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NO. 64419-0-I

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

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STATE OF WASHINGTON,

Respondent,

v.

EDWARD CASTILLO,

Appellant.

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STATE OF WASHINGTON  
2010 APR 16 PM 3:57

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

The Honorable Steven J. Mura, Judge

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BRIEF OF APPELLANT

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A. ASSIGNMENTS OF ERROR

1. The trial court violated appellant's constitutional rights to a public trial.

2. The trial court violated appellant's state and federal constitutional due process rights to present a defense when it excluded Michelle Kitchen's testimony.

3. The trial court violated appellant's state and federal constitutional rights to compel witnesses for the defense when it excluded Michelle Kitchen's testimony.

Issues Pertaining to Assignments of Error

1. Did the trial court's exclusion of the public violate appellant's constitutional rights to a public trial where the trial court did not analyze the "Bone-Club"<sup>1</sup> factors before conducting a portion of voir dire in chambers?

2. Did the trial court violate appellant's constitutional rights to present witnesses for his defense when it prevented a defense witness from testifying after the witness violated the court's ruling excluding witnesses from the courtroom?

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<sup>1</sup> State v. Bone-Club, 128 Wn.2d 254, 906 P.2d 629 (1995).

B. STATEMENT OF THE CASE

1. Procedural Facts

The Whatcom County prosecutor charged Edward Castillo with first-degree rape of a child. CP 90-91. A jury convicted Castillo and he was sentenced to a minimum term of 171 months and maximum term of life. CP 77, 81. After his conviction was reversed on appeal, Castillo was again convicted, and the court imposed the same sentence as previously. CP 3, 29. Castillo timely filed notice of appeal. CP 15.

2. Substantive Facts

On Thursday, August 23, 2007, Edward Castillo and his friend Heather Stutzman went to a nightclub for a private party he had organized. 4RP<sup>2</sup> 292-93, 295. At the end of the night, they returned to Stutzman's home. 4RP 297. Castillo had briefly met Stutzman's seven-year-old niece, R.G., a few times before when she was visiting. 2RP 22; 4RP 292. That night, Castillo having had several alcoholic drinks, fell asleep on Stutzman's bed, where R.G. and Stutzman's daughter, both seven years old, were sleeping. 4RP 295-96, 298, 300. The next morning, Castillo awoke early and left while the girls were still asleep. 4RP 302.

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<sup>2</sup> There are four volumes of Verbatim Report of Proceedings from Castillo's second trial referenced as follows: 1RP – 10/19/2009, 10/20/2009 (voir dire); 2RP – 10/19/2009, 10/20/2009; 3RP 10/21/2009; 4RP – 10/22/2009, 11/4/2009.

Later that weekend, Stutzman called Castillo, accusing him of raping R.G. 4RP 303-04. Castillo told her he did not have time for this and did not take the allegation seriously. 3RP 233-34. However, he encouraged the family to call the police and voluntarily turned himself in. 3RP 224; 4RP 304-05.

Stutzman testified she and Castillo returned to her home quite late after cleaning up after the party. 3RP 152-53. Both were drunk, and Castillo collapsed on her bed between the two sleeping girls. 3RP 154-56. Stutzman tried to wake him a couple of times but was unable to do so. 3RP 156.

Stutzman then left the bedroom and spent some time in the living room talking with her roommates. 3RP 158. The bedroom door was ajar about one foot, and the living room is visible from the bedroom. 3RP 146, 161. A lot of people, including Stutzman's roommates and guests from across the street were in the living room watching television and talking. 3RP 154-55. When Stutzman returned to the bedroom, R.G. was crying and wanted her mother. 3RP 163. Castillo was patting R.G.'s head and saying "shush" as if to calm her down. 3RP 163. Stutzman comforted R.G., but thought it was normal for the child to want her mother. 3RP 165-66. She moved the children to the floor and R.G. went right back to sleep. 3RP 166-67.

