

No. 62459-8-1

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

STATE OF WASHINGTON,

Respondent,

v.

TONY SMITH,

Appellant.

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

The Honorable George Mattson

BRIEF OF APPELLANT

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A. SUMMARY OF ARGUMENT

Tony Smith appeals his convictions for three counts of first degree murder with accompanying firearm enhancements. Mr. Smith contends the trial court violated his rights to an impartial and unanimous jury by improperly excusing a deliberating juror and seating an alternate. Mr. Smith also contends his right to a public trial and right to be present as well as the public's right to open proceedings was violated when the court closed the courtroom without making the required findings prior to closing the courtroom.

B. ASSIGNMENTS OF ERROR

1. The trial court deprived Mr. Smith of his federal and state constitutional rights to an impartial and unanimous jury by dismissing a deliberating juror.

2. In violation of the right to a public trial secured by the Sixth Amendment of the United States Constitution and article I, sections 10 and 22 of the Washington Constitution, the trial court erred in closing courtroom proceedings and excluding Mr. Smith.

3. The court violated Mr. Smith's right under Sixth Amendment to the United States Constitution to be present when it closed the courtroom without analyzing the *Bone-Club*¹ factors.

C. ISSUES PERTAINING TO ASSIGNMENTS OF ERROR

1. Because of the danger of violating a defendant's rights to a unanimous and impartial jury, before excusing a deliberating juror who has been accused of refusing to deliberate in accordance with the court's instructions, the court must first reinstruct the jury as a whole, and then only if such reinstruction is ineffective may the trial court engage in further inquiry of the juror. In the present case, when confronted with the allegation that a juror was not deliberating in accordance with the court's instructions, the trial court did not reinstruct the jury and instead proceeded to question and ultimately dismiss the juror. Did the court err?

2. The right to a public trial is guaranteed by both the Sixth Amendment of the United States Constitution and article I, sections 10 and 22 of the Washington Constitution. The right provides the accused a public trial and also provides the public a right of access to trial proceedings. To protect the right, the trial court seeking to close all or part of a trial must weigh five requirements set forth by

¹ *State v. Bone-Club*, 128 Wn.2d 254, 906 P.2d 325 (1995).

the Washington Supreme Court in *State v. Bone-Club*, and enter specific findings justifying the closure order. A violation of the public trial right is a structural error. Where the trial judge closed the courtroom and specifically excluded Mr. Smith while it discussed the disclosure of records by a defense expert with the expert and Mr. Smith's attorney without conducting the required *Bone-Club* analysis, must this Court reverse Mr. Smith's convictions for a violation of the right to a public trial?

3. The Sixth Amendment of the United States Constitution provides that the defendant has a right to be present during his trial. Here, while in the middle of the trial, the trial court closed the courtroom to the public and specifically excluded Mr. Smith while it discussed whether the defense was required to disclose to the State records prepared by a defense expert. Did Mr. Smith have a right to be present during this hearing, and did his exclusion violate his right to be present resulting in the reversal of his convictions?

D. STATEMENT OF THE CASE

Tony Smith was charged with three counts of first degree murder under the alternative prongs of premeditated murder or murder during the course of a robbery for killing Francisco Rojas, Ruben Fuentes, and Edgar Santos. CP 1-12. Each count also

contained an enhancement for being armed with a firearm while committing the alleged offenses. CP 1-12. Following a jury trial, Mr. Smith was convicted of the three counts of first degree murder: all three under the alternative means of during the course of a robbery and only one under the alternative means of premeditation. CP 774, 778, 782. The three enhancement allegations were also found by the jury. CP 777, 781, 785.

E. ARGUMENT

1. THE COURT'S DISMISSAL OF JUROR 8 DURING DELIBERATIONS VIOLATED MR. SMITH'S CONSTITUTIONALLY PROTECTED RIGHT TO A FAIR AND IMPARTIAL JURY

The jury deliberated for approximately two days when the court received a note from the jury foreperson, Juror 8, which stated:

Sorry for any undue burden this may cause the court, I ask (beg!) that I be excused from this jury. For reasoning that is beyond my control, I do not – no – I know that I will never be able to reach a verdict [sic] in this case. No amount of instructions to return to this jury and come to a consensus will ever happen. I know that you don't know me personally, but please be advised that my word (which I've given freely from the beginning of this case) is bond [sic] and my request is justifiable and true and correct. In the end this action is to ensure that my actions are totally to ensure that the defendant in this case gets the best and the fairest that I can give in this case. Please replace me with an alternate.

