No. 92310-8

No. 40333-1-II

THE COURT OF APPEALS FOR THE STATE OF WASHINGTON
DIVISION II

STATE OF WASHINGTON,

Respondent,

vs.

KENNETH SLERT,

Appellant.

Appeal from the Superior Court of Washington for Lewis County

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Respondent's Supplemental Brief

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I. ISSUES

A. Did the use of the jury questionnaire violate the public's right to open courts, or Slert's right to a public trial, if the jurors were questioned about their responses in open court when Slert was present with counsel?

B. Did the use of the jury questionnaire violate the defendant's right to be present at critical stages of the proceedings if it was written by Slert's counsel, discussed in Slert's presence in open court, and made the subject of voir dire questioning in the defendant's presence?

II. STATEMENT OF RELEVANT FACTS

At oral argument in this case on September 9, 2011, the Court raised the issue of whether the jury questionnaire used to screen the venire for exposure to pretrial publicity was constitutional. The State sought leave to supplement the record concerning the jury questionnaire and to file a brief on the matter, which the court granted. Order of September 13, 2011. The State then requested that a copy of the jury questionnaire and two pretrial motion hearings be designated as supplemental clerk's papers. Because the motion hearings are short, their transcripts are

attached for the Court's reference as Exhibits 1 and 2.[1] The questionnaire is attached as Exhibit 3.

At a pretrial hearing on January 6, 2010, Slert's trial counsel (Mr. Cordes) submitted a proposed jury questionnaire designed to screen the venire for exposure to pretrial publicity. SVRP1 at 3-4. The purpose of the questionnaire was to prevent the venire from being tainted by a loose comment from someone who had heard about the incident. *Id.* The State asked for time to review the proposed questions in case it wanted to supplement or amend them. *Id.* at 14. This exchange occurred on the record in open court, in the defendant's presence. *Id.* at 2.

On January 21, 2010, the parties again appeared on the record in open court, in Slert's presence. SVRP2 at 2. The State had no additional questions it wished to include in the jury questionnaire. *Id.* at 3. The parties resolved an issue regarding two words in the questionnaire's introduction, but the final questionnaire was essentially identical to Mr. Cordes's original. *Id.* at 3-4.

[1] These two transcripts will be referred to a SVRP1 (January 6, 2010) and SVRP2 (January 21, 2010) which stands for Supplemental Verbatim Report of Proceedings.

The prospective jurors were given the questionnaire when they appeared for voir dire. SVRP1 at 14. They filled them out that morning, *id.*, with instructions that their responses were under oath. CP 359-61 at 1. The court and counsel for both parties reviewed the questionnaires while the prospective jurors were all present and available for questioning. *See* Verbatim Report of Proceedings (VRP) (January 25, 2010) at 5. After this review and by mutual agreement, the Court excused four jurors on the record, in open court, and in the defendant's presence. *Id.* at 3-5.

Counsel discussed the questionnaire responses on the record. Mr. Cordes indicated that 15 potential jurors had heard something about the case. *Id.* at 10-11. The parties resolved to conduct individual voir dire of these potential jurors in open court, in the defendant's presence, and on the record. *Id.* at 11-14. Mr. Cordes did not object to this procedure. *Id.* at 14.

The parties conducted extensive individual voir dire of the prospective jurors based on their questionnaire responses. The jurors were sworn under oath for this questioning, *id.*, the transcript of which is 55 pages long. *Id.* at 14-69. The defendant was present with counsel for all of it. *Id.*

III. ARGUMENT

A. BECAUSE THE JURY QUESTIONNAIRE'S CONTENTS WERE DISCUSSED AT PRETRIAL HEARINGS AND IT WAS THE SUBJECT OF QUESTIONING DURING VOIR DIRE, THE QUESTIONNAIRE DID NOT INFRINGE ON THE RIGHT TO OPEN COURTS OR A PUBLIC TRIAL.

This court recently decided the question of whether the use of a juror questionnaire infringes on the right to open courts or a public trial: it doesn't. *State v. Smith*, 162 Wn. App. 833, 256 P.3d 449, 456 (Div. 2, 2011); *accord In re Pers. Restraint of Stockwell*, 160 Wn. App. 172, 177-81, 248 P.3d 576 (Div. 2, 2011). In *Smith*, the defendant had full access to the jury questionnaires and was able to use them to conduct voir dire. Therefore, only the public's right to open courts, not the defendant's personal right to a public trial, was implicated by the courts' sealing of the questionnaires. *Smith*, 256 P.3d at 456. The public's right was not infringed because the parties used the contents of the jury questionnaire in open court during voir dire, where the public could observe if it wanted. *Id.* Consequently, there was no courtroom closure and no *Bone-Club* analysis was required.[2] *Id.*

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[2] This Court expressly disagreed with a Division One case from 2009, which opined that sealing the jury questionnaire violated the defendant's and public's rights to a public trial, but that the error was not structural. *State v. Coleman*, 151 Wn. App. 614, 618-24, 214 P.3d 158 (2009).

