryl, the Court of Appeals case manager, directed me to state what I needed via a motion and attach a copy of how this was going to be accomplished. Ms. Ball came up with the idea of a table and incorporated that in her affidavit.

Therefore, I respectfully request that I be allowed to file a Supplemental Statement of Arrangements to include an affidavit by the transcriptionist, Sharon Ball.

Please note that I do not need to extend the filing of the Brief of Appellant in this case due to this addition. The brief does, however, cite to this affidavit and the information it contains. The Brief of Appellant will be filed tomorrow, August 14, 2009.

DATED this 13th day of AUGUST, 2009.


JOHN A. HAYS, WSB#16654
Attorney for Appellant

IN THE SUPREME COURT OF THE STATE OF WASHINGTON

| | | |
|----------------------|---|-------------|
| STATE OF WASHINGTON, |) | |
| |) | |
| Respondent, |) | |
| |) | |
| v. |) | NO. 85809-8 |
| |) | |
| WILLIAM GLEN SMITH, |) | |
| |) | |
| Petitioner. |) | |

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 24TH DAY OF JUNE, 2013, I CAUSED A TRUE AND CORRECT COPY OF THE SUPPLEMENTAL BRIEF OF PETITIONER WILLIAM SMITH TO BE SERVED ON THE PARTY / PARTIES DESIGNATED BELOW BY DEPOSITING SAID DOCUMENT IN THE UNITED STATES MAIL.

[X] WILLIAM GLEN SMITH
909 SOUTH PACIFIC AVENUE, APT. #4
KELSO, WA 98626

SIGNED IN SEATTLE WASHINGTON, THIS 24TH DAY OF JUNE, 2013.

X *Patrick Mayovsky*

OFFICE RECEPTIONIST, CLERK

To: Patrick Mayovsky
Cc: sasserm@co.cowlitz.wa.us; Smith.james@co.cowlitz.wa.us
Subject: RE: State of Washington v. William Glen Smith, No. 85809-8

Rec'd 6-24-13

Please note that any pleading filed as an attachment to e-mail will be treated as the original. Therefore, if a filing is by e-mail attachment, it is not necessary to mail to the court the original of the document.

From: Patrick Mayovsky [<mailto:MayovskyP@nwattorney.net>]
Sent: Monday, June 24, 2013 2:54 PM
To: OFFICE RECEPTIONIST, CLERK
Cc: sasserm@co.cowlitz.wa.us; Smith.james@co.cowlitz.wa.us
Subject: State of Washington v. William Glen Smith, No. 85809-8

Attached for filing today is a supplemental brief of petitioner William Smith for the case referenced below.

State v. William Glen Smith

No. 85809-8

Supplemental Brief of Petitioner William Smith

Filed By:
Casey Grannis
206.623.2373
WSBA No. 37301
grannisc@nwattorney.net