CP 772.

The defense urged the court to ask Juror 8 in the presence of the other jurors, if the jury continued to deliberate, whether there was a reasonable possibility of a verdict. 5/28/08RP 1-3.

Conversely, the State urged the court to inquire of the juror whether she was unable or unwilling to continue to deliberate. 5/28/08RP 3-

4. The defense vehemently objected to any individual questioning of Juror 8 regarding why she could not, or would not, reach a decision, arguing the inquiry would delve into the deliberative process of the jury, an inquiry which courts have consistently barred. 5/28/08RP 12-13.

The court took a middle ground and questioned Juror 8 separate from the other members of the jury:

Judge: Okay, your message was pretty long, but the core of the message that we're concerned about is that you say I asked and in parenthesis begged that I be excused from this jury for reasoning that is beyond my control. I do not, no, I know that I will never be able to reach a verdict in this case. I don't really actually want to know precisely what the, what is meant by reasoning beyond your control but I'm going to ask a more narrow question. And the question is through up [sic] throughout this process and up until this point have you been able and moreover in the future do you continue to be able to follow the Court's instructions that were given to you?

[Juror 8]: No.

5/28/08RP 28-29.

Over defense objection, the court dismissed Juror 8 and replaced her with an alternate. 5/28/08RP 39, 5/29/08RP 1-2. Deliberations began anew, and later that day, the jury returned with guilty verdicts on all three counts. CP 774-85; 5/29/08RP 7-8.

Post-trial, Mr. Smith moved for a new trial based upon among other reasons, the court's dismissal of Juror 8 over his objections. CP 790-817; 6/9/08RP 20, 7/231/08RP 5. The trial court held a hearing at which it questioned Juror 8 further about the note that she wrote seeking to be replaced as a juror. 6/12/08RP 8-18. In addition, the State introduced affidavits from other members of the jury addressing jury deliberations and Juror 8's conduct during those deliberations. CP 96-80. In a written memorandum decision the trial court denied the motion, ruling that its dismissal of Juror 8 was the correct decision and its decision not to question her further during the May 28, 2008, hearing was similarly correct because to do so would have intruded into the jury's deliberative process. CP 994-95, 1002.

a. Mr. Smith had the constitutional right to an fair, impartial and unanimous jury. The Sixth and Fourteenth Amendments to the United States Constitution and Article I, §§ 3, 22 of the Washington Constitution guarantee a defendant the right to an impartial jury. *Wainwright v. Witt*, 469 U.S. 412, 429-30, 105 S.Ct. 844, 83 L.Ed.2d 841 (1985); *Irvin v. Dowd*, 366 U.S. 717, 722, 81 S.Ct. 1639, 1642, 6 L.Ed.2d 751 (1961); *State v. Davis*, 141 Wn.2d 798, 824-25, 10 P.3d 977 (2000). Moreover, Article I, § 21 of the Washington Constitution requires a unanimous verdict in criminal cases. *State v. Ortega-Martinez*, 124 Wn.2d 702, 707, 881 P.2d 231 (1994).

To protect these rights RCW 2.36.110 and CrR 6.5 “place a ‘continuous obligation’ on the trial court to investigate allegations of juror unfitness and to excuse jurors who are found to be unfit, even if they are already deliberating.” *State v. Elmore*, 155 Wn.2d 758, 773, 123 P.3d 72 (2005). RCW 2.36.110 which provides:

It shall be the duty of a judge to excuse from further jury service any juror, who in the opinion of the judge, has manifested unfitness as a juror, by reason of bias, prejudice, indifference, inattention or any physical or mental defect or by reason of conduct or practices incompatible with proper and efficient jury service.

In addition, CrR 6.5 provides that “[i]f at any time before submission of the case to the jury a juror is found unable to perform the duties the court shall order the juror discharged.”

