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NO. 69328-0-1

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

**REC'D**  
MAR 29 2013  
King County Prosecutor  
Appellate Unit

STATE OF WASHINGTON,

Respondent,

v.

CARL TOBIN,

Appellant.

2013 MAR 29 PM 4:04  
COURT OF APPEALS  
STATE OF WASHINGTON  
DIVISION ONE

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

The Honorable Barbara Linde, Judge

BRIEF OF APPELLANT

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A. ASSIGNMENTS OF ERROR

1. The evidence is insufficient to sustain appellant's conviction for robbery.

2. The trial court violated appellant's constitutional right to a public trial by taking peremptory challenges in a proceeding closed from public view.

Issues Pertaining to Assignments of Error

1. Whether the state failed to prove robbery where the evidence showed that the complainant was assaulted because of his sexual orientation and that his fur coat was taken as an afterthought, once the assault was complete and the complainant was unconscious?

2. During jury selection, the parties made peremptory challenges by passing a piece of paper back and forth, while the court gave its preliminary instructions to the jury. Because the trial court did not analyze the Bone-Club<sup>1</sup> factors before conducting this important portion of jury selection privately, did the court violate appellant's constitutional right to a public trial?

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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<sup>2</sup>

1. Trial Testimony

Following a jury trial in King County superior court, appellant Carl Tobin was convicted of one count of first degree robbery and one count of malicious harassment, allegedly committed against Dan Lusko outside Inay's Restaurant on Beacon Hill<sup>3</sup> on December 23, 2011. CP 1-7, 69-70; RP 145. The state alleged Tobin and Antonio Gomez<sup>4</sup> assaulted Lusko because of his sexual orientation, and that the assault constituted a robbery because Lusko's fur coat was taken at some point during the assault. CP 1-7, RP 474.

December 23<sup>rd</sup> was a Friday night. RP 147. Friday night is "drag night" at Inay's. RP 146, 148, 260. Restaurant owner Ernesto Rios testified that although the restaurant has no stage, two of his waiters dress as women on Friday nights and perform by singing and telling jokes during their down time, when they are not serving food. RP 146.

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<sup>2</sup> This brief refers to the transcripts as follows: RP – jury trial on August 13-17, 2012; and 1RP – sentencing on September 14, 2012.

<sup>3</sup> The restaurant is located at 2503 Beacon Avenue South, Seattle, WA 98144. RP 145. The restaurant is adjacent to a gas station that is situated on the same (west) side of Beacon Avenue South, although the restaurant and gas station are separated by South Bayview Street, with Inay's to the south and the gas station to the north. RP 160-161, 164-166.

Lusko testified he went to Inay's Friday, December 23<sup>rd</sup>, because he had been asked to perform. RP 260. Lusko testified he was "dressed waist up in \$2,000.00 worth of entertainment clothing[,] including a "red-sequined Liberace shirt" and "an inside-out Fingerhut coat from 1970." RP 262. The coat belonged to Lusko's mother but was too big for her; it was gold and brown and looked like it was made of real fur. RP 262-63.

According to Lusko, he danced with "Natasha," one of the waiters dressed in drag, as part of the entertainment. RP 261, 263. Lusko testified his arrival was highly anticipated by other guests and that everyone wanted to take his picture by the restaurant's Christmas tree. RP 264, 293.

In contrast, Rios testified Lusko was not part of the evening's entertainment (RP 192), but that Lusko: "was acting a little bit flamboyant, friendly. Kind of dancing around, you know. And since – like he's a little intoxicated, kind of." RP 150; see also RP 195. Lusko was wearing "white pants and some kind of beige, white color jacket, fur-looking jacket." RP 151.

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<sup>4</sup> The record does not indicate how Gomez's case resolved, but he did not go to trial with Tobin.



Rios further explained Lusko was “a little bit rowdy” and overly affectionate with other customers, to the extent Rios took him aside and told him to tone it down. RP 150-51, 195-196. According to Rios, Lusko said he just came in to ask for a ride home; Rios testified Lusko did not come in until almost closing time, around 10:00 p.m. RP 150, 196.

