

NO. 61053-8-I

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

In re Detention of Ricardo Capello,

STATE OF WASHINGTON,

Respondent,

v.

RICARDO CAPELLO,

Appellant.

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King County Prosecuting Attorney's Office
Criminal Division
Civil Commitment Unit

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

The Honorable Sharon S. Armstrong, Judge

REPLY BRIEF OF APPELLANT

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A. ARGUMENT IN REPLY

1. THE COURT'S CONDUCT OF PROCEEDINGS
SHIELDED FROM PUBLIC SCRUTINY REQUIRES
REVERSAL.

The State claims there was no open trial violation because the reference to the off-the-record chambers conference was made during the first trial, which ended in a mistrial, while Capello was committed only after the second trial. Brief of Respondent (BOR) at 13. This claim ignores the fact that the motions in limine from the first trial were repeated exactly in the second trial, and that the trial court made substantially the same rulings in each. CP 1928-31, 1991-95, 2032-36, 2037-40.

Thus, the State's claim that the second trial proceedings were shielded from the structural violations of the first is wrong. The impacts of the secret, off-the-record chambers proceedings in the first trial carried over into the second trial and a hung jury in the first trial does nothing to open the in-chambers proceedings to the clear light of public scrutiny.

The State also claims the written orders on the motions in limine constitute the entire proceeding. BOR at 13-14. That would be true if the trial deputy had not referenced in-chamber discussions "quite a bit" about at least one of those motions and framed the case based on those secret proceedings. 11RP 203-04; see Brief of Appellant (BOA) at 27-28.

The State asserts that “topics addressed informally in chambers are generally later discussed, as required, on the public record.” BOR at 14. While the State may have a good faith belief in this proposition, it cannot be substantiated without the actual discussions being held on the record in the public courtroom. The need to know exactly what is said in chambers is demonstrated by the State’s response to Capello’s evidentiary issues, where the State asserts the error was not preserved because the specific grounds claimed do not appear in the record. BOR at 32-34. An incomplete record of how a court exercised its discretion does not satisfy the constitutional requirement for “Justice in all cases [to be] administered openly[.]” Const. art. I, § 10.

a. Capello Has Standing To Challenge The Secret Proceedings Conducted In Chambers.

The State argues Capello does not have standing to challenge the closed in-chamber proceedings because article I, § 10 defines a right “held by the public and the press, not a party to the proceedings.” BOR at 16. Thus, according to the State, parties to civil actions lack standing to ensure the court administers justice openly. BOR at 16-18. In support of this rather bold denial of the right to the open administration of justice to all parties of civil actions, the State relies on Dreiling v. Jain.¹

¹ 151 Wn.2d 900, 93 P.3d 861 (2004).

Dreiling addressed a motion to terminate a shareholder derivative suit, where the Seattle Times intervened and moved to unseal the records. 151 Wn.2d at 904. The issue involved “when a motion to terminate a shareholders’ derivative suit and the documents filed in support thereof may be sealed.” Id. at 907 The Court noted blanket protective orders are disfavored and determined the appropriate analytical approach regarding individual documents was the Ishikawa² procedure. Id. at 911-15.

Analyzing the issue under article 1, § 10, the Court said “Our state constitution ‘entitles the public, and . . . the press is part of that public, to openly administered justice.’” Id. at 908.³ Thus, the State’s observation that Dreiling holds Article I, § 10 provides open and accessible court proceedings to the public and the press, is not unsupported. BOR at 16.

Nowhere does Dreiling suggest, however, that parties to the action are precluded from demanding the court fulfill this constitutional mandate. Rather, in its discussion of the Ishikawa factors, the Dreiling Court said, “Anyone present when the closure . . . motion is made must be given an opportunity to object[.]” Id. at 914. In light of this mandate, it is difficult to understand the State’s position here. How can a party to a proceeding be precluded from objecting to a closure motion when everyone else

² Seattle Times Co. v. Ishikawa, 97 Wn.2d 30, 640 P.2d 716 (1982).

³ Quoting Cohen v. Everett City Council, 85 Wn.2d 385, 388, 535 P.2d 801 (1975).

present has that standing? Of course, here there was no closure motion, just a casual mention after the fact of considerable discussion occurring off the record in private proceedings.