Smith is the silver bullet for our case. First, Slert actively participated in submitting the questionnaire to the prospective jurors. Defense counsel proposed the juror questionnaire for Slert's benefit, with ample time to consult with Slert about its contents. SVRP1 at 3-4. The final questionnaire was almost exactly the same as Mr. Cordes's initial proposal. SVRP2 at 3-4. The parties discussed the contents and purpose of the questionnaire in Slert's presence on the record. SVRP1 at 2-4; SVRP2 at 2-4. Slert had no objection to the Court's procedure for submitting the questionnaires to the venire. SVRP1 at 14. He was present with counsel to review the questionnaire responses and sat beside counsel during extensive voir dire regarding the questionnaire responses. VRP (Jan. 25, 2010) at 3-69. All of this contact ensured that Slert had plenty of time to review the questions and responses with counsel and pose whatever voir dire questions he wished to the venire in open court. As in *Smith*, Slert's personal public trial rights were not violated.

Nor was the public's right to open proceedings violated by this procedure. The parties discussed the contents of the jury questionnaire on the record in open court both before trial and during voir dire. SVRP1, SVRP2, VRP (Jan 25, 2010) at 3-69.

Anyone who wished to observe these proceedings could have heard about the contents of the questionnaire. There was no courtroom closure, no need for a *Bone-Club* analysis, and no infringement of the public's open-courts right. *Smith*, 256 P.3d at 456.

If anything, this case implicates the defendant's and the public's open trial rights less than *Smith* because the jury questionnaire here was not sealed. To acquire a copy of it, the State simply requested one from the trial court.

Finally, even if this Court were to hold that the use of the jury questionnaire somehow infringed on public or open trial rights, Slert cannot demonstrate prejudice. Public unavailability of the juror questionnaires is not a structural error; the defendant must demonstrate prejudice. *Smith* 256 P.3d at 456; *State v. Coleman*, 151 Wn. App. 614, 623–24, 214 P.3d 158 (Div. 1, 2009). Slert cannot prove prejudice because the confidentiality of the jurors' responses encouraged them to be candid. *Smith*, 256 P.3d at 456. In fact, Slert's attorney originally asked for in-chambers voir dire to encourage candidacy and avoid tainting the jury. VRP (Jan 25, 2010) at 10-12. The trial court accounted for the public's open-

courts rights by conducting individual voir dire in open court, instead. *Id.* at 12. The point of this process was to ensure that Slert got a fair trial by jurors untainted by pretrial publicity. SVRP1 at 3-4. Under the circumstances, Slert could not establish prejudice even if using the use of the questionnaire were error. The Court should affirm his conviction.

B. BECAUSE THE DEFENSE ATTORNEY PROPOSED THE JURY QUESTIONNAIRE AND THE DEFENDANT WAS PRESENT WITH COUNSEL DURING VOIR DIRE, THE USE OF THE QUESTIONNAIRE IN NO WAY IMPACTED THE DEFENDANT'S RIGHT TO BE PRESENT DURING CRITICAL STAGES OF TRIAL.

Slert's right to be present was not violated by the use of the questionnaire or the subsequent voir dire proceedings. Slert's counsel prepared the questions in advance, with plenty of time in which to consult with his client. SVRP1 at 3-4. The parties twice discussed the questionnaire in Slert's presence before it was ever submitted to the jury, in case Slert wished to voice objections or propose changes. SVRP1; SVRP2. The prospective jurors did not receive the questions in advance; they filled out the questionnaires when they reported to voir dire on the morning of trial. SVRP1 at 14. All of the prospective jurors were present and available for questioning when counsel reviewed the questionnaire answers.

VRP (Jan. 25, 2010) at 5. Four jurors were subsequently dismissed on the record in Slert's presence, affording him an opportunity to confer with counsel or object to this action based on the questionnaire answers. *Id.* at 3-5. Finally, Slert was present with counsel during 55 pages' worth of voir dire based on the questionnaire answers. *Id.* at 14-69. It is simply not the case that Slert was absent or uninvolved in submitting, receiving, or evaluating the questionnaire responses. He was present during all of the voir dire.

The Washington Supreme Court's recent opinion in *State v. Irby*, 170 Wn.2d 874, 246 P.3d 796 (2011), confirms that Slert's right to be present was not violated. In *Irby*, neither party appeared for the first day of jury selection, when the judge administered the oath to the panel and gave them the jury questionnaire. *Id.* at 877. That evening, before any questioning took place in open court, the trial judge and counsel for both parties exchanged emails agreeing that seven prospective jurors would be excused. *Id.* at 878. The excused jurors did not appear for voir dire the next day. *See id.* Irby was in custody during this exchange, and there was no indication that trial counsel consulted with him regarding it. *Id.* The court held that the emails engaged in an individualized

determination of the prospective jurors' fitness to serve, and so were voir dire at which the defendant had a constitutional right to be present. *Id.* at 882-85. His absence and counsel's failure to confer with him rendered the procedure unconstitutional. *Id.* at 884.

The problem in *Irby* was that the trial judge and counsel eliminated members of the venire via private emails with no input from the defendant whatsoever—and the decision was irreversible. The excused jurors never showed up for voir dire in the defendant's presence, and so the defendant had no opportunity to question them or gauge the propriety of their dismissal. The defendant was never involved with their deselection as jurors *at all*.