Regardless, as the restaurant was closing, Lusko was outside saying goodbye to other patrons. RP 264, 268. Lusko testified an African American man in a wheelchair was sitting outside by the restaurant: “Right by the side. And it’s all windows. And they stand. Those homeless people that have nowhere to go after they get a free show all take drugs (inaudible) homosexual and they watch. And so when they’re sober they’re upset.” RP 268.

Lusko turned to go back inside the restaurant but it had closed and a metal accordion door enclosed the front entrance. RP 154, 268. Because his fur coat and cab fare was inside, Lusko wondered aloud what he was going to do. RP 268, 270.

According to Lusko, the African American man in the wheelchair called him over, stood up and asked if he could have a “Christmas hug, too.” RP 269. Lusko agreed, but claimed “he

didn't hug me, but he feeled [sic] me up and down through that fur coat." RP 269.

Lusko testified the man offered to help, explaining there was a side door around the corner Lusko could knock on. RP 269. Lusko claimed the man wanted to be pushed in the wheelchair. RP 269. Lusko testified he pushed the man as far as the corner, but became frightened and returned to the front of the restaurant. RP 269. The next time Lusko looked, the man was gone. RP 270.

Accordingly, Lusko went around the corner and knocked on the side door. RP 270. Lusko testified he heard a noise and when he looked behind him, saw the African American man standing there<sup>5</sup> with an Hispanic man, "the one who smothered me at the end[.]" RP 271.

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<sup>5</sup> Lusko testified the African American man no longer had the wheelchair. RP 276.

When Rios answered the door, Lusko asked if he could come in. Rios said he'd be back and shut the door. When he returned, Rios gave Lusko a bottle of water and a bag of cookies and said to wait for him there.<sup>6</sup> RP 277, 301.

Lusko testified that as soon as the door shut, the African American man and Hispanic man each grabbed one of his arms and dragged him down some dark steps about 25 feet from the restaurant. RP 277. Almost immediately, the Hispanic man put an open can of beer next to Lusko and went and stood with the African American man on the sidewalk. RP 272. According to Lusko, "they started, with their clothes on, in a very homosexual manner, started humping or bumping (indicating), but I'll say humping. Dry humping is what it's called." RP 272.

Lusko looked away and accidentally knocked over the beer of the Hispanic man, who reportedly said, "you'll pay for this." RP 272. But according to Lusko, the men "continued to hump." RP

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<sup>6</sup> Rios remembered the interaction a little differently. He testified that when he was cleaning up, he noticed Lusko's coat and went to the side door to give it to him. According to Rios, Lusko was in front of the restaurant "with the two guys, him and his friends." RP 155. Rios gave Lusko the coat at the side of the restaurant and Lusko reminded him he needed a ride home. RP 156. Rios agreed to give him a ride home after he closed the restaurant. RP 156. Rios told Lusko to wait at the side door while he finished counting the till. RP 156. At this time, the two men Lusko had been standing outside with were still in the front of the restaurant. RP 157.

273. Lusko continued to look away but heard the men passing a joint back and forth. RP 274, 299, 301. Lusko testified that when he peaked to see what was happening, the African American man saw him and said, "Have you take a hit." RP 275. Lusko declined. RP 275.

Lusko testified that all of a sudden, "there were three of them, and there was six fists at my head at once." RP 275. Lusko testified that, "like an Olympic person, I leaped to the end of curb on my knees, covered my nose, and started to crawl." RP 275. Lusko testified all three men were hitting him, but he kicked the tall skinny one in the groin:

I was in my Fred Astaire shoes, I'm a track star, and a dancer, trained dancer. I strongly stand. Immediately I kicked and got the tall skinny one that got off.<sup>[7]</sup> I kicked him in the groin. He ran behind a tree and cried.

RP 276.