But aside from its duty to monitor juror’s compliance and ability to comply with the court’s instructions, the trial court “must also take care not to violate the defendant’s right to a unanimous jury verdict by granting a dismissal that stems from the juror’s doubts about the sufficiency of the evidence.” *Elmore*, 155 Wn.2d at 771, citing *United States v. Symington*, 195 F.3d 1080, 1085 (9th Cir. 1999). Moreover, dismissal of a holdout juror also presents the risk of violating the defendant’s right to an impartial jury. *Elmore* explained “If a holdout juror is dismissed in a way that implies his dismissal stems from his views on the merits of the case, then the reconstituted jury may be left with the impression that the trial judge prefers a guilty verdict.” *Elmore*, 155 Wn.2d at 772.

The trial court has broad discretion in determining whether a juror remains fit to continue serving on a jury. *Elmore*, 155 Wn.2d at 773, citing *State v. Jordan*, 103 Wn.App. 221, 229, 11 P.3d 866 (2000). But, a deliberating juror who is accused of failing to follow the law *cannot* be dismissed when there is a *reasonable possibility* that the juror’s views stem from an evaluation of the sufficiency of

the evidence, thus requiring a greater limitation on the trial court's discretion beyond simply applying RCW 2.36.110. *Id.*, at 778.

Only after this heightened evidentiary standard is applied by the trial court is the court's evaluation of the facts reviewable for an abuse of discretion. *Id.*

b. The trial court erred in dismissing Juror 8 as it did not first reinstruct the jury, then failed to apply the heightened evidentiary standard adopted in *Elmore*. It was unclear from Juror 8's note whether she was a frustrated holdout juror or a juror who simply refused to follow the court's instructions. In this scenario, the Supreme Court's decision in *Elmore* provides the framework for resolving the issue and presents the basis for reversal of Mr. Smith's conviction for a violation of his right to an impartial jury.

In *Elmore*, the trial court dismissed a deliberating juror after two other jurors told the judge that he was refusing to follow the judge's instructions during deliberations. *Elmore*, 155 Wn.2d at 764. The trial court questioned the two jurors who authored the notes, then based upon the notes, concluded there was sufficient evidence to dismiss the juror in question for failing to follow the law and refusing to deliberate. *Id.* Upon the urging of counsel for both parties, the trial court ultimately interviewed the juror in question,

then concluded that the juror's testimony also provided sufficient evidence of unfitness and affirmed its earlier ruling dismissing the juror. *Id.*, at 765-66.

The Supreme Court reversed, finding the juror's dismissal to be error, in part because the trial court excused the juror based on the other jurors' testimony rather than conducting a "more balanced investigation into [the] allegations." *Elmore*, 155 Wn.2d at 775. The Court noted that court's "investigating . . . allegations [of juror misconduct] must take special care not to delve into the substance of deliberations or the thought process of any particular juror." *Id.*, at 771. But, on the other hand, the Court also noted that

a trial court must also take care not to violate the defendant's right to a unanimous jury verdict by granting a dismissal that stems from a juror's doubts about the sufficiency of the evidence.

Id.

As a consequence, the Court held that when investigating claims of a juror refusing to follow the law, the court must *first* reinstruct the jury. *Id.* at 774. Only after this initial tact fails may the court engage in an inquiry of the juror(s).

First, if a juror or jurors accuse another juror of refusing to deliberate or attempting nullification, the trial court should first attempt to resolve the problem by reinstructing the jury. If reinstruction is not

effective and problems continue, any inquiry should remain as limited in scope as possible. The inquiry should focus on the conduct of the jurors and the *process* of deliberations, rather than the *content* of discussions. The court's inquiry should cease if the trial judge becomes satisfied that the juror in question is participating in deliberations and does not intend to ignore the law or the court's instructions. Finally we recognize that if inquiry occurs, it should reflect an attempt to gain a balanced picture of the situation; it may be necessary to question the complaining juror or jurors, the accused juror, *and* all or some of the other members of the jury.

(Internal citations omitted, emphasis in original) *Elmore*, 155 Wn.2d at 773-74. The Court also cautioned that in situations as presented here, where a juror seeks to be dismissed, “the court must be equally careful that the request does not stem from the juror’s wish to avoid the unenviable position of holdout juror, even though the juror has doubts as to the sufficiency of the evidence.” *Elmore*, 155 Wn.2d at 772 n.5.

Elmore found that based upon the facts presented in that case, the trial court failed to follow the general guidelines adopted when it first failed to reinstruct the jury, then made its decision to replace the juror solely on the content of the other jurors’ notes and their testimony. *Id.* at 774-75.