Here, in contrast, the prospective jurors received the questionnaire the morning that voir dire was conducted. Slert was present and had the opportunity to confer with counsel about the questionnaire responses before any prospective juror was dismissed. All of these proceedings occurred in the normal course of court business, with Slert's and his attorney's input. Thus, there were no jurors whom Slert lost the opportunity to question, and Slert was present to ensure that these jurors were excused for fair reasons. Because none of the Supreme Court's concerns in *Irby*

are implicated by this case, Slert's right to be present at voir dire remained intact. The Court should affirm his conviction.

IV. CONCLUSION

Slert's trial counsel submitted a jury questionnaire to screen prospective jurors for exposure to trial publicity. Slert was present both times that the parties discussed the questionnaire on the record before trial. Slert was present and able to confer with his attorney regarding the questionnaire answers, was present when the court excused certain agreed-upon jurors based on the questionnaire, and was present with counsel during 55 pages of under-oath voir dire concerning the prospective jurors' responses. The voir dire occurred in open court for any member of the public to hear. Nothing about this process violated Slert's right to be present at voir dire, his right to a public trial, or the public's right to open courts. The Court should affirm his conviction.

RESPECTFULLY SUBMITTED this 3 day of October, 2011.

JONATHAN L. MEYER
Lewis County Prosecuting Attorney

BY: _____
J. BRADLEY MEAGHER, WSBA18685
Chief Criminal Deputy Prosecuting Attorney

Ex. 1

1 IN THE SUPERIOR COURT OF THE STATE OF WASHINGTON.

2 IN AND FOR THE COUNTY OF LEWIS

3

STATE OF WASHINGTON,	)	No. 04-1-00043-7
Plaintiff,	)	Court of Appeals No. 40333-1-II
vs.	)	
KENNETH SLERT,	)	
Defendant.	)	COPY

VERBATIM REPORT OF PROCEEDINGS
JANUARY 6, 2010

MOTION HEARING

APPEARANCES

For the Plaintiff: RICK CORDES
ATTORNEYS AT LAW
Olympia, Washington

For the Defendant: BRAD MEAGHER
STEVE SCOTT
DEPUTY PROSECUTORS
Chehalis, Washington

Presiding Judge: JAMES LAWLER
DEPARTMENT 2

CHERYL L. HENDRICKS, CCR NO. 2274
OFFICIAL COURT REPORTER
LEWIS COUNTY SUPERIOR COURT
CHEHALIS, WASHINGTON 98532
(360) 740-1171

1 *******

2

3 THE CLERK: Please rise.

4 THE COURT: Go ahead and be seated.

5 MR. MEAGHER: Thank you, Your Honor. This is State
6 versus Kenneth Slert 04-1-43-7. I'm Brad Meagher for the
7 State, co-counsel Steve Scott, for the defense Rick Cordes,
8 and Mr. Slert is here in custody.

9 This is on, quite frankly, at my request. And I
10 appreciate counsel's availability and The Court allowing us
11 to do this. Mr. Cordes and I have been discussing a
12 variety of matters, all of which at this point are somewhat
13 minor but important. I don't want to do them the day
14 before trial. I kind of want to get these things out in
15 front of The Court in enough time so if The Court has to
16 make rulings on them or if The Court wants briefing we can
17 do that well in advance of trial.

18 The most important thing for me right now is scheduling.
19 I have given to counsel, and I'll file with the clerk and
20 give a copy to The Court. . . If I may approach?

21 THE COURT: Yes.

22 MR. MEAGHER: I have an anticipated order of witnesses
23 scheduled for the trial which is at this point, according
24 to the omnibus order, the trial is scheduled to last seven
25 days including the defense case. What I'd like to queue in

1 on to The Court's intention is that the State would like
2 The Court to allow us Monday the 25th for pretrial motions,
3 voir dire, and opening statements, recognizing the fact
4 that it will probably take a little longer than usual but
5 maybe not all day. And what I don't want to be faced with
6 is The Court saying, well, where is your first witness at 3
7 o'clock on Monday. I would prefer to start the case in
8 terms of presenting testimony and evidence the following
9 day, Tuesday, because we have a number of witnesses that
10 are out of State, we have to fly them in, house them, and I
11 need a little more control about exactly when people are
12 going to be testifying. I, of course, can move officers
13 around.
14 But given the length of the trial and the fact the State
15 believes it's critical that its order of witnesses remain
16 as close to this order as possible, I wanted to raise to
17 The Court's attention, recognizing there might be a little
18 down time on Monday.
19 THE COURT: All right. Mr. Cordes?
20 MR. CORDES: Your Honor, two things, I guess. One, I'm
21 going to interject another issue here but it relates to
22 this. Mr. Meagher and I talked about the possibility of
23 having a juror questionnaire for the jurors with respect to
24 the publicity issue and what they've heard so that if it's
25 all in an open panel, somebody blurts out, "Oh, yeah, I