Lusko testified the Hispanic man remained on one side of him, while the African American man stood on the other. RP 276. Lusko claimed that as he crawled away, they said, "Goddamn it. Let's kill this faggot so faggot corner is over with. Done." RP 277. According to Lusko, the derogatory slurs and beating continued for

45 minutes as he crawled to the gas station to call for help. RP 277-78.

Lusko testified that when he reached the gas station, the Hispanic man smothered him, while the African American man pinned him down. RP 279. According to Lusko:

They says, smother the faggot so he's dead. Faggot corner will be over. And cut out his finger for that ring. Then the Hispanic did this (indicating) before that take a deep breath. He did this. I totally relaxed. Then I was pushed to the ground so my face rubbed in this – whatever that was down there, the black tar, sidewalk.

Then I immediately was out. I didn't even really, at all, felt scared [sic] of it. I didn't feel smothered. I didn't even know I was smothered at all. But I woke up later, nothing on waist up, with teeth in front of me on the street. And my mouth – I crawled back to Inay's, and had just caught them down the street wearing my clothing because they thought I was dead, they could get away with it. Dead. They decided they should go put on my clothes. What is going on with society today? And then the police drove down the street and they all came to me.

RP 280.

Rios had called 911 after looking out his window and seeing the assault. RP 178. Rios lives on the top floor of a triplex, located

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<sup>7</sup> Lusko described this man to police as tall, skinny and dark-skinned. RP 244, 275.

behind the gas station.<sup>8</sup> RP 146, 170; see note 3. Rios had closed the restaurant around 10:30 p.m. that night, but did not see Lusko anywhere. RP 163. Accordingly, after giving the dishwasher a ride to his home about ten minutes away, Rios also went home. RP 163-64.

When Rios first got home and looked out his window, he saw three men on the steps to an apartment building on Bayview. RP 174, 191. He recognized Lusko, Tobin and Tobin's friend, both of whom Lusko described as "laughing, giggling." RP 174-75. Rios recognized Tobin, in part, because he was wearing an "orange reflector vest." RP 175. Rios had seen Tobin and the other man earlier that evening in front of the restaurant. RP 151-52. Rios testified that a couple of days earlier, Tobin had tried to sell him an electric wheelchair. RP 151-52. Rios thought the group was having fun and went to watch television for a while. RP 177.

About ten minutes later, Rios looked out his window again. RP 178. This time, he saw Lusko falling and being attacked. RP 178. Rios called 911 and left his house to help. RP 178. As he walked down his stairs, Rios reportedly saw Tobin's friend jumping

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<sup>8</sup> The triplex is located at 2417 14<sup>th</sup> Avenue South. RP 146, 171. From his bedroom window, Rios has a partial view of Bayview Street and the back of Inay's. RP 162, 171, 174, 189.

on Lusko. RP 179. Rios testified Tobin was standing on the other side of Lusko, but Rios did not see him assault Lusko. RP 179.

When Rios reached Lusko, the men had already left. RP 180. Rios told Lusko to stay put, that he was on the phone with 911. RP 180.

Meanwhile, Rios followed the men as they walked around toward the front of the restaurant and headed southbound on 15<sup>th</sup> Avenue South toward South Lander Street. RP 181, 185. Rios testified Tobin was wearing Lusko's fur coat. RP 185. At some point, possibly when they went around the corner onto 15<sup>th</sup> Avenue, the men were joined by another, taller man. RP 184-185. Rios flagged down one of the responding officers to point the men out. RP 181, 184.

Police officers responded to the restaurant around 11:10 p.m. RP 213, 317. Aaron Johnson was the officer Rios flagged down. RP 323. After talking to Rios, Johnson made a U-turn and headed south on 15<sup>th</sup> Avenue. RP 321, 323. At first, Johnson saw only two men walking, one of whom was a taller, black man and the other Caucasian or possibly Hispanic. RP 322. By the time Johnson came to a stop on South Lander, a third man in a wheelchair had joined them. RP 325-27. The three were identified

as Carl Tobin, who was in the wheelchair, Antonio Gomez and John Austin. RP 332. Tobin was wