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NO. 65009-2-I

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

STATE OF WASHINGTON,

Respondent,

v.

ANDREW M. STEAN,

Appellant.

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

The Honorable Steven J. Mura, Judge

REPLY BRIEF OF APPELLANT

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TABLE OF CONTENTS

	Page
A. <u>ARGUMENT IN REPLY</u>	1
HOLDING THE JURY INSTRUCTIONS CONFERENCE IN CHAMBERS VIOLATED STEAN'S RIGHT TO A PUBLIC TRIAL.....	1
B. <u>CONCLUSION</u>	9

TABLE OF AUTHORITIES

	Page
 <u>WASHINGTON CASES</u>	
<u>In re Personal Restraint of Benn</u> 134 Wn.2d 868, 952 P.2d 116 (1998).....	7
<u>In re Personal Restraint of Lord</u> 123 Wn.2d 296, 868 P.2d 835 <u>cert. denied</u> , 513 U.S. 849 (1994).....	5
<u>In re Personal Restraint of Pirtle</u> 136 Wn.2d 467, 965 P.2d 593 (1998).....	4
<u>Micro Enhancement Intern., Inc. v. Coopers & Lybrand, LLP</u> 110 Wn. App. 412, 40 P.3d 1206 (2002).....	3
<u>State v. Berrysmith</u> 87 Wn. App. 268, 944 P.2d 397 (1997) <u>review denied</u> , 134 Wn.2d 1008 (1998).....	5
<u>State v. Berube</u> 150 Wn.2d 498, 79 P.3d 1144 (2003).....	4
<u>State v. Bremer</u> 98 Wn. App. 832, 991 P.2d 118 (2000).....	3, 4, 6, 8
<u>State v. Brightman</u> 155 Wn.2d 506, 122 P.3d 150 (2005).....	6
<u>State v. Easterling</u> 157 Wn.2d 167, 137 P.3d 825 (2006).....	7
<u>State v. Koss</u> ___ Wn. App. ___, 241 P.3d 415, 2010 WL 4015216 (2010).....	2, 4
<u>State v. Leyerle</u> ___ Wn. App. ___, ___ P.3d ___ 2010 WL 4489420 (2010).....	8

TABLE OF AUTHORITIES (CONT'D)

	Page
<u>State v. Pruitt</u> 145 Wn. App. 784, 187 P.3d 326 (2008).....	5, 7
<u>State v. Sadler</u> 147 Wn. App. 97, 193 P.3d 1108 (2008).....	4
<u>State v. Scott</u> 110 Wn.2d 682, 757 P.2d 492 (1988).....	3
<u>State v. Strobe</u> 167 Wn.2d 222, 217 P.3d 310 (2009).....	6, 7, 8
<u>State v. Sublett</u> 156 Wn. App. 160, 231 P.3d 231 (2010).....	1, 2, 3, 4
<u>State v. Wilson</u> 141 Wn. App. 597, 171 P.3d 501 (2007).....	6
 <u>FEDERAL CASES</u>	
<u>Kentucky v. Stincer</u> 482 U.S. 730, 107 S. Ct. 2658, 96 L. Ed. 2d 631 (1987).....	5
<u>Malloy v. Hogan</u> 378 U.S. 1, 84 S. Ct. 1489, 12 L. Ed. 2d 653 (1964).....	6
<u>Presley v. Georgia</u> ___ U.S. ___, 130 S. Ct. 721, 175 L. Ed. 2d 675 (2010).....	8
<u>Snyder v. Massachusetts</u> 291 U.S. 97, 54 S. Ct. 330, 78 L. Ed. 674 (1934).....	6
<u>United States v. Gagnon</u> 470 U.S. 522, 105 S. Ct. 1482, 84 L. Ed. 2d 486 (1985).....	5
<u>Waller v. Georgia</u> 467 U.S. 39, 104 S. Ct. 2210, 81 L. Ed. 2d. 31 (1984).....	6-7

TABLE OF AUTHORITIES (CONT'D)

	Page
<u>Washington v. Recuenco</u>	
548 U.S. 212, 126 S. Ct. 2546, 165 L. Ed. 2d 466 (2006).....	7

RULES, STATUTES AND OTHER AUTHORITIES

CrR 6.15.....	3
RAP 2.5.....	3
U.S. Const. amend. V	5
U.S. Const. amend. VI	5
U.S. Const. amend. XIV	5
Wash. Const. art. 1, § 3.....	5
Wash. Const. art. 1, § 22.....	5

A. ARGUMENT IN REPLY¹

HOLDING THE JURY INSTRUCTIONS CONFERENCE IN CHAMBERS VIOLATED STEAN'S RIGHT TO A PUBLIC TRIAL.

In the Brief of Appellant (BOA), Stean argued the trial court violated his federal and state constitutional right to a public trial by conducting the jury instructions conference in chambers. BOA at 8-17. The state argues the conference did not implicate Stean's public trial right because it involved purely legal or ministerial matters. Brief of Respondent (BOR) at 5-7.