1 read about that case and that guy should be hanging," or
2 something like that, we don't want that to taint the panel
3 and because this case has been tried before, I know there
4 has been a lot of publicity. So I have proposed a draft of
5 a juror questionnaire. I know Mr. Meagher hasn't had a
6 chance to go through it. But the point is if we had
7 that -- that's frequently done in some counties in sex
8 cases -- and so if the jurors answer the questions a
9 certain way then those jurors would be voir dired
10 individually in chambers. And so that does add some time
11 to the voir dire process.
12 So getting back to Mr. Meagher's suggestion that we just
13 do at most voir dire and opening statements the first day,
14 I don't have a problem with that. I think that's probably
15 -- and looking at his list of witnesses, while I'm not
16 anywhere near ready to cross-examine any of these people
17 tomorrow, I can say that I think the day two is certainly
18 reasonable and I wouldn't anticipate any problem not
19 getting through those witnesses on that day. Day three is
20 another issue. I think we might have trouble getting
21 through all of those witnesses on that day. But it's
22 possible, as Mr. Meagher said, maybe Kenepah could be
23 Tuesday or one of them could drop down to Wednesday because
24 Wednesday's also fairly easy to get done. So my estimate
25 right now is we'd still get done in the four days at least

1 with the voir dire and the State's case.
2 THE COURT: Well, I don't have any problem with your day
3 one schedule.
4 MR. MEAGHER: Thank you, Your Honor.
5 THE COURT: After that we're going to be as flexible as
6 we can. If we can fit witnesses in, move things around,
7 we'll do that. I prefer not to have any downtime if we can
8 avoid it. We have officers to fill in. If we have an
9 hour, we'll do that. And if we don't get done with them,
10 for example, on day three, if we need to carry some over to
11 the next day we do that. So, but this gives us a fairly
12 good read on what we're intending.
13 MR. MEAGHER: Yes, Your Honor. I appreciate that.
14 MR. CORDES: I guess, Your Honor, the other thing is we
15 will have several witnesses and I'm not sure whether to try
16 to have any available for late day four or just start
17 completely on day five because I think this will probably
18 be pushing four days so. . .
19 THE COURT: Well, I think if we look at tentatively
20 scheduling them for day five with your witnesses but we'll
21 have to reevaluate that because if things start going
22 really fast for some reason, you know, we need to move some
23 things up because I don't want to sit, take a half day
24 break in the middle of the trial.
25 MR. CORDES: I understand.

1 THE COURT: Again, it's helpful to have this so we're at
2 least talking about these issues now and understanding what
3 the potential issues might be as far as scheduling goes.
4 MR. MEAGHER: Thank you, Your Honor. And I guess that
5 does bring me to the next issue that I have that I'd like
6 to address and that is defense witnesses. We don't have a
7 witness list yet. And while I anticipate some of the same
8 witnesses in the prior trials being called in this one, we
9 still don't have a witness list. And I don't expect
10 counsel to give me one now. But I would like The Court to
11 set a deadline if no other deadline than the mandatory
12 15-day discovery deadline in the omnibus order.
13 THE COURT: How soon are you going to have your witness
14 list put together?
15 MR. CORDES: Your Honor, it's somewhat problematic for a
16 couple reasons. One is that one of the witnesses that
17 testified in the previous trial, Ed Formoso, the
18 toxicologist, we can't find. I don't know where he is.
19 And so we're talking about having somebody else instead of
20 him testify to essentially the same thing. So I don't know
21 who that -- right now I can't tell you who that witness
22 would be if we still can't find Formoso.
23 Also, we just interviewed Douglas Shwenk, the -- for
24 lack of a better term, the jailhouse snitch, last week.
25 He's presently incarcerated in the correction center in

1 Shelton. And that has perhaps necessitated additional
2 witnesses that did not testify in the first trial.
3 So, with those two exceptions, I could probably come up
4 with a witness list fairly quickly.
5 THE COURT: Well, today is the 6th. Trial is scheduled
6 for the 25th. I would like -- my order's going to be that
7 you provide a witness list by Monday the 11th to
8 Mr. Meagher. And I understand that there's some -- there
9 may be a little bit of flex in that.
10 MR. CORDES: And I'll try to address that on the list
11 itself.
12 THE COURT: And I think that's going to be acceptable --
13 MR. MEAGHER: We just want to get started.
14 MR. CORDES: And if I could do that by e-mail Monday, by
15 5:00 Monday, that would be --
16 MR. MEAGHER: That's acceptable. We've had very good
17 e-mail communications --
18 MR. CORDES: Right.
19 MR. MEAGHER: -- which, quite frankly, has been helpful.
20 THE COURT: That will be the order.
21 MR. MEAGHER: The next issue that I would like The Court
22 to address: Counsel had an issue regarding the DCH we
23 supplied regarding the conviction record of Mr. Shwenk.
24 Now, the State's understanding is that we only have to
25 provide conviction data, not all other charges that Mr.

1 Shwenk has been charged with and that have been resolved
2 without a conviction. This is for impeachment purposes. I
3 can't understand why counsel would need, number one, or we
4 would have to supply a criminal history that does not
5 include convictions. Haven't done that in the past. But I
6 know counsel raised it with me yesterday and so I'd like
7 The Court to address that.
8 Our position would be we've given him his criminal
9 history which includes the convictions --
10 THE COURT: Which is what you would be using for
11 impeachment purposes.
12 MR. MEAGHER: He would be using for impeachment
13 purposes, yeah. But we redacted off the DCH all other
14 charges which have not resulted in convictions.
15 THE COURT: Mr. Cordes?
16 MR. CORDES: It's a little more problematic than that.
17 I can show The Court. I didn't bring an extra copy, but I
18 can show The Court the record that we got.
19 In addition to the normal impeachment problems we have
20 in this case, I mean, prior criminal history, in addition
21 to that he was in the Lewis County jail back in 2006 when
22 he testified -- or when he testified about conversations
23 that he'd supposedly had with Mr. Slert at that same time
24 period. You can see on there that it would appear that
25 both when he was in custody then and when he was in custody