R.G. testified she was spending the night at her aunt Heather's playing with her cousin. 2RP 25-26. When Stutzman went out with Castillo, R.G. and her cousin remained behind. 2RP 28-29. The two girls fell asleep watching television on Stutzman's bed. 2RP 28. At some point R.G. awoke and Castillo was on the bed next to her. 2RP 32-33. She testified Castillo touched her with his finger inside the place where she goes pee, and it hurt. 2RP 34-35. Two days later, in the car near Stutzman's home, she told her father what had happened. 2RP 38.

R.G.'s father testified that while on their way back to Stutzman's home the following Sunday, R.G.'s mood suddenly changed. 2RP 76. She told him Eddie rubbed her back and her butt, told her he loved her and wanted her to be his girlfriend, and put his finger in her "potty place." 2RP 77.

After arriving at Stutzman's home, R.G.'s father grabbed a hammer he found on the front step and entered screaming, "Who's Eddie?" 2RP 79. He relayed R.G.'s accusations to Stutzman, who did not believe Castillo would do such a thing. 2RP 80.

Instead of calling the police, R.G.'s father tried to reach R.G.'s mother, who was away for the weekend. 2RP 80. He believed this was a family matter and wanted to discuss it with her before going to the police. 2RP 80. He did not take R.G. to a doctor. 2RP 90. He thought there would

be minimal evidence due to the passage of time and a rape examination would be traumatic for the child. 2RP 94. R.G.'s mother later concurred with this assessment. 2RP 130.

R.G.'s mother had received messages from R.G.'s father over the weekend, but could not reach him by phone. 2RP 120-22. Finally, on Monday evening after work, she received a voicemail from R.G.'s father and drove to Stutzman's home. 2RP 121-22. After speaking with Stutzman, she called the police. 2RP 123. R.G. later told her mother that while she was sleeping, Eddie put his finger in her potty place and it hurt. 2RP 126. R.G. told her he was her boyfriend and it would feel good. 2RP 127.

There were inconsistencies between R.G.'s testimony and her previous statements regarding the relative positions of the girls on the bed, whether she was under the covers, and what she was wearing. 2RP 49-50, 57. She also denied previously saying she had bad dreams or that it hurt. 2RP 59, 62.

Castillo testified he fell asleep on Stutzman's bed after the party and woke when Stutzman moved the children to the floor. 4RP 300-01. He testified he neither touched R.G. nor spoke to her. 4RP 303. Although he was drunk, he testified he was not so intoxicated as not to recall what occurred. 4RP 309.

Castillo first heard about the allegations two days later when Stutzman called him. 4RP 303-04. Stutzman called him again later when he had returned to his home in Birch Bay. 4RP 306. She told Castillo she did not believe the allegations and asked him to run away with her. 4RP 306. Castillo said no. 4RP 306. Some time later, Stutzman called Castillo again asking for money, a request he also refused. 4RP 307. Stutzman denied asking Castillo to run away with her or to give her money. 3RP 183-84.

After the State rested, defense counsel announced the intent to call Michelle Kitchen, Castillo's fiancée, to impeach Stutzman on whether she asked Castillo for money. 4RP 280. The State objected because Kitchen had been in the courtroom. 4RP 283. Kitchen told the court she was only in the courtroom during Stutzman's testimony the previous day. 4RP 283-84. Defense counsel did not know Kitchen ever entered the courtroom; she had instructed her to wait outside. 4RP 283-84.

Kitchen would have testified she was living with Castillo in Birch Bay when Stutzman called. 4RP 285. Because she was jealous of Castillo's relationship with Stutzman, when she called, Kitchen required Castillo to let her listen to the call. 4RP 286-87. She would have testified Stutzman told Castillo she did not believe the allegations and then in the same breath asked him for money for rent. 4RP 287.

The court excluded Kitchen's testimony because she violated the ruling in limine excluding witnesses and had heard the testimony of the very witness she would be called to impeach. 4RP 284. After hearing the offer of proof, the court also concluded the impeachment was collateral. 4RP 288. Because the court found Kitchen's testimony was not critical to the defense, it denied counsel's request to reconsider and excluded Kitchen's testimony. 4RP 288.