Relevant to Stean's reply to this contention are two recent cases and one older case that illustrate the weaknesses in the state's position. The first case is State v. Sublett,² where the trial court held an in-chambers conference in response to a question the deliberating jury submitted about the accomplice instruction. On appeal, the court held the private conference did not trigger the public trial right because the matter addressed was purely legal and did not require the resolution of disputed facts. Id. "More important," the court found, jury questions regarding

¹ Stean rests on the Brief of Appellant at 17-23 with respect to the argument trial counsel deprived him of his constitutional right to effective representation.

² 156 Wn. App. 160, 177-78, 231 P.3d 231 (2010).

instructions are "part of jury deliberations and, as such, are not historically a public part of the trial." Sublett, 156 Wn. App. at 182.

The court also held the conference was not a critical stage requiring the accused's presence because it involved "only the purely legal issue of how to respond to the jury's request for a clarification of an instruction." Sublett, 156 Wn. App. at 183.

The second case is State v. Koss, ___ Wn. App. ___, 241 P.3d 415, 2010 WL 4015216 (2010). There counsel and the trial court met off the record and in chambers, where everyone agreed to remove accomplice language from a to-convict instruction. Koss, 241 P.3d at 418. On appeal, the court held the conference did not implicate the accused's public trial right because it was a "ministerial legal matter [and] did not involve disputed facts." Id.

The trial court also answered two questions the deliberating jury submitted without making a record to show it discussed the questions with the parties in open court. Koss, 241 P.3d at 418-19. Relying on Sublett, the reviewing court held the accused's right to a public trial did not apply to the trial court's responding in writing to the jurors' questions. Koss, 241 P.3d at 419.

Finally, in State v. Bremer,³ the accused contended the trial court violated his constitutional right to be present by holding a jury instructions conference in chambers without his presence. The court held because he was represented by counsel at the conference, the accused "would not have had an opportunity to speak," which meant his "presence had no relation to the opportunity to defend against the charge[.]" Bremer, 98 Wn. App. at 835.

The state cites Sublett in support of its assertion. BOR at 6. Sublett, however, is readily distinguishable. The main holding was that because jury questions are part of deliberation, they are historically dealt with privately. Instructions conferences are not; a trial court must give counsel an opportunity to object to the giving of any instruction and refusal to give a proposed instruction. CrR 6.15(c). A party generally waives a challenge to an instruction by not objecting on the record. RAP 2.5(a); State v. Scott, 110 Wn.2d 682, 685-86, 757 P.2d 492 (1988) (citing CrR 6.15(c)); see Micro Enhancement Intern., Inc. v. Coopers & Lybrand, LLP, 110 Wn. App. 412, 429, 40 P.3d 1206 (2002) (dispute over whether particular exception to instruction actually was made in chambers required court to consider only exceptions made on record).

³ 98 Wn. App. 832, 834, 991 P.2d 118 (2000).

Moreover, the question jurors asked in Sublett went to the concept of accomplice liability and implicated the wording of the instruction, which is viewed as a purely legal matter. In re Personal Restraint of Pirtle, 136 Wn.2d 467, 484, 965 P.2d 593 (1998). The same is true in Koss, which involved removing accomplice liability language from a burglary "to-convict" instruction.

In contrast, during an instructions conference parties and the court grapple with whether or not to give an instruction, not merely with how it should be presented. This question is not purely legal but also mandates consideration of facts, because instructions must not only accurately state the law, but also must be supported by the evidence. State v. Berube, 150 Wn.2d 498, 510-11, 79 P.3d 1144 (2003); see State v. Sadler, 147 Wn. App. 97, 116-17, 193 P.3d 1108 (2008) (consideration of Batson challenge to prosecutor's use of peremptory strikes to remove African-American prospective jurors not purely legal or ministerial).

Bremer is distinguishable from Stean's case for a more fundamental reason. In that case, the only issue was whether the trial court violated the accused's constitutional right to be present by holding the instructions conference outside his presence. The due process right to be present protects different interests and sweeps less broadly than the right to a public trial. This Court should not apply Bremer here.

Due process guarantees a criminal defendant the right to be present for all critical stages of the prosecution. U.S. Const. amends. 5, 6, 14; Const. art. 1, §§ 3, 22; Kentucky v. Stincer, 482 U.S. 730, 745, 107 S. Ct. 2658, 96 L. Ed. 2d 631 (1987); United States v. Gagnon, 470 U.S. 522, 526, 105 S. Ct. 1482, 84 L. Ed. 2d 486 (1985). The Washington Constitution also specifically provides for the right to "appear and defend in person." Const. art. 1, § 22.

The right applies whenever the defendant's "presence has a relation, reasonably substantial, to the fulness of his opportunity to defend against the charge" In re Personal Restraint of Lord, 123 Wn.2d 296, 306, 868 P.2d 835 (quoting Gagnon, 470 U.S. at 526), cert. denied, 513 U.S. 849 (1994); State v. Berrysmith, 87 Wn. App. 268, 273, 944 P.2d 397 (1997), review denied, 134 Wn.2d 1008 (1998). Due process does not require the accused's presence when that presence would be useless. Berrysmith, 87 Wn. App. at 273. A defendant thus has no right to be present during conferences between the court and counsel on purely legal matters. Lord, 123 Wn.2d at 306.