1 recently in Yakima where he was convicted that part of that
2 has been redacted. And, for example, on one of those, it
3 may be both, we can't even determine what the cause number
4 was. But clearly if there -- there were uncharged crimes
5 in both instances that apparently were dismissed as part of
6 a deal, and so I think we're entitled to know what that is.
7 And most recently I just discovered in interviewing
8 Mr. Shwenk that he had sent Mr. Meagher a letter back in
9 October and that Mr. Meagher had actually responded to it
10 or had a letter to him. We didn't know anything about
11 that. But that letter -- those letters involved at least
12 some discussion about something that would affect his
13 sentence in Yakima. Again, I think we're entitled to know
14 what the other charges were.
15 We've gotten -- we got on to SCOMIS and got some stuff,
16 but that's so abbreviated it's not a lot of help. And so I
17 think that -- I agree with Mr. Meagher that, you know,
18 normally what we'd be entitled to is just the conviction
19 data. In this case where there's been some deals
20 apparently made or offered, then I think we're entitled to
21 a more complete record, particularly to get the cause
22 numbers, if nothing else. But I think that in this
23 particular circumstance we should be allowed the complete
24 criminal history.
25 That doesn't mean we can necessarily impeach him with

1 charges, but it may lead us also to additional information
2 that we can impeach him about. He's apparently a critical
3 witness for the State and I think that's obvious.
4 THE COURT: Mr. Meagher?
5 MR. MEAGHER: Well, we disclosed -- in fact, Mr. Cordes
6 asked for the letter that Mr. Shwenk sent me. I not only
7 gave him that, I gave him what I consider private
8 correspondence that I sent back to him because it
9 explained, number one, I wasn't making any deals. So, to
10 the extent he's talking about other deals out there, I
11 think he's got a record that reflects there aren't any,
12 but. . .
13 Normally I would have no problem getting a DCH to
14 counsel. But as The Court knows, these are governed by
15 privacy laws and things like that, so without an order from
16 The Court, I am reluctant to simply turn it over as part of
17 discovery.
18 THE COURT: I am going to order that it be turned over.
19 And I'm going to want a written order for these things
20 that --
21 MR. MEAGHER: That's what we're doing.
22 MR. COURT: -- I'm doing here today. But I do want that
23 disclosed. It's discovery. The fact that it may not be
24 admissible in court does not mean it is not discoverable.
25 It could lead to other admissible evidence. In this matter

1 I want it to be disclosed. The normal discovery rules will
2 apply --
3 MR. MEAGHER: Can I ask you. . . I'm sorry. I didn't
4 mean to interrupt.
5 THE COURT: The normal discovery rules will apply. This
6 is information that will go to Mr. Cordes and he'll be
7 required to keep that in his file and not disclose that to
8 anyone else either.
9 MR. MEAGHER: Including his client, Your Honor?
10 THE COURT: Correct. Well, his client can look at it
11 with him, --
12 MR. MEAGHER: Right.
13 THE COURT: -- but he's not to give him copies of it.
14 MR. CORDES: I won't, Your Honor.
15 MR. MEAGHER: Actually, I could provide that today if he
16 wants to hang around.
17 MR. CORDES: He may already have. What do you see up
18 there? Can I have that back?
19 THE COURT: Yes. Yes. You're just giving an unredacted
20 copy --
21 MR. MEAGHER: Yeah --
22 THE COURT: -- of the DCH?
23 MR. CORDES: I'm just saying that Mr. Slert may already
24 have a copy of this that he got at some other time so. . .
25 THE COURT: Well, with regards to this unredacted copy

1 that you're getting and as with all of the discovery,
2 you're not to give that to your client. You can review it
3 with him but not give it to him. I don't anticipate that
4 problem, but we have had that problem in another case so I
5 don't want that in this one.
6 MR. MEAGHER: Next issue I have is is there a time when
7 we can schedule a presentation of the ruling on the 3.5,
8 3.6, The Court's findings on that? I anticipate some
9 argument on that. I guess if I get it to counsel, our
10 proposed findings, and he doesn't have any argument, we can
11 strike it. But once again, these are sort of issues that
12 have been cropping up and I want to make sure they get
13 scheduled before the trial.
14 THE COURT: Well, we're running a little short of time.
15 But let's see, next week is not going to work. So we're
16 looking at Wednesday the 20th at 10:00 or 10:30 or 3:00 or
17 3:30, or Friday afternoon the 22nd at 1:30.
18 MR. MEAGHER: At counsel's convenience.
19 MR. CORDES: I would prefer, Your Honor, because I think
20 time is important on this in case we do have some
21 arguments, I would suggest Wednesday at 10:00 or 10:30 the
22 20th.
23 THE COURT: How about 10 o'clock? I'll schedule it for
24 an hour.
25 MR. MEAGHER: Very well. Thank you.