During jury selection before trial, the court told prospective jurors that if any of the questions made them uncomfortable, "we can go back into my chambers with the attorneys, the defendant, myself, and the court reporter present so you will have a small group of people to answer the question in front of." 1RP 8-9. At least two jurors indicated they wished to be questioned in private. 1RP 71. Defense counsel reiterated the court's offer to question jurors in private if they wished. 1RP 95. Finally, the court asked whether anyone objected to questioning five jurors in chambers, and asked those five to arrive early at 9:30 for private questioning the next morning. 1RP 104. Apparently no one objected. 1RP 104. The next morning, proceedings began in the judge's chambers. 1RP 105. Five jurors were questioned in chambers on the record before everyone returned to open court. 1RP 105-121. At no time did the court consider the Bone-Club factors on the record.

C. ARGUMENT

1. THE COURT VIOLATED CASTILLO'S RIGHT TO A PUBLIC TRIAL BY CONDUCTING A PORTION OF JURY SELECTION IN CHAMBERS.

Castillo's right to a public trial is protected by both the state and federal constitutions. Const art. 1, § 22; U.S. Const. amend. VI; State v. Easterling, 157 Wn.2d 167, 174, 137 P.3d 825 (2006). Additionally, article I, section 10 expressly guarantees to the public and press the right to open court proceedings. Easterling, 157 Wn.2d at 174. The First Amendment implicitly protects the same right. Waller v. Georgia, 467 U.S. 39, 46, 104 S. Ct. 2210, 81 L. Ed. 2d 31 (1984). Prejudice is presumed where the public trial right is violated. In re Personal Restraint of Orange, 152 Wn.2d 795, 814, 100 P.3d 291 (2004). The remedy is reversal of the convictions and remand for a new trial. Orange, 152 Wn.2d at 814.

The right to a public trial encompasses jury selection. Press-Enterprise Co. v. Superior Court, 464 U.S. 501, 508, 104 S. Ct. 819, 78 L. Ed. 2d 629 (1984); State v. Brightman, 155 Wn.2d 506, 515, 122 P.3d 150 (2005). Even where, as in Castillo's case, only a part of the proceedings are improperly closed to the public, such a closure violates a defendant's constitutional right to a public trial. See State v. Frawley, 140 Wn. App. 713, 719-21, 167 P.3d 593 (2007) (trial court's private portion of jury

selection, which addressed each venire person's answers to a jury questionnaire, violated right to public trial). Relocation of jury selection to the judge's chambers is the equivalent of a closed courtroom. State v. Duckett, 141 Wn. App. 797, 809, 173 P.3d 948 (2007); Frawley, 140 Wn. App. at 720.

Although the right to a public trial is not absolute, a trial court may restrict the right only "under the most unusual circumstances." State v. Bone-Club, 128 Wn. 2d 254, 259, 906 P.2d 325 (1995). Before a trial judge can close any part of a trial from the public, it must first apply on the record the five factors set forth in Bone-Club. Orange, 152 Wn.2d at 806-07, 809.

The Bone-Club requirements are:

1. The proponent of closure . . . must make some showing [of a compelling 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 (quoting Allied Daily Newspapers of Wash. v. Eikenberry, 121 Wn.2d 205, 210-11, 848 P.2d 1258 (1993)).

Recently, the Washington Supreme Court considered the remedy when a court holds part of voir dire in chambers. State v. Momah, 167 Wn.2d 140, 217 P.3d 321 (2009); State v. Strode, 167 Wn.2d 222, 217 P.3d 310 (2009). Each of these cases supports Castillo's argument.

a. State v. Strode Requires Reversal of Castillo's Conviction.

Strode was charged with three sex offenses. His prospective jurors were asked in a confidential questionnaire whether they or anyone they were close to had ever been the victim of or accused of committing a sex offense. The prospective jurors who answered "yes" were individually questioned in the judge's chambers to determine whether they could nonetheless render a fair and impartial verdict. Before excluding the public from this private questioning, the trial court failed to hold a "Bone-Club hearing." Strode, 167 Wn.2d at 223-224.