Juror 8’s note strongly supports the conclusion that she was a hold-out juror whose motivation for seeking replacement was a

disagreement over the sufficiency of the evidence against Mr. Smith. The fact that the jury spent two days deliberating with Juror 8 yet returned a verdict merely a few hours after the alternate juror was seated, also lends further support to the conclusion that Juror 8 was a hold-out juror. Thus, the concerns regarding protecting the rights to an impartial and unanimous jury outlined in *Elmore* are present here.

While the dismissal of a potential hold-out juror raises the concerns which are at the heart of the decision in *Elmore*, the requirements of *Elmore* do not hinge upon a showing that the dismissed juror was in fact hold-out juror. Instead, the requirements of *Elmore* apply whenever a trial court is faced with the prospect of a juror who refuses to deliberate at all or refuses to deliberate in accordance with the court's instructions. Such was the case here, as despite the court's instructions, Juror 8 voiced her willingness to refuse to follow the court's instructions and sought to be replaced.

Elmore requires that as a first step in such a scenario, the court must reinstruct the entire jury with respect to their obligations. Despite urging by Mr. Smith, that step was never taken by the trial court in the present case. Instead, the court proceeded directly to

the second step outlined in *Elmore*, questioning Juror 8. Yet *Elmore* plainly limits this approach to those situations where reinstruction has proven ineffective. *Elmore* 155 Wn.2d at 773-74.

By failing to first reinstruct the jury, then failing to apply the more exacting evidentiary standard before removing Juror 8, the court erred in dismissing Juror 8, and Mr. Smith is entitled to a new trial. *Id.* at 780.

2. THE COURT VIOLATED MR. SMITH'S RIGHT TO A PUBLIC TRIAL WHEN IT CLOSED THE COURTROOM WITHOUT DETERMINING CLOSURE WAS JUSTIFIED

During the testimony of defense expert Kay Sweeney, a disagreement erupted over whether the defense had fully disclosed to the State Mr. Sweeney's notes prior to his testifying and whether some of those notes were privileged as attorney work product.

5/12/08RP 122-33. Growing frustrated during the discussion between the parties, the court decided to hold an *in camera* hearing in the courtroom with defense counsel and Mr. Sweeney present.

5/12/08RP 133.

Here is what I want to do. *I want to clear this courtroom and make this an incamera [sic] courtroom and I want him to read his notes, so I can make sure I understand what he is saying. It is not the most legible. That means the defendant has to go, everybody else has to go. If it is as I think, I don't*

think there is anything to redact, but I just want to make sure I am not missing the point because I don't understand the name of the certain person he's talking to because he is kind of illegible.

5/12/08RP 133 (emphasis added). The court conducted the hearing, without Mr. Smith's presence.

a. The federal and state constitutions provide the accused the right to a public trial and also guarantee public access to court proceedings. Public criminal trials are a hallmark of the Anglo-American justice system. *Globe Newspaper Co. v. Superior Court*, 457 U.S. 596, 605, 102 S.Ct. 2613, 73 L.Ed.2d 248 (1982); *Richmond Newspapers, Inc. v. Virginia*, 448 U.S. 555, 564-73, 100 S.Ct. 2814, 65 L.Ed.2d 973 (1980) (plurality) (outlining history of public trials from before Roman Conquest of England through Colonial times). "A trial is a public event. What transpires in the court room is public property." *State v. Coe*, 101 Wn.2d 364, 380, 679 P.2d 353 (1984), *quoting Craig v. Harney*, 331 U.S. 367, 374, 67 S.Ct. 1249, 91 L.Ed.2d 1546 (1947).

Both the federal and state constitutions guarantee the accused the right to a public trial. The Sixth Amendment provides, "In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial . . ." Article I, section 22 of the Washington

Constitution also guarantees “[i]n criminal prosecutions, the accused shall have the right to . . . a speedy public trial.”