1 THE COURT: So 10:00 o'clock, Wednesday, January 20th,
2 Department 2.
3 MR. MEAGHER: The other thing I wanted to get out of the
4 way was jury instructions. I was wondering if The Court
5 would set a deadline prior to trial for jury instructions.
6 As The Court knows, on the second remand from The Court of
7 Appeals instructions were part of the big issue. And quite
8 frankly, the State and counsel and I'm sure The Court would
9 like to just make sure this all -- we did it right. So in
10 case there's any argument over the form of the
11 instructions, if The Court has time to ascertain those
12 problems and get them out of the way before trial starts.
13 The form of the instructions I think will make a difference
14 to both the State and the defense as to how they present
15 their case.
16 THE COURT: Well, again, it's going to be difficult for
17 me to rule on those things until I've heard the evidence,
18 but at least we can get the proposed instructions and
19 perhaps be narrowing some of those issues.
20 MR. CORDES: Your Honor, I usually submit the
21 instructions the day of trial which would be the 25th. I
22 think given the fact that this trial I think is clearly
23 going to go into the following week, I don't know that
24 doing it much sooner than that would make much difference,
25 quite frankly, but I'd certainly defer to The Court on

1 that.
2 THE COURT: Well, what I would like, perhaps the best
3 way to do this is if we could get -- if I could get them by
4 Friday the 22nd, that would be helpful to me and if you
5 could e-mail them to me so I have electronic copies of
6 them, that will make it easier so we can adjust things on
7 the fly.
8 MR. MEAGHER: Very well. Thank you. Let's see here.
9 Okay.
10 THE COURT: 22nd, January 22nd.
11 MR. MEAGHER: And then lastly, is The Court going to --
12 I like counsel's idea of a jury questionnaire but I'd like
13 an opportunity to submit our own and perhaps make
14 objections and have some argument regarding the form of the
15 questionnaire. Could we have that on the 20th as well,
16 Your Honor? I'll put one together and get it to counsel.
17 THE COURT: I think that's appropriate.
18 MR. MEAGHER: Is that enough time for the court
19 administrator to get them to the panels?
20 THE COURT: We don't do that until when they come in
21 anyway.
22 MR. MEAGHER: Oh, okay.
23 THE COURT: When they come in, we'll have them fill it
24 out that morning.
25 MR. MEAGHER: I see. Very well. Is the court going to

1 bring in two panels or. . . ?
2 THE COURT: We have one -- I'm not sure because one
3 panel has over 70 people on it. So we have a very large
4 panel already. I'll see. I don't know for sure.
5 MR. MEAGHER: Questionnaire too on the 20.
6 MR. CORDES: I guess the only issue with that is -- and
7 court and counsel will be more aware than I am -- and
8 that's the extent of the publicity, how much -- what The
9 Court and counsel anticipate how many people might have a
10 problem with --
11 THE COURT: I anticipate very few.
12 MR. CORDES: Okay. 70 would seem to be more than
13 enough, I would think.
14 THE COURT: Yeah. It's surprising to me how few
15 reactions we get to that kind of question.
16 MR. MEAGHER: Okay. I think. . . May I have a moment,
17 Your Honor?
18 THE COURT: Yes.
19 MR. MEAGHER: The last thing I was thinking, Your Honor,
20 if I can just throw this up to The Court, once again, in
21 order to save time for judicial economy, perhaps could we
22 premark exhibits the Friday before trial? I don't know if
23 that -- that may require the clerk of the court to handle
24 the exhibits over the weekend. But if we premark
25 everything, it's going to take a little time to mark it

1 all, and then we would have a list for myself and counsel
2 and The Court as to what exhibits are going to be offered
3 and in what order.
4 THE COURT: Yeah, I think that would be advisable. At
5 least we can get State's in because --
6 MR. MEAGHER: Yeah, I'm just talking about the State's
7 exhibits.
8 MR. CORDES: Yeah, that would be fine. I can't possibly
9 until I see what theirs are --
10 MR. MEAGHER: Certainly.
11 MR. CORDES: -- know what my mine may be.
12 THE COURT: That will be fine. You can work with the
13 clerk to find a time because right now I've got a drug
14 court termination at 2:30 for an hour and that's all I've
15 got Friday afternoon.
16 MR. MEAGHER: We'll organize it all and give her a nice
17 big list so we can do it quickly.
18 THE COURT: I'm sure that would be appreciated.
19 Anything else?
20 MR. MEAGHER: We're good. Once again, I appreciate The
21 Court and counsel's indulgence here. I want to get this
22 stuff off the dime before this hits the fan on Monday and
23 we're trying to deal with it all, so thank you.
24 THE COURT: Okay. Mr. Cordes, anything that we need to
25 bring up?

1 MR. CORDES: A couple things, Your Honor. I mentioned
2 to Mr. Meagher the possibility of maybe having a time set
3 aside other than Monday morning the 25th for motions in
4 limine. And maybe they could be on that Wednesday or
5 Friday or even when they have the confirmation hearing. I
6 don't know if that. . . I don't -- at this point I can't
7 advise The Court that I'm going to have two or 15, but --
8 and I don't know what the State's practice is on that but.
9 . .
10 THE COURT: Well, let's do this, let's add motions in
11 limine in on the 20th as well. If we have time, we'll deal
12 with it then. If we don't have time to do it, then we'll
13 fit it in maybe Friday if that's what we need.
14 MR. MEAGHER: Start with the 20th then?
15 THE COURT: Yes.
16 MR. CORDES: Right now we don't have anything scheduled
17 for Friday?
18 THE COURT: Correct.
19 MR. CORDES: Other than get the instructions in was that
20 Friday.
21 THE COURT: The instructions Friday, the State will get
22 their exhibits in to get them premarked but we're not going
23 to do that in open court, we don't need to worry that.
24 MR. CORDES: The only other thing, Your Honor, is I have
25 a few ex parte motions that I need to show The Court.