While privately questioning some potential jurors, the trial court stated variously that "the questioning was being done in chambers for 'obvious' reasons, to ensure confidentiality, or so that the inquiry would not be 'broadcast' in front of the whole jury panel." Strode, 167 Wn.2d at 224. The trial judge, prosecutor and defense counsel questioned the prospective jurors, and challenges for cause were heard and ruled upon. Id.

A majority of the Supreme Court reversed Strode's conviction because the trial court failed to weigh the competing interests as required by Bone-Club. Strode, 167 Wn.2d at 226-229 (Alexander, C.J., lead opinion); 167 Wn.2d at 231-236 (Fairhurst, J., concurring). The lead and concurring opinions differed, however, on whether a defendant can waive the issue through affirmative conduct. The lead opinion concluded a defendant's failure to object to courtroom closure does not constitute a waiver of the issue for appeal, and that waiver occurs only if it is shown to be knowing, voluntary and intelligent. Strode, 167 Wn.2d at 229 n.3 (Alexander, C.J.).

The concurring opinion, however, concluded that defense participation in the closed courtroom proceedings can, under certain circumstances, constitute a valid waiver of the right to a public trial. Strode, 167 Wn.2d at 234-236 (Fairhurst, J., concurring). As an example, Justice Fairhurst noted that in Momah, the trial court expressly advised that all proceedings are presumptively public. Id. at 234. Despite this admonishment, defense counsel affirmatively requested individual questioning of panel members in private, urged the court to expand the number of jurors subject to private questioning, and actively engaged in discussions about how to accomplish this. Id. Justice Fairhurst concluded counsel's conduct "shows the defendant intentionally relinquished a known right." Id.

The facts in Castillo's case are like those in Strode. Defense counsel did not request private questioning. The court simply announced certain jurors would be questioned privately in the jury room. 1RP 8-9. The court neither addressed the Bone-Club factors nor in any other way weighed the competing interests before closing a portion of voir dire.

Although the court asked whether there were objections to holding voir dire in chambers, this does not rise to the level of the affirmative waiver discussed in Justice Fairhurst's concurrence. 1RP 104. The court did not, expressly advise Castillo of his right to public proceedings. While counsel participated in the process, she neither requested it, nor urged its expansion. As in Strode, the trial court violated Castillo's constitutional right to a public trial.

b. State v. Momah is Distinguishable and Does Not Control the Outcome of Castillo's Appeal.

The State charged Momah, a gynecologist, with committing sex offenses against several patients. Momah, 167 Wn.2d at 145. Unlike the "unexceptional circumstances" in Strode, 167 Wn.2d at 223 (Alexander, C.J., lead opinion), Momah's case was "heavily publicized" and "received extensive media coverage." Momah, 167 Wn.2d at 145.

As a result, the court summoned more than 100 prospective jurors and gave them a written questionnaire. By agreement of the parties, jurors

who said they had prior knowledge of the case, could not be fair, or requested private questioning, were questioned individually in chambers. Id. at 145-146.

Concerned about poisoning the entire panel, defense counsel also argued for expansion of the private voir dire:

Your Honor, it is our position and our hope that the Court will take everybody individually, besides those ones we have identified that have prior knowledge. Our concern is this: They may have prior knowledge to the extent that that might disqualify themselves, or we have the real concern that they will contaminate the rest of the jury.

Momah, 167 Wn.2d at 146.

The trial court compiled a list of jurors to be questioned individually. Defense counsel agreed with the list. Id. Both the defense and prosecution actively participated in the in-chambers jury selection, most of which focused on prospective jurors' knowledge of the case gained from media publicity. Id. at 146-147 and n.1.

The six-justice majority in Momah noted that when “the record lack[s] any hint that the trial court considered the defendant’s right to a public trial when it closed the courtroom[.]” the error is “structural in nature” and reversal is required. Momah, 167 Wn.2d at 149-151. The majority found reversal was not required because, despite failing to explicitly discuss

the Bone-Club factors, the trial court balanced Momah's right to a public trial with his right to an impartial jury. Momah, 167 Wn.2d at 156.