The public also has a vital interest in access to the criminal justice system. The Washington Constitution provides, “Justice in all cases shall be administered openly, and without unnecessary delay.” Const. art. I, § 10; *see also* U.S. Const. amends. 1, 6. The clear constitutional mandate in article I, section 10 entitles the public and the press to openly administered justice. *Seattle Times Co. v. Ishikawa*, 97 Wn.2d 30, 36, 640 P.2d 716 (1982); *Federated Publications Inc. v. Kurtz*, 94 Wn.2d 51, 59-60, 615 P.2d 440 (1980). Public access to the courts is further supported by article I, section 5, which establishes the freedom of every person to speak and publish on any topic. *Federated Publications*, 94 Wn.2d at 58. In the federal constitution, the First Amendment’s guarantees of free speech and a free press also protect the right of the public to attend a trial. *Globe Newspaper*, 457 U.S. at 603-05; *Richmond Newspapers*, 448 U.S. at 580 (plurality).

Although the defendant’s right to a public trial and the public’s right to open access to the court system are different, they serve “complimentary and interdependent functions in assuring the fairness of our judicial system.” *Bone-Club*, 128 Wn.2d at 259.

The 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, and that the presence of interested spectators may keep his triers keenly alive to a sense of their responsibility and to the importance of their functions.

Id., quoting *In re Oliver*, 333 U.S. 257, 270 n.25, 68 S.Ct. 499, 92 L.Ed. 682 (1948).

Open public access to the judicial system is also necessary for a healthy democracy, providing a check on the judicial process. *Globe Newspaper*, 457 U.S. at 606; *Richmond Newspapers*, 448 U.S. at 572-73 (plurality). Criminal trials may provide an outlet for community concern or outrage concerning violent crimes. *Press-Enterprise Co. v. Superior Court*, 464 U.S. 501, 509, 104 S.Ct. 819, 78 L.Ed.2d 629 (1984) (*Press-Enterprise I*). When trials are open to the public, citizens may be confident that established, fair procedures are being followed and that deviations from those standards will be made known. *Press-Enterprise I*, 464 U.S. at 508. Openness thus “enhances both the basic fairness of the criminal trial and the appearance of fairness so essential to public confidence in the system.” *Id.* at 501. The role of public access to the court system in maintaining public confidence was also noted by the Washington Supreme Court.

We adhere to the constitutional principle that it is the right of the people to access open courts where they may freely observe the administration of civil and criminal justice. Openness of courts is essential to the courts' ability to maintain public confidence in the fairness and honesty of the judicial branch of government as being the ultimate protector of liberty, property, and constitutional integrity.

Allied Daily Newspapers v. Eikenberry, 121 Wn.2d 205, 211, 848 P.2d 1258 (1993).

While a defendant may waive his or her right to a public trial, the defendant cannot waive the public's right to open proceedings. *State v. Strode*, 167 Wn.2d 222, 230, 217 P.3d 310 (2009). The reason for this is that the public has an independent right to object to a courtroom closure and the trial court has an independent obligation to protect that right. *Id.* at 230 n.4.

b. Washington courts must apply a five-part test when addressing a request for full or temporary exclusion of the public from a trial. In order to protect the accused's constitutional right to a public trial, a trial court may not conduct secret or closed proceedings "without, first, applying and weighing five requirements as set forth in *Bone-Club* and, second, entering specific findings justifying the closure order." *State v. Easterling*, 157 Wn.2d 167, 175, 137 P.3d 825 (2006). The five criteria are "mandated to

protect a defendant's right to [a] public trial." *In re the Personal Restraint of Orange*, 152 Wn.2d 795, 809, 100 P.3d 291 (2004) (emphasis in original).

The test requires:

1. The proponent of closure or sealing must make some showing [of a compelling state interest], and where that need is based on a right other than an accused's right to a fair trial, the proponent must show a "serious and imminent threat" to that right;
2. Anyone present when the closure motion is made must be given an opportunity to object to the closure.
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 258-59. The same test applies for a violation of the public's right to an open courtroom under article I, section 10. *Id.*

This Court reviews *de novo* whether a trial court procedure violated a defendant's right to a public trial. *State v. Momah*, 167 Wn.2d 140, 147, 217 P.3d 321 (2009); *State v. Brightman*, 155 Wn.2d 506, 514, 122 P.3d 150 (2005). The failure to engage in the

Bone-Club analysis results in a violation of the right to a public trial.

Strode, 167 Wn.2d at 228, *citing Brightman*, 155 Wn.2d at 515-16.

Where the record 'lacks any hint that the trial court considered [the defendant's] public trial right as required by *Bone-Club*, [the appellate court] cannot determine whether the closure was warranted.'