Similarly, the State's reliance on In re Detention of Campbell⁴ for the proposition that the right to public administration of justice in 71.09 RCW proceedings can be invoked solely by the press or public turns that case completely on its head. BOR at 17. Campbell claimed a violation of his privacy rights when the trial court kept the courtroom open and did not seal the file. Campbell, 139 Wn.2d at 355. Rejecting Campbell's privacy assertion, the Court ruled article I, § 10 required proceedings under RCW 71.09 be open to the public. Id. At no point did the Court suggest respondents to RCW 71.09 commitment proceedings lack standing to insist on strict compliance with the mandate for openly administered justice. Capello acquired standing to demand openly administered justice the moment the State filed its 71.09 RCW commitment motion against him. If anything, the Campbell Court's insistence on open proceedings supports Capello's position here. BOA at 23-24.

⁴ 139 Wn.2d 341, 986 P.2d 771 (1999), cert. denied by Campbell v. Washington, 531 U.S. 1125, 121 S. Ct. 880, 148 L. Ed. 2d 789 (2001).

The standing question, however, was more directly addressed by the concurrence in State v. Strode,⁵ a case cited but not discussed by the State. In Strode, Justice Fairhurst objected to the lead opinion's conflation of the defendant's right to a public trial under article I, § 22 with the right of the public and press to attend judicial proceedings under article I, § 10.

While I agree with the lead opinion's result in this case, I do not agree with its conflation of the rights of the defendant, the media, and the public. A defendant should not be able to assert the right of the public or the press in order to overturn his conviction when his own right to a public trial has been safeguarded as required under Bone-Club or has been waived.

Strode, 167 Wn.2d at 236.

This passage should not be read as a blanket exclusion of respondents at RCW 71.09 proceedings from standing under article I, § 10. Rather, it merely admonishes against permitting a second bite of the constitutional apple by a criminal defendant who has waived rights under article I, § 22, with either an explicit or functional Bone-Club⁶ analysis, and who has had the benefit of a closed hearing.

In a RCW 71.09 proceeding, there is only one provision involved, article I, § 10. In this analysis, the trial respondent who brought a motion

⁵ 167 Wn.2d 222, 231-36, 217 P.3d 310 (2009) (Fairhurst, J., concurring joined by Madsen, J.)

⁶ State v. Bone-Club, 128 Wn.2d 254, 906 P.2d 325 (1995).

for closure could not then come back on appeal and complain about the fact of the closure. Where the court conducts a closed hearing sua sponte without making its own motion before those assembled in the courtroom, including the respondent, and without Bone-Club analysis for the benefit of all assembled in the courtroom, again including the respondent, then the constitutional violation impacts the respondent in precisely the same manner as the public and media present. Their interests are not “conflated.” Rather, they are identical. Under such circumstances, our constitution requires that the respondent, as a “person” who is necessarily part of the “public,” be able to challenge the closure under article I, § 10.

In light of this, the State’s discussion of third-party standing is completely irrelevant. Of the cases the State cites regarding third-party standing,⁷ only State v. Wise⁸ addresses a violation of the open trial provisions of article I, § 10. Wise, however, largely ignored established

⁷ See BOR at 18-19 (citing Mearns v. Scharbach, 103 Wn. App. 498, 510-12, 12 P.3d 1048 (2000), rev. denied, 143 Wn.2d 1011 (2001) (third-party status to former wife to challenge constitutionality of insurance statute on behalf of her deceased former husband where estate administered by son who would benefit under that statute); Warth v. Seldin, 422 U.S. 490, 493, 95 S. Ct. 2197, 45 L. Ed. 2d 343 (1975) (housing advocates from one municipality lack standing to challenge zoning practices of neighboring municipality); United States v. De Gross, 960 F.2d 1433, 1436-37 (9th Cir. (Cal.) 1992) (government had standing to assert its own injury as well as the injury to challenged venireperson improperly excused because of gender); Ludwig v. Washington State Dept. of Retirement Systems, 131 Wn. App. 379, 384-85, 127 P.3d 781 (2006) (niece lacks standing to challenge application of pension statute where aunt acted to revoke non-spousal survivor benefit)).

⁸ 148 Wn. App. 425, 200 P.3d 266 (2009).

Washington Supreme Court precedent, which has consistently held conducting of voir dire, at issue in Wise, in violation of the open trial mandate is structural error requiring a new trial. Compare Wise, 148 Wn. App. at 438-441 with BOA at 22-27 (and cases cited therein). In addition, the most recent pronouncement on public trials from the United States Supreme Court completely undermines Wise.

In Presley v. Georgia,⁹ the Court rejected the state supreme court's assertion that it had not provided clear guidance regarding whether a court must, sua sponte, advance its own alternatives to closure. Presley, 130 S. Ct. at 723. The state court ruled a defendant is obliged to present the court with alternatives to closure he wished the court to consider. Id. Reviewing its public access cases, the Supreme Court said its pronouncements on this issue were explicit – trial courts are required to consider alternatives to closure even when they are not offered by the parties. Id. at 724-25. “The public has a right to be present whether or not any party has asserted the right.” Id. The Court acknowledged circumstances may arise when closure of the voir dire might be appropriate, but “even assuming, arguendo, that the trial court had an overriding interest in closing voir dire, it was still incumbent upon it to

⁹ ___ U.S. ___, 130 S. Ct. 721, ___ L. Ed. 2d ___ (2010).

consider all reasonable alternatives to closure. It did not, and that is all this Court needs to decide.” Id. at 725.

Presley effectively overruled Wise’s requirements of a closure motion to trigger the Ishikawa/Bone-Club analysis and a showing of prejudice. Presley’s clear statement a trial court must consider alternatives to closure even when they are not offered by the parties, rendering Wise’s discussion about third-party standing a nullity. Compare Presley, 130 S. Ct. at 725 (“trial courts are required to consider alternatives to closure even when not offered by the parties”(emphasis added)) with Wise, 148 Wn. App. at 441-43 (discussing article I, § 10 and third-party standing). Presley controls here and thus the standing question is irrelevant.

The State also cites to State v. Momah¹⁰ in support of its assertion that Capello somehow waived this public trial violation by participating in the conference. BOR at 19-20. Momah, however, shows that such waiver analysis requires a much greater showing of a party’s active and explicit support of the closure than occurred here. Momah, 167 Wn.2d at 155-56 (failure to object does not preclude raising trial closure for the first time on appeal). Rather, waiver of the public trial right requires affirmatively advocating for the closure, arguing for its expansion, and benefiting from it. Id. at 156; see also, Strode, 167 Wn.2d at 234 (Fairhurst, J.,

concurring) (discussing Momah: failure to object does not waive public trial right; record must show intentional relinquishment of known right).

The State's waiver argument, however, is interesting for two reasons. First, the State here acknowledges there was at least one off the record chambers conference held outside of public scrutiny. Second, the State presumes, without supporting citation to the record, that Capello, in person or by counsel, was present at and benefitted from the secret chamber hearing. BOR at 19.

One of the evils inherent to secret chambers hearings is the lack of record as to who attended as well as what was said. Such is the case here. Open administration of justice is a constitutional mandate, which directly scourges such evils. The trial court violated that mandate when it conducted its hearing outside of public scrutiny.

The State's reliance on King v. Olympic Pipeline Co.,¹¹ for the proposition that information derived from pretrial discovery is not a public component of a civil trial, is also misplaced. BOR at 16 (citing King, 104 Wn. App. at 370). Capello has not sought public disclosure of pretrial discovery. Rather, the basis for the open trial issue here is that proceedings related to this case were discussed in closed chambers

¹⁰ 167 Wn.2d 140, 219 P.3d 321 (2009).

¹¹ 143 Wn.2d 1012 (2001).

sessions off the record. BOA at 22-30. As far as the record permits, it appears nothing involved in those discussions implicated pretrial discovery. If any such concerns would have required closing the proceedings disclosed by the trial deputy, there is a simple and well delineated process for protecting the contents of discovery – the Ishikawa/Bone-Club colloquy. That colloquy never happened, and the result is a structural error requiring a new trial.

b. The Secret Proceedings Addressed Substantive Issues.

The State next argues without authority that the in-chambers conferences were not “‘proceedings’ that implicate the public trial right.” BOR at 20. The State claims “brief contacts in chambers” are not “proceedings” or “hearings.” Id. The State is wrong. At least one motion in limine was addressed and a closure was effected by conducting the hearing in chambers.

The Washington Supreme Court has determined the open administration of justice mandate of article I, § 10 cannot be limited to dispositive motions and hearings.

[T]he right is not concerned with merely whether our courts are generating legally sound results. Rather, we have interpreted this constitutional mandate as a means by which the public’s trust and confidence in our entire judicial

system may be strengthened and maintained. [Citation omitted.] To accomplish such an ideal, the public must – absent any overriding interest – be afforded the ability to witness the complete judicial proceeding, including all records the court has considered in making any ruling, whether “dispositive” or not. There is good reason to diverge from federal open courts jurisprudence where appropriate. While our state constitution has an explicit open courts provision, there is no such counterpart in the federal constitution, and much of the federal right is grounded in federal common law.

Rufer v. Abbott Laboratories, 154 Wn.2d 530, 114 P.3d 1182 (2005) (emphasis in original) (addressing challenge to unsealing documents used in pretrial motions); see also State v. Heath, 150 Wn. App. 121, 127-29, 206 P.3d 712 (2009) (conducting portions of pre-trial hearing on motions in limine without Bone-Club analysis requires reversal).

The State attempts to bolster its position by reference to cases, which address due process and Sixth Amendment¹² rights to be present during trial proceedings. BOR at 21-23. Because most of these cases do not address the right to a public trial in any way, they are not applicable here. The State relies on In re Personal Restraint of Lord¹³ to define artificial limits on the nature of proceedings covered by the open and

¹² The Sixth Amendment provides in part, “In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the state and district wherein the crime shall have been committed, . . . [and] to be confronted with the witnesses against him[.]”

¹³ 123 Wn.2d 296, 868 P.2d 835 (1994).

public trial guarantees, and the source of the State's confusion regarding what proceedings are subject to the open public trial rights can be found in United States v. Gagnon,¹⁴ which was relied upon by the Lord Court.¹⁵ In Gagnon, the Court addressed a Fifth Amendment¹⁶ due process claim regarding an in-chambers discussion between the judge, one of the defense counsel, and a juror who had noticed one of the defendants drawing portraits of the jurors. Gagnon, 470 U.S. at 523-24. Explaining why the right to be present was not violated by this in camera discussion, the Court explained:

The constitutional right to presence is rooted to a large extent in the Confrontation Clause of the Sixth Amendment, but we have recognized that this right is protected by the Due Process Clause in some situations where the defendant is not actually confronting witnesses or evidence against him. . . . The presence of a defendant is a condition of due process to the extent that a fair and just hearing would be thwarted by his absence, and to that extent only. . . . [T]he exclusion of a defendant from a trial proceeding should be considered in light of the whole record.

Gagnon, 470 U.S. at 526-27 (citations omitted).

¹⁴ 470 U.S. 522, 105 S. Ct. 1482, 84 L. Ed. 2d 486 (1985).

¹⁵ 123 Wn.2d at 306.

¹⁶ The Fifth Amendment provides in part, "No person . . . shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law[.]"

Thus, unlike the right to an open public trial, the right to be present is intimately identified with the right of confrontation, and may be limited according to its origins. The right to an open and public trial in Washington, however, is not so constrained. “The public trial right protected by both our state and federal constitutions is designed to ‘ensure a fair trial, to remind the officers of the court of the importance of their functions, to encourage witnesses to come forward, and to discourage perjury.’” Strode, 167 Wn.2d at 226.

Indeed, the central aim of any criminal proceeding must be to try the accused fairly. Thus, the requirement of a public trial is primarily for the benefit of the accused: that the public may see he is fairly dealt with and not unjustly condemned and that the presence of interested spectators may keep his triers keenly alive to a sense of the responsibility and to the importance of their functions.

Momah, 167 Wn.2d at 148.

Despite the obvious distinction between the right to be present and the open trial right, this Court adapted a right-to-presence analysis to an open public trial issue in State v. Rivera.¹⁷ See BOR at 23. At issue in Rivera was court closure to deal with a juror’s complaint about the personal hygiene of a fellow juror, obviously a ministerial matter. Rivera, 108 Wn. App. at 652. A case so obviously on the margins of the issue should not be read to close legal argument from public scrutiny.

The State's relies on State v. Sadler¹⁸ to exclude legal argument from the open administration of justice mandate. BOR at 22-23. In Sadler, the Court addressed the closure of a Batson¹⁹ hearing, which the Court said "involves both factual and credibility determinations and is relevant to the fairness and integrity of the judicial process as a whole." Sadler, 147 Wn. App. at 118. Thus, Sadler falls in the center of the open trial right and does not define the line between ministerial judicial operations and those proceedings that require the court to perform a Bone-Club analysis before operating outside of public scrutiny. Its assertion that hearings on legal issues are not subject to the open administration of justice mandate is dicta.