In addition, drawing on the invited error doctrine, the Court essentially found Momah "waived" his public trial right:

Momah affirmatively assented to the closure, argued for its expansion, had the opportunity to object but did not, actively participated in it, and benefited from it. Moreover, the trial judge in this case not only sought input from the defendant, but he closed the courtroom after consultation with the defense and the prosecution.

167 Wn.2d at 151; see also 167 Wn.2d at 153-154 (discussing invited error).

The court reiterated this theme later in the opinion, presuming Momah made the following "tactical choices to achieve what he perceived as the fairest result[:]"

- Before any private voir dire, the parties and the judge discussed numerous proposals concerning juror selection;
- Although Momah was given a chance to object to the in-chambers procedure, he never objected;
- Momah never suggested closed voir dire might violate his right to public trial;
- Defense counsel deliberately chose to pursue in-chambers questioning to avoid tainting the panel; counsel "affirmatively assented to, participated in, and even argued for the expansion of in-chambers questioning."

Momah, 167 Wn.2d at 155.

Counsel's affirmative and aggressive pursuit of private voir dire is an atypical and distinctive feature of Momah. Much more common is the

unexceptional case where a trial court merely informs the parties it will honor prospective jurors' requests to be spared the embarrassment of revealing sensitive matters in open court. In short, Momah is the aberration and Strode is the ordinary. And because the Momah Court relied so heavily on counsel's unusually assertive conduct, its holding will apply only in the rare case.

Castillo's case is hardly rare; it is instead ordinary, like Strode. Unlike Momah, the trial court did not discuss various courses of action with the parties; instead, the court announced that those prospective jurors who had heard about the case would be questioned privately in the jury room. 1RP 8-9. Unlike Momah, Castillo's counsel neither affirmatively requested closed voir dire nor urged its expansion.

While Castillo's attorney was present for voir dire in chambers, by itself presence of counsel or even active participation is insufficient to waive this constitutional right. Defense counsel in Strode also questioned jurors in the judge's chambers. See Strode, 167 Wn.2d at 224 ("the trial judge and counsel for both parties asked questions of the potential jurors").

As in Strode, the trial court gave no consideration to Bone-Club factors before conducting part of voir dire in chambers. It failed to evaluate whether closure was the least restrictive means to obtain the necessary information from jurors, failed to weigh that interest against Castillo's and

the public's interest in an open proceeding, and failed to ensure the closure was no broader or longer than necessary. Bone-Club, 128 Wn.2d at 258-59.

For all the reasons stated above, this Court should conclude that the trial court violated Castillo's right to a public trial, that the violation was structural error, and that reversal is required. Strode, 167 Wn.2d at 223.

2. THE TRIAL COURT VIOLATED CASTILLO'S RIGHT TO CALL WITNESSES FOR HIS DEFENSE WHEN IT EXCLUDED THE TESTIMONY OF A CRUCIAL DEFENSE WITNESS.

Michelle Kitchen was a crucial defense witness who would have corroborated the defense theory by providing a motive for R.G. and her family to lie. The court excluded Kitchen's testimony as a sanction because she was in the courtroom when Stutzman testified. This draconian sanction violated Castillo's constitutional rights to due process and to call witnesses for his defense.

a. Castillo Has a Fundamental Constitutional Right to Present Witnesses for His Defense.

The right to compel witnesses is guaranteed by the Sixth Amendment to the United States Constitution<sup>3</sup> as well as Article I, section 22 of Washington's constitution. U.S. Const. amend. VI; Const. art. I, § 22; Taylor v. Illinois, 484 U.S. 400, 412-13, 108 S. Ct. 646, 98 L. Ed. 2d 798

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<sup>3</sup> This right applies to the states through the Fourteenth Amendment. Washington v. Texas, 388 U.S. 14, 17-19, 87 S. Ct. 1920, 18 L. Ed. 2d 1019 (1967).

(1988); State v. Maupin, 128 Wn.2d 918, 928-29, 913 P.2d 808 (1996).