Strode, 167 Wn.2d at 228.

The constitutional right to a public trial is not waived by a defendant's failure to object and may be raised for the first time on appeal. *Strode*, 167 Wn.2d at 229; *Easterling*, 157 Wn.2d at 173 n.2.

c. The trial court failed to apply the five-part *Bone-Club* test before closing the courtroom to question defense counsel and Kay Sweeney. In this case, while ostensibly holding an in chambers conference, the court closed the courtroom and excluded Mr. Smith in order to discuss matters with defense counsel and the defense expert witness. The court never considered Mr. Smith's right to a public trial or the public's right to open proceedings, and thus, never engaged in the required *Bone-Club* analysis. The court could have closed the courtroom to conduct its conference as it did, but only after engaging in the *Bone-Club* analysis and determining there was a compelling interest to do so. It did not,

thus violating both Mr. Smith's right to a public trial and the public's right to an open proceeding.

d. Mr. Smith is entitled to reversal of his convictions.

The denial of the right to a public trial is a structural error and not subject to a harmless error analysis. *Strode*, 167 Wn.2d at 231; *Easterling*, 157 Wn.2d at 181. Thus the remedy for an improper courtroom closure is reversal and remand for a new trial. *Orange*, 152 Wn.2d at 814. Mr. Smith is entitled to reversal of his conviction and remand for a new trial.

3. THE COURT VIOLATED MR. SMITH'S RIGHT TO BE PRESENT AT ALL PROCEEDINGS WHEN IT BARRED HIM FROM THE COURTROOM DURING QUESTIONING OF HIS ATTORNEY AND A DEFENSE EXPERT

a. A defendant has a Sixth Amendment right to be present at all critical stages of the proceedings. The federal constitutional right to be present at all criminal proceedings is one of the most basic rights contained in the Confrontation Clause of the Sixth Amendment to the United States Constitution. *Illinois v. Allen*, 397 U.S. 337, 338, 90 S.Ct. 1057, 25 L.Ed.2d 353 (1970). Although rooted "to a large extent" in the Confrontation Clause, the right to be present is also protected by the Fourteenth Amendment's Due Process Clause "in some situations where the

defendant is not actually confronting witnesses or evidence against him.” *United States v. Gagnon*, 470 U.S. 522, 526, 105 S.Ct. 1482, 84 L.Ed.2d 486 (1985) (per curiam). The defendant also has a due process right to be present “whenever his presence has a relation, reasonably substantial, to the fullness of his opportunity to defend against the charge.” *Kentucky v. Stincer*, 482 U.S. 730, 745, 107 S.Ct. 2658, 96 L.Ed.2d 631 (1987). The right to be present stems in part from the fact that by his physical presence, the defendant can hear and see the proceedings and can participate in the presentation and preservation of his rights. *Bustamante v. Eyman*, 456 F.2d 269, 274 (9th Cir.1972). The right is also designed to safeguard the public's interest in a fair and orderly judicial system. *Bustamante*, 456 F.2d at 274-75. Thus, the right to personal presence at all critical stages of the trial is a “fundamental right[] of each criminal defendant.” *Rushen v. Spain*, 464 U.S. 114, 117, 104 S.Ct. 453, 78 L.Ed.2d 267 (1983) (per curiam).

The core of this right is the right to be present when evidence is presented. *Id.*; see also *In re Personal Restraint of Lord*, 123 Wn.2d 296, 306, 868 P.2d 835, *clarified*, 123 Wn.2d 737, 870 P.2d 964, *cert. denied*, 513 U.S. 849 (1994). Even in proceedings where the defendant is not confronting witnesses or

evidence against him, the Due Process Clause guarantees the defendant's right to be present “ ‘whenever his presence has a relation, reasonably substantial, to the fullness of his opportunity to defend against the charge.’ ” *Lord*, 123 Wn.2d at 306 *quoting Gagnon*, 470 U.S. at 526. “[T]he 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.” *Snyder v. Commonwealth of Massachusetts*, 291 U.S. 97, 107-08, 54 S.Ct. 330, 78 L.Ed. 674 (1934).

b. Mr. Smith had the right to be present during the court’s questioning of counsel and the defense witness. The discussion in the closed court room here consisted of questioning by the trial court of Mr. Sweeny and defense counsel regarding Mr. Sweeny’s billing records and notes and whether some or all of these were privileged as attorney work product and need not be disclosed to the State.