More instructive on the status of legal argument under article I, § 10 are cases like Rufer and Dreiling, which address the presumption under that provision that papers filed in civil motions be open to the public view. See Rufer, 154 Wn.2d at 541-44 (heightened presumption of openness applicable to trials applies equally to dispositive motions in civil cases; Ishikawa factors must be addressed when considering whether to seal attached documents); Dreiling, 151 Wn.2d at 908-10, 913-15 (previously

¹⁷ 108 Wn. App. 645, 32 P.3d 292 (2001).

¹⁸ 147 Wn. App. 97, 193 P.3d 1108 (2008).

¹⁹ Batson v. Kentucky, 476 U.S. 79, 106 S. Ct. 1712, 90 L. Ed. 2d 69 (1986).

sealed discovery attached to dispositive motions are presumptively open to the public; Ishikawa provides appropriate analysis for motions to seal). Both cases addressed whether previously sealed pretrial discovery would remain under seal if attached to dispositive motions. What underlies this issue, however, is the presumption that written legal motions, composed primarily of legal arguments, are open to the public. In regard to written legal arguments placed before the court, there is no question that those legal arguments are presumed open to the public.

The State, however, would hold legal argument falls outside the mandate for openly administered justice. BOR at 22-23. If the State is correct, however, and oral legal argument is categorically excluded from the open administration of justice mandate, why should the written legal motions in civil and criminal trials be presumptively open to public scrutiny? Carried to its logical conclusion, the State's position would exempt all appellate argument, which is limited to legal issues, from public scrutiny under article I, § 10.

The interests protected by the open administration of justice requirement serve the significant social and judicial functions of permitting the public to ascertain whether the defendant has been fairly dealt with and of keeping the triers focused on their responsibilities.

Momah, 167 Wn.2d at 148. “[P]ublic trials embody a view of human nature, true as a general rule, that judges, lawyers, witnesses, and jurors will perform their respective functions more responsibly in an open court than in secret proceedings.” Strode, 167 Wn.2d at 226 (citing Waller v. Georgia, 467 U.S. 39, 46 n.4, 104 S. Ct. 2210, 81 L. Ed. 2d 31 (1984) (internal quotations omitted)). These social and judicial functions cannot be fulfilled if the right to a public trial is constrained by the defendant’s right to be present.

The right to be present and the right to have an open and public trial are distinct rights, derived from different traditions of analysis and, to some extent, serving different purposes. This Court should distinguish these rights and recognize the broader, structural justice interests served by the open administration of justice.

The State also contends the framers of the state constitution intended judges to be able to perform all judicial acts not requiring a trial by jury in their chambers. See BOR at 24 (citing Peterson v. Dillon, 27 Wash. 78, 67 P. 397 (1901)). The Peterson Court, addressing an attack on the jurisdiction of the court commissioners, however, does not provide unequivocal support for this position:

The courts established by the constitution were to supersede the territorial courts. The men who framed the constitution were familiar with the powers then exercised

by the judges at chambers, and in using that term it is fair to infer that they had reference to such powers. Winsor v. Bridges (Wash.) 64 P. 780. Under the law as it then existed, judges of territorial courts could at chambers entertain, try, hear, and determine all actions, causes, motions, demurrers, and other matters not requiring a trial by jury. Section 2138, Code 1881. However, even if this construction is not correct, we think the legislature under the provisions of section 23, art. 4 . . . had the power to provide by law for the entry of defaults and judgments thereon by court commissioner[.]

Peterson, 27 Wash. at 83-84 (citing Winsor v. Bridges, 24 Wash. 540, 64 P. 780 (1901)).

The Winsor Court, discussing the relationship between the territorial judicial powers and the provisions of the new state constitution observed, “The constitution expressly continues in force all laws of the territory which are not repugnant to the constitution.” Winsor, 24 Wash. at 544-45. Thus, the Court in Rauch v. Chapman²⁰ found itself interpreting the new constitution to balance the limitations on the taxing authorities of counties against the “elementary and indestructible” functions of government:

There is much controversy at times among our statesmen as to the necessary and proper limitations upon the powers of government, both state and municipal, but all are agreed that certain necessary fundamental functions of government must always be expressed and exercised. The protection of life, liberty, and property, the conservation of peace and good order in the state cannot remain in abeyance. These

²⁰ 16 Wash. 568, 48 P.253 (1897).

functions of government are elementary and indestructible. The constitutional convention which framed, and the sovereign people who adopted, the republican form of government for the state of Washington, had these known principles in mind. Section 10 of the declaration of rights prescribes: “Justice in all cases shall be administered openly and without unnecessary delay[.]”