While not explicitly stated therein, the right to have the trier of fact hear a witness's testimony is "grounded in the Sixth Amendment." Taylor, 484 U.S. at 409.

Additionally, the right to call witnesses in one's own behalf has long been recognized as essential to due process. Chambers v. Mississippi, 410 U.S. 284, 93 S. Ct. 1038, 35 L. Ed. 2d 297 (1973). In Washington v. Texas, 388 U.S. 14, 19, 87 S. Ct. 1920, 18 L. Ed. 2d 1019 (1967), the United States Supreme Court explained a defendant's right to compel the attendance of witnesses is "in plain terms the right to present a defense." This right to present witnesses to establish a defense is "a fundamental element of due process of law." Id. Thus, courts must jealously guard a criminal defendant's right to present witnesses in his defense. State v. Smith, 101 Wn.2d 36, 41, 677 P.2d 100 (1984).

Further, a criminal defendant's right to present witnesses is an "essential attribute of the adversary system itself." Taylor, 484 U.S. at 408. The court explained in Taylor:

The need to develop all relevant facts in the adversary system is both fundamental and comprehensive. The ends of criminal justice would be defeated if judgments were to be founded on a partial or speculative presentation of the facts. The very integrity of the judicial system and public confidence in the system depend on full disclosure of all the facts, within the framework of the rules of evidence. To

ensure that justice is done, it is imperative to the function of courts that compulsory process be available for the production of evidence needed either by the prosecution or by the defense.

Id. at 408-09 (quoting United States v. Nixon, 418 U.S. 683, 709, 94 S. Ct. 3090, 3108, 41 L. Ed. 2d 1039 (1974)). Thus, a trial court order entirely excluding the testimony of a material defense witness directly implicates not only the defendant's constitutional right to offer testimony on his own behalf, but also the integrity of the adversary system itself.

b. Mere Violation of a Ruling Excluding Witnesses from the Courtroom Does Not Warrant the Drastic Remedy of Denying a Criminal Defendant the Right to Present Witnesses.

It is within the court's discretion to exclude witnesses from the courtroom until after they have testified. ER 615;<sup>4</sup> State v. Dixon, 37 Wn. App. 867, 877, 684 P.2d 725 (1984). But the rule does not specify the sanction to be employed when a witness violates this rule. ER 615.

No Washington case has specifically addressed this issue in the context of the defendant's constitutional right to present a defense. However, federal courts interpreting the analogous federal rule<sup>5</sup> have

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<sup>4</sup> ER 615 states in relevant part, "At the request of a party the court may order witnesses excluded so that they cannot hear the testimony of other witnesses, and it may make the order of its own motion."

<sup>5</sup> Federal Rule of Evidence 615 states, "At the request of a party the court shall order witnesses excluded so that they cannot hear the testimony of other witnesses, and it may make the order of its own motion."

adhered to the general rule that a defense witness may not be excluded solely for violating a ruling excluding witnesses from the courtroom.

United States v. Gibson, 675 F.2d 825, 835-36 (6th Cir. 1982).

If a witness disobeys the order of withdrawal, while he may be proceeded against for contempt and his testimony is open to comment to the jury by reason of his conduct, he is not thereby disqualified, and the weight of authority is that he cannot be excluded on that ground merely. . .

Id. at 836 (quoting Holder v. United States, 150 U.S. 91, 92, 14 S. Ct. 10, 37 L. Ed. 2d 1010 (1893)). The Fifth Circuit has also noted, “it is generally true that a witness should not be disqualified for this reason alone.” Calloway v. Blackburn, 612 F.2d 201, 204 (5th Cir. 1980) (discussing violation of the witness sequestration rule).

Under the federal cases, the drastic remedy of denying the defense’s right to present witnesses is justified only when there is a “knowing intelligent waiver” or “consent, procurement, or knowledge on the part of defendant or his counsel.” Calloway, 612 F.2d at 204 (quoting Braswell v. Wainwright, 463 F.2d 1148, 1155 (5th Cir. 1972)); Gibson, 675 F.2d at 836 (citing United States v. Kiliyan, 456 F.2d 555, 560 (8th Cir. 1972); Taylor v. United States, 388 F.2d 786 (9th Cir. 1967); United States v. Bostic, 327 F.2d 983 (6th Cir. 1964); United States v. Schaefer, 299 F.2d 625 (7th Cir. 1962)).

Washington courts have applied the same general principles when a State's witness violates the order excluding witnesses from the courtroom. State v. Dixon, 37 Wn. App. 867, 684 P.2d 725 (1984). In Dixon, the trial court permitted the State's witness to testify despite violation of an order excluding her. Id. at 876. On appeal, the court held there was no abuse of discretion for two main reasons: the prosecutor claimed he had not anticipated the witness would be called to testify and the court found no bad faith. Id. at 877. Similarly, in State v. Bergen, 13 Wn. App. 974, 977-78, 538 P.2d 533 (1975), two State's witnesses were recalled for rebuttal although they had heard the defendant testify. On appeal the court's discretion was also upheld because there was no evidence of bad faith. Id. at 978. One commentator summarized, "Refusal to permit the offending witness to testify is regarded as a drastic remedy, but one which may be invoked if the witness violates the court's order with the connivance or knowledge of a party or counsel." Karl B. Tegland, 5A Washington Practice: Evidence 628-29 (5<sup>th</sup> ed. 2007).

Given the importance of the defendant's right to present a defense, this Court should hold that more than a mere violation of an ER 615 ruling is required before the defendant may be prevented from presenting his case. The extreme sanction of excluding a material defense witnesses should be limited to situations of demonstrated bad faith or collusion.

c. The Court Abused Its Discretion and Violated Castillo's Right to Present a Defense By Excluding Evidence of R.G.'s Motive to Fabricate.

“[D]iscretion does not mean immunity from accountability.” Carson v. Fine, 123 Wn.2d 206, 226, 867 P.2d 610 (1994). A court abuses its discretion when that decision is manifestly unreasonable or based on untenable grounds. State ex rel. Carroll v. Junker, 79 Wn.2d 12, 26, 482 P.2d 775 (1971). Given the fundamental nature of Castillo's right to present Kitchen's crucial testimony, the absence of any evidence of collusion, and the availability of other less drastic remedies, the court abused its discretion in excluding her testimony.

A court's decision is manifestly unreasonable if it is outside the range of acceptable choices, given the facts and the applicable legal standard. In re Marriage of Littlefield, 133 Wn.2d 39, 47, 940 P.2d 1362 (1997). “The range of discretionary choices is a question of law and the judge abuses his or her discretion if the discretionary decision is contrary to law.” State v. Neal, 144 Wn.2d 600, 609, 30 P.3d 1255 (2001). The court's decision to exclude Kitchen's testimony was manifestly unreasonable because there was no evidence of bad faith or collusion by Castillo or his attorney. United States v. Torbert, 496 F.2d 154, 158 (9th Cir. 1974) (“[I]t is ordinarily an abuse of discretion to disqualify a witness unless the

defendant or his counsel have somehow cooperated in the violation of the order.”); Dixon, 37 Wn. App. at 877.

The facts of this case parallel those in Pickel v. United States, 746 F.2d 176 (3d Cir. 1984). In that case, a State’s witness violated the sequestration order at a hearing on a petition to enforce an Internal Revenue Service summons. Id. at 179-80. As a sanction, the court quashed the summons. Id. at 181, 182. On the government’s appeal, the Third Circuit held the trial court abused its discretion in quashing the summons for three reasons. Id. at 182-83. First, the court failed to consider the range of remedies available under Federal Rule of Evidence 615. Id. at 182. Second, there was no evidence the witness was acting “other than unilaterally” in violating the exclusionary order. Id. Finally, there was no evidence of prejudice to the opposing party. Id.

The reasoning of the Third Circuit in Pickel applies equally here. The court similarly failed to consider the availability of other remedies for violation of the exclusion order before imposing an extremely severe sanction. 4RP 287-88. Additionally, there was no evidence of collusion by either Castillo or his counsel. On the contrary, counsel informed the court she did not know Kitchen was in the courtroom and had her wait outside. 4RP 283, 284. In other words, there was no evidence Kitchen was acting “other than unilaterally” when she violated the court’s order.

And as in Pickel, the State made no showing that it would be prejudiced by admission of Kitchen's testimony. Without such evidence, exclusion of the witness was not within the range of discretionary choices available and the court abused its discretion. Pickel, 746 F.2d at 182-83; Neal, 144 Wn.2d at 609.

The court also abused its discretion because it unreasonably concluded Kitchen's testimony not critical. 4RP 288. With no physical evidence and no witnesses to what occurred, this trial was a credibility contest. Stutzman's requests for money were the only evidence of a motive for R.G.'s family to fabricate the allegations against Castillo. Kitchen's corroborating testimony was central to establishing this motive. "The trial court may have discretion to determine what is relevant evidence, but it has no discretion to disallow evidence that is relevant. And discretion exercised may be abused. This is especially true in criminal trials where a person's life, liberty, and property can be taken." State v. Cheatam, 150 Wn.2d 626, 664, 81 P.3d 830 (Sanders, J., dissenting).

Even assuming, arguendo, the court had discretion to exclude a critical defense witness without evidence of collusion, the court abused its discretion because it failed to recognize that other, less drastic, options were available. When a court fails to recognize the scope of its discretion, no valid exercise of discretion exists. See State v. McGill, 112 Wn. App. 95,

98-99, 47 P.3d 173 (2002) (reversing standard range sentence because trial court mistakenly believed it had no authority to grant an exceptional sentence); Pickel, 746 F.2d at 182.

Potential sanctions for violating the court's exclusionary ruling include: holding the witness in contempt, comment by the court to the jury regarding the violation, vigorous cross-examination and/or comment in closing argument by counsel regarding the witness's opportunity for collusion, refusal to permit the testimony, and dismissal of the charges. Tegland, supra at 627-30; Pickel, 746 F.2d at 182. Yet the court considered only one of these possible remedies: exclusion of a crucial defense witness. 4RP 287-88. The court abused its discretion by imposing this severe sanction without considering other options in light of Castillo's fundamental right to present a defense. Pickel, 746 F.2d at 182-83.

d. The Violation of Castillo's Right to Present Witnesses for his Defense Requires Reversal of his Conviction.

An error impacting a defendant's Sixth Amendment right to compel attendance of witnesses is of constitutional magnitude and will be considered harmless only if the state can show beyond a reasonable doubt that the jury would have reached the same result in the absence of the error. State v. Maupin, 128 Wn.2d 918, 928-29, 913 P.2d 808 (1996).

Violation of the constitutional right to compel witnesses is presumed prejudicial and the burden is on the State to prove the error was harmless beyond a reasonable doubt. Id.

The State cannot prove harmlessness in this case. As noted, this case came down to credibility. The State cannot prove beyond a reasonable doubt that the jury would have convicted Castillo if it had heard testimony corroborating R.G.'s family's motive to fabricate.

D. CONCLUSION

For the foregoing reasons, Castillo requests this Court reverse his conviction and remand for a new trial.

DATED this 16<sup>th</sup> day of April, 2010.

Respectfully submitted,

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WSBA No. 38068  
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Attorney for Appellant

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

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STATE OF WASHINGTON,	)	
	)	
Respondent,	)	
	)	
v.	)	COA NO. 64419-0-1
	)	
EDWARD CASTILLO,	)	
	)	
Appellant.	)	

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

- [X] WHATCOM COUNTY PROSECUTOR'S OFFICE  
WHATCOM COUNTY COURTHOUSE, SUITE 201  
311 GRAND AVENUE  
BELLINGHAM, WA 98227
  
- [X] EDWARD CASTILLO  
DOC NO. 845791  
STAFFORD CREEK CORRECTIONS CENTER  
191 CONSTANTINE WAY  
ABERDEEN, WA 98520

**SIGNED** IN SEATTLE WASHINGTON, THIS 16<sup>TH</sup> DAY OF APRIL, 2010.

x *Patrick Mayovsky*