The issue is whether Mr. Smith’s presence during the conference had a relation to the fullness of his opportunity to defend himself against the charges. *Lord*, 123 Wn.2d at 306. Assuming that the argument against Mr. Smith’s presence was that the issues discussed were purely legal, Mr. Smith could have

observed whether his attorney was zealously advocating for him. Ultimately, it was Mr. Smith who bore the consequences of the trial court's rulings on the issues discussed by counsel and the court which had the potential to prejudice his defense.

c. Mr. Smith did not waive his right to be present. It may be argued that Mr. Smith's acquiescence to his attorney's request to leave the courtroom acted as a waiver by Mr. Smith of his right to be present. This Court must reject any such argument in the absence of a knowing, voluntary, and intelligent waiver by Mr. Smith.

The defendant may waive his right to be present but the waiver must be a knowing, voluntary and knowing one . *State v. Garza*, 150 Wn.2d 360, 367, 77 P.3d 347 (2003); *State v. Thomson*, 123 Wn.2d 877, 880, 872 P.2d 1097 (1994). This Court must indulge every presumption against a waiver of the right to be present. *Thomson*, 123 Wn.2d at 881-82.

Here, the record is devoid of any evidence Mr. Smith was aware he had the right to be present. In fact, his attorney's request for Mr. Smith to exit the courtroom as required by the trial court raises a strong inference that Mr. Smith felt he had no right to be present. Without any evidence in the record that Mr. Smith knew of

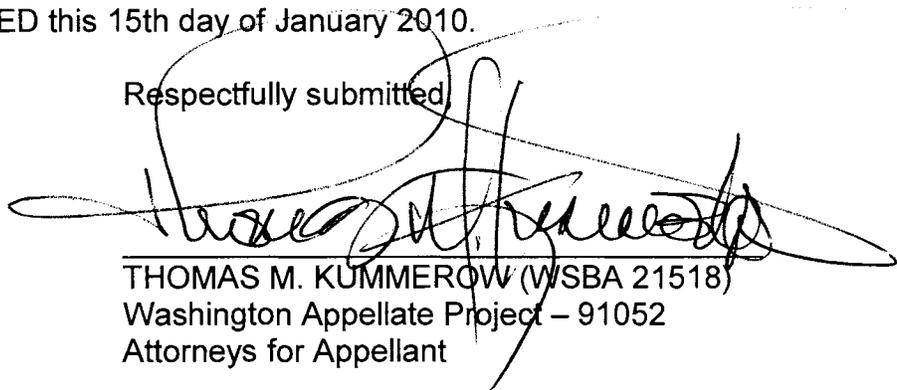
his right, let alone that he voluntarily or intelligently waived that right, he could not have waived the right.

F. CONCLUSION

For the reasons stated, Mr. Smith submits this Court must reverse his convictions and remand for a new trial.

DATED this 15th day of January 2010.

Respectfully submitted,

A large, stylized handwritten signature in black ink, appearing to read 'Thomas M. Kummerow', is written over the typed name and extends across the typed address.

THOMAS M. KUMMEROW (WSBA 21518)
Washington Appellate Project – 91052
Attorneys for Appellant

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

STATE OF WASHINGTON,)	
)	
Respondent,)	
)	NO. 62459-8-I
v.)	
)	
TONY SMITH,)	
)	
Appellant.)	

DECLARATION OF DOCUMENT FILING AND SERVICE

I, MARIA ARRANZA RILEY, STATE THAT ON THE 15TH DAY OF JANUARY, 2010, I CAUSED THE ORIGINAL **OPENING BRIEF OF APPELLANT** TO BE FILED IN THE **COURT OF APPEALS - DIVISION ONE** AND A TRUE COPY OF THE SAME TO BE SERVED ON THE FOLLOWING IN THE MANNER INDICATED BELOW:

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[X] TONY SMITH 814207 CLALLAM BAY CC 1830 EAGLE CREST WAY CLALLAM BAY, WA 98326	(X) () ()	U.S. MAIL HAND DELIVERY _____

SIGNED IN SEATTLE, WASHINGTON THIS 15TH DAY OF JANUARY, 2010.

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