Rauch, 16 Wash. at 574-75.

In this light, the statutory provisions upheld in Peterson may well be repugnant to the open administration of justice under article I, § 10. That question, however, was not before the Peterson Court.

In like manner, the State’s other early case, Meisenheimer v. Meisenheimer,²¹ involved a challenge to the court’s jurisdiction to hear motions while sitting in chambers. BOR at 24. In that case both parties requested a judge from Whitman County to travel to Spokane to hear a case on file in Douglas County. Meisenheimer, 55 Wash. at 35-36. While the judge’s presence in the Spokane chambers in Meisenheimer has a certain similarity to the closure effected in Momah, the Meisenheimer Court was not asked to address a violation of article I, § 10’s open administration of justice mandate.

Finally, the State relies on State v. Collins²² for the proposition that Capello’s Bone-Club challenge was not preserved for appeal. BOR at 24-

²¹ 55 Wash. 32, 104 P. 159 (1909).

²² 50 Wn.2d 740, 314 P.2d 660 (1957).

28. The State contends Collins is binding precedent. BOR at 19-20. Collins, however, was decided 25 years before Ishikawa and 38 years before Bone-Club. While Collins has never been explicitly overturned, Bone-Club and its progeny have gutted its waiver analysis.

Addressing the same argument as the State presents here under Collins, the Bone-Club Court said, “We also dismiss the State’s argument that Defendant’s failure to object freed the trial court from the strictures of the closure requirements.” Id. at 261. Instead, the Court said, “The motion to close, not Defendant’s objection, triggered the trial court’s duty to perform the weighing procedure.” Id. This duty is triggered even when that motion originates sua sponte with the trial court. See Presley, 130 S. Ct. at 725 (it is incumbent upon the court to consider all reasonable alternatives to closure); Heath, 150 Wn. App. at 128 (trial court’s sua sponte decision to close triggers need for Bone-Club analysis).

c. Violations Of The Constitutional Mandate For Open Proceedings Are Structural Errors; A New Trial Is Required.

The State argues the closure here should be evaluated under a de minimis standard. BOR at 28 (citing State v. Easterling, 157 Wn.2d 167, 181-82, 183-85, 137 P.3d 825 (2006)). In essence, the State’s argument mirrors that of Justice Madsen’s concurrence in Easterling. BOR at 28-30.

That position was, however, rejected by the majority. 157 Wn.2d at 180-81. “Although the State and Justice Madsen correctly note that other jurisdictions have determined that improper courtroom closures may not necessarily violate a defendant’s public trial right, a majority of this court has never found a public trial right violation to be de minimis.” Id. at 180.

The majority noted a distinction between cases decided under the Sixth Amendment and Washington cases decided under the open administration of justice requirement of article I, § 10. Id. at 180 n.12. The majority also noted there would be no need for a triviality analysis if the Bone-Club guidelines were correctly applied in the first place. Id.

Writing separately, Justice Chambers, joined by Justices Sanders and Owens, addressed Justice Madsen’s de minimis argument;

I completely agree with Justice Madsen that there may be a case, there may be many cases, where substantive justice to the parties was done behind locked doors. Defendants themselves might even want the courtrooms closed for many rational reasons. But whether or not the defendant got due process of law is a completely different question than whether our article I, section 10 was violated. While a defendant may not herself be harmed by a hearing in a closed courtroom, there is no case where the harm to the principle of openness, as enshrined in our state constitution, can properly be described as de minimis. Thus, I cannot agree that there could ever be a proper exception to the principle that a courtroom may be closed without a proper hearing and order.

Easterling, 157 Wn.2d at 186 (Chambers, J. concurring); see also Strode, 167 Wn.2d at 230 (Alexander, J. lead opinion) (“This court, however, has never found a public trial right violation to be [trivial or] de minimis.”).

The State’s argument on de minimis violations invites this Court to ignore clear instruction from the Supreme Court, and therefore should be declined. Open court violations are structural errors for which reversal is required.

2. THE EVIDENTIARY ERRORS REQUIRE REVERSAL

a. Baker’s Hearsay And Opinion On Capello’s Mental State.

The State claims Capello’s motions in limine were insufficient to preserve his challenge to the court’s admission of Geri Baker’s hearsay statements to the Honolulu police officer. BOR at 32-34; BOA at 30-34. In support, the State relies on State v. Weber²³ That reliance is misplaced.

In Weber, the defense motion in limine to exclude evidence was granted, but no objection was heard when the prosecutor subsequently violated the court’s order and inquired about that evidence. Weber, 159 Wn.2d at 270-71. The Court distinguished Weber from cases where the motion to exclude is denied. “[A] party losing a motion to exclude

²³ 159 Wn.2d 252, 272, 149 P.3d 646 (2006).

evidence has a standing objection to the admission of that evidence at trial unless instructed by the court to continue to object.” Id. at 271.

Here, Capello opposed the State's motion to admit Baker's statements to police, arguing in part that the statement was not an excited utterance. CP 956-58; 1RP 103-07. While the court initially reserved ruling, and did not state its reasons on the record, the State's motion to admit was granted. CP 1930, 2039. Thus, Capello as the losing party had a standing objection to the admission of that testimony. Weber, 159 Wn.2d at 271.

While the State is correct that Capello did not specifically object to Baker's hearsay statements as lay opinion on the ultimate issue, this Court has discretion to review the issue. RAP 2.5(a) (“The appellate court may refuse to review any claim of error which was not raised in the trial court.” (emphasis added)). In this light, RAP 1.2(a) directs, “These rules will be liberally interpreted to promote justice and facilitate the decision of cases on the merits. Cases and issues will not be determined on the basis of compliance or noncompliance with these rules except in compelling circumstances where justice demands[.]”

Should this Court decide not to address Baker's lay opinion as to the ultimate issue, Capello asks this Court to keep the character of this evidence in mind when assessing its prejudicial effect.

b. Prejudicial Victim Impact Evidence.

In regard to the victim impact evidence, the State says no citation was given for the court's ruling that the urination in the mouth was relevant only to the question of identification. BOR at 36. While the State misstates the issue presented, the citations to the record on Capello's issue can be found in the opening brief. BOA at 37-38.

Contrary to the State's characterization, BOR at 36-38, Capello has not assigned error to the admission of testimony regarding the rapist urinating in Willman's mouth. BOA at 1. Further, that testimony was not excluded. What was excluded was emotional testimony of the impact this act had on her. CP 1993, 2034; 1RP 134-39. That victim impact testimony was limited to explain why she delayed reporting the incident to police. CP 1993, 2034; 1RP 134-39.

As discussed in the opening brief, timely objections on the specific grounds of prejudicial victim impact were made below. BOA at 38-42. The court erred when it overruled that initial objection, and the court's sustaining of the subsequent objection to the same line of questioning failed to overcome the prejudice inherent in the jury hearing about the emotional impact this act had on Willman.

Each of the erroneous evidentiary rulings was prejudicial and each warrants reversal. In combination, the prejudice is magnified. This Court should reverse.

D. CONCLUSION

For the reasons stated above, and in the opening brief, this Court should reverse and remand for a new trial.

DATED this 27th day of May 2010.

Respectfully submitted,

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Attorneys for Appellant

**IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON
DIVISION ONE**

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|---|---|-------------------|
| In re the Detention of Richard Capello, |) | |
| |) | |
| STATE OF WASHINGTON, |) | |
| |) | |
| Respondent, |) | |
| |) | |
| v. |) | COA NO. 61053-8-I |
| |) | |
| RICARDO CAPELLO, |) | |
| |) | |
| Appellant. |) | |

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 27TH DAY OF MAY, 2010, I CAUSED A TRUE AND CORRECT COPY OF THE **REPLY BRIEF OF APPELLANT** TO BE SERVED ON THE PARTY / PARTIES DESIGNATED BELOW BY DEPOSITING SAID DOCUMENT IN THE UNITED STATES MAIL.

[X] RICHARD CAPELLO
SPECIAL COMMITMENT CENTER
P.O. BOX 88600
STEILACOOM, WA 98388

SIGNED IN SEATTLE WASHINGTON, THIS 27TH DAY OF MAY, 2010.

x *Patrick Mayovsky*