THE COURT: All right. Okay. Thank you very much, gentlemen. Is there anything else on the Slert matter?

MR. MEAGHER: No, Your Honor. We'll prepare our orders and present them.

THE COURT: All right.

C E R T I F I C A T E

STATE OF WASHINGTON)
) ss
COUNTY OF THURSTON)

I, CHERYL HENDRICKS, Notary Public in and for the State of Washington, residing at Olympia, do hereby certify:

That the foregoing Verbatim Report of Proceedings consisting of 19 pages was reported by me and reduced to typewriting by means of computer-aided transcription;

That said transcript is a full, true, and correct transcript of my shorthand notes of the proceedings heard before Judge James Lawler on the 6th day of January, 2010, at Lewis County Superior Court, Chehalis, Washington;

That I am not a relative or employee of counsel or to either of the parties herein or otherwise interested in said proceedings.

WITNESS MY HAND AND OFFICIAL SEAL this 19th day of September, 2011.

Cheryl L. Hendricks,
CCR NO. 2274

Ex. 2

1 IN THE SUPERIOR COURT OF THE STATE OF WASHINGTON.

2 IN AND FOR THE COUNTY OF LEWIS

3

STATE OF WASHINGTON,	)	No. 04-1-00043-7
Plaintiff,	)	Court of Appeals No. 40333-1-II
vs.	)	
KENNETH SLERT,	)	
Defendant.	)	

COPY

VERBATIM REPORT OF PROCEEDINGS
JANUARY 21, 2010

Motion Hearing

A P P E A R A N C E S

For the Plaintiff: RICK CORDES
ATTORNEYS AT LAW
Olympia, Washington

For the Defendant: BRAD MEAGHER
DEPUTY PROSECUTORS
Chehalis, Washington

Presiding Judge: JAMES LAWLER
DEPARTMENT 2

CHERYL L. HENDRICKS, CCR NO. 2274
OFFICIAL COURT REPORTER
LEWIS COUNTY SUPERIOR COURT
CHEHALIS, WASHINGTON 98532
(360) 740-1171

1 *******

2

3 MR. MEAGHER: First matter State versus Kenneth Slert,
4 04-1-43-7. Brad Meagher for the State. Rick Cordes for
5 the defendant who is here in custody.
6 THE COURT: Just wait till we get the hearing device.
7 All right. Can you hear now, Mr. Slert?
8 MR. SLERT: Yes.
9 MR. MEAGHER: Brad Meagher for the State. We're here to
10 confirm for trial. State is confirming. We contacted all
11 of our witnesses. We have plane tickets purchased and
12 travel arrangements made. So the State is ready to
13 proceed. There were a couple of last minute discovery
14 issues. Counsel and I resolved that today. So State's
15 ready to go.
16 THE COURT: Is this resolve relative to the defense
17 motions in limine?
18 MR. MEAGHER: What are you looking at, Your Honor?
19 THE COURT: There are some motions in limine.
20 MR. MEAGHER: Right. And those would be heard on
21 Monday, we anticipate that.
22 THE COURT: All right.
23 MR. MEAGHER: And we would still like our schedule where
24 we kind of do motions in limine, jury selection, and do
25 opening statements on Monday, question witnesses Tuesday.

1 THE COURT: What about the jury questionnaire? The
2 State had indicated it was going to have some other
3 proposed --
4 MR. MEAGHER: At this point -- at this point the State's
5 not going to have any additional questions on the
6 questionnaire. We made that decision. So if counsel has
7 some --
8 THE COURT: Those have been provided already. Is the
9 State going to have any input on that?
10 MR. MEAGHER: No.
11 THE COURT: So you don't have any objection to the
12 questionnaire as it is?
13 MR. MEAGHER: The only problem with the questionnaire
14 that I saw didn't have anything to do with the questions
15 but with that sort of initial statement that counsel had
16 which referenced a prior trial, I was a little concerned
17 about that, that perhaps we should have a ruling by The
18 Court that anything referencing a prior trial be referred
19 to as a prior proceeding. That's how it's commonly done.
20 That way the jury doesn't know there's another trial
21 sitting out there with another verdict.
22 THE COURT: I didn't look at that today, but my
23 recollection was that it did mention prior hearings. I
24 don't remember if it said prior trial.
25 MR. CORDES: I think what he's referring to, Your Honor,

1 it does say there have been a number of prior proceedings
2 in this case which were reported by the newspaper and the
3 radio since October of 2000.
4 MR. MEAGHER: The word prior proceeding I believe is
5 appropriate. Anything referencing a prior trial is not.
6 THE COURT: I agree with that and that will be the
7 ruling.
8 MR. CORDES: That's actually the subject of one of the
9 motions in limine as well so. . .
10 THE COURT: Okay. Well, we'll deal with the rest of
11 those on Monday. Defense is confirming for trial then?
12 MR. CORDES: Yes, Your Honor.
13 THE COURT: All right. We still have some time that I
14 reserved for tomorrow afternoon at 1:30. Is there any need
15 to keep that?
16 MR. MEAGHER: No. I'm still working on the findings for
17 3.5, 3.6. I think counsel and I can go through those.
18 Those aren't critical to have prior to actually starting
19 the trial. I have nothing further to bring before the
20 Court before Monday.
21 THE COURT: Anything further from the defense?
22 MR. CORDES: No, Your Honor. With respect to the 3.5
23 findings and conclusions, I prefer to have more time to
24 look at that anyway, so I wouldn't want to get it tomorrow
25 morning and have to decide on it tomorrow afternoon.

THE COURT: All right. The matter is confirmed for trial next week. I'm anticipating having both jury panels here. I'm not sure the number we're going to have but we'll have them both here. We'll start with -- and I don't know the number of the panel. It will be the panel that Judge Hunt did not have for his long trial.

MR. MEAGHER: I got a list from the clerk today. It said panel two had 56 names on it.

THE COURT: All right. And Mr. Cordes, if you could stop down at the Clerk's Office and see Ruth.

MR. CORDES: I got it here. And that's correct, it has 56.

MR. MEAGHER: 56.

MR. CORDES: So is The Court saying there may be more than this?

THE COURT: There may be additional people come in as well. But we're going to start with this list from one through 56. If we need additional, they'll be from the other panel.

MR. CORDES: Number one will still be number one?

THE COURT: Yes. The matter is confirmed.

C E R T I F I C A T E

STATE OF WASHINGTON)
) ss
COUNTY OF THURSTON)

I, CHERYL HENDRICKS, Notary Public in and for the State of Washington, residing at Olympia, do hereby certify:

That the foregoing Verbatim Report of Proceedings consisting of 6 pages was reported by me and reduced to typewriting by means of computer-aided transcription;

That said transcript is a full, true, and correct transcript of my shorthand notes of the proceedings heard before Judge James Lawler on the 21st day of January, 2010, at Lewis County Superior Court, Chehalis, Washington;

That I am not a relative or employee of counsel or to either of the parties herein or otherwise interested in said proceedings.

WITNESS MY HAND AND OFFICIAL SEAL this 19th day of September, 2011.

Cheryl L. Hendricks,
CCR NO. 2274

Ex. 3

JUROR QUESTIONNAIRE

This questionnaire is designed to obtain information from you with respect to your qualifications to sit as jurors in this case. You are under oath and must answer each question honestly and to the best your ability. You must answer these questions by yourself without consulting other jurors or anyone else. Do not ask anyone for help. This is not a test. There are no right and wrong answers. If you do not understand a question, please indicate such. Your own thoughts and experiences are what are important, so please be sure your answers are complete and helpful.

The information you provide is confidential and solely for the use of the judge and the lawyers during the jury selection process. After jury selection, the questionnaires will be sealed to protect your privacy, and will not be available for public inspection or use.

If any questions ask for information about which you are not entirely certain, simply give the best and most complete answer that you can. Where appropriate, you may write "not applicable."

1. Juror Name: _____ Badge # _____

Kenneth L. Slert is charged with one count of Murder in the Second Degree stemming from an incident that occurred up near Mt. Rainier National Park on 10/24/00 in Gifford Pinchot National Forest. There have been a number of prior proceedings in this case which were reported by both the newspapers and the radio, since October 2000 and most recently in late 2009. It is alleged that Mr. Slert shot and killed John Benson while both were hunting.

2. Have you heard or read about this case from any source whatsoever?

   Yes_____ No_____

3. If you have heard or read about this case, please summarize to the best of your ability what you have heard or read: _____

_____

_____

_____

4. Where did you read or hear about this case? _____

_____

5. Have you discussed this case with anyone? Yes_____ No_____

6. If you have discussed this case with anyone, please identify the reason this case was discussed, with whom it discussed and about what was discussed:_____

_____

_____

_____

7. What do you believe you know about this case? _____

_____

_____

_____

8. Have you formed an opinion or feeling about this case whatsoever?
Yes_____ No_____

9. If you have formed any such opinions or feelings, please indicate those opinions and/or beliefs:_____

_____

_____

_____

Thank you for your time in filling out this questionnaire.

LEWIS COUNTY PROSECUTOR

October 03, 2011 - 3:19 PM

Transmittal Letter

Document Uploaded: 403331-Supplemental Respondent's Brief.pdf

Case Name:

Court of Appeals Case Number: 40333-1

Designation of Clerk's Papers Supplemental Designation of Clerk's Papers

Statement of Arrangements

Motion: ____

Answer/Reply to Motion: ____

Brief: __Supplemental Respondent's__

Statement of Additional Authorities

Cost Bill

Objection to Cost Bill

Affidavit

Letter

Copy of Verbatim Report of Proceedings - No. of Volumes: ____
Hearing Date(s): _____

Personal Restraint Petition (PRP)

Response to Personal Restraint Petition

Reply to Response to Personal Restraint Petition

Other: _____

Sender Name: Teresa L Bryant - Email: **teri.bryant@lewiscountywa.gov**

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