The right is not restricted, however, to the presentation of evidence. State v. Pruitt, 145 Wn. App. 784, 798, 187 P.3d 326 (2008) For example, the constitutional right extends to jury selection "because it is substantially related to the defense and allows the defendant 'to give

advice or suggestion or even to supersede his lawyers." State v. Wilson, 141 Wn. App. 597, 604, 171 P.3d 501 (2007) (quoting Snyder v. Massachusetts, 291 U.S. 97, 106, 54 S. Ct. 330, 78 L. Ed. 674 (1934), overruled on other grounds by Malloy v. Hogan, 378 U.S. 1, 84 S. Ct. 1489, 12 L. Ed. 2d 653 (1964)).

These cases indicate the primary purpose of the due process right to attend a critical stage is to safeguard a defendant's ability to assist counsel by offering advice or suggestion when useful. This rationale is clearly identified by the Bremer court, which held that "[i]n the absence of some extraordinary circumstance in which Mr. Bremer's presence would have made a difference, a discussion involving proposed jury instructions is not a critical stage of the proceedings." 98 Wn. App. at 835.

The right to a public trial protects distinctly different interests. The purpose of the right is "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." State v. Strobe, 167 Wn.2d 222, 226, 217 P.3d 310 (2009) (quoting State v. Brightman, 155 Wn.2d 506, 514, 122 P.3d 150 (2005)). This is consistent with the general belief that judges, attorneys, witnesses, and jurors will be more responsible in an open court than behind closed doors. Strobe, 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)); see State v. Easterling, 157 Wn.2d 167, 178, 137 P.3d 825 (2006) (public trial guarantee protects "the transparency and fairness of criminal trials by ensuring that all stages of courtroom proceedings remain open unless the trial court identifies a compelling interest to be served by closure.")

Therefore, the public trial right benefits not only the defendant, but also the government, the trial judge, the jury, and the criminal justice system. Because of its inherent and immeasurable systemic importance, the violation of the right to a public trial is structural error and prejudice is necessarily presumed. Strode, 167 Wn.2d at 231. As such, it is an error that inevitably makes a criminal trial fundamentally unfair. Washington v. Recuenco, 548 U.S. 212, 218-19, 126 S. Ct. 2546, 165 L. Ed. 2d 466 (2006).

Violation of a defendant's right to be present, by comparison, is one of a broad class of constitutional errors subject to harmless error analysis. In re Personal Restraint of Benn, 134 Wn.2d 868, 920-21, 952 P.2d 116 (1998). Constitutional error is harmless "where the 'untainted' evidence is so overwhelming that it necessarily leads to a finding of guilt." Pruitt, 145 Wn. App. at 788.

Another indication of the systemic importance of the public trial right is that the defendant "cannot waive the public's right to open

proceedings." Strode, 167 Wn.2d at 229. This is because the public, like a party, has a right to object to the closure of a courtroom, and the trial court has the independent obligation to perform a Bone-Club analysis. Strode, 167 Wn.2d at 229-30. "The public has the right to be present whether or not any party has asserted the right." Presley v. Georgia, ___ U.S. ___, 130 S. Ct. 721, 725, 175 L. Ed. 2d 675 (2010). Trial courts are therefore required to consider alternatives to closure even when the parties offer no alternatives. State v. Leyerle, ___ Wn. App. ___, ___ P.3d ___ 2010 WL 4489420, *4 (2010) (citing Presley, 130 S. Ct. at 724-25).

For these reasons, the constitutional right to a public trial jury should not be linked with the right to be present at a critical stage of a proceeding. A defendant may wish to absent himself from a proceeding for a variety of reasons or for no reason at all. That same defendant, however, may wish to retain the systemic benefits that flow from an open proceeding. Simply because the defendant chooses to sit out a trial or hearing does not authorize the trial court to close the hearing because other, more general, interests remain.

The holding in Bremer, therefore, does not apply to Stean's public trial argument here. The trial court violated Stean's public trial right by conducting the instructions conference in private. Stean's convictions should be reversed and the cause remanded for a new trial.

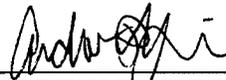
B. CONCLUSION

For the reasons cited herein and in his Brief of Appellant, this Court should reverse Stean's convictions and remand for a new trial.

DATED this 1 day of December, 2010.

Respectfully submitted,

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

STATE OF WASHINGTON,)	
)	
Respondent,)	
)	
v.)	COA NO. 65072-6-1
)	
ANDREW M. STEAN,)	
)	
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 1ST DAY OF DECEMBER, 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.

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SIGNED IN SEATTLE WASHINGTON, THIS 1ST DAY OF DECEMBER, 2010.

x *Patrick Mayovsky*

Handwritten: 2/11/10
Stamp: 2/11/10 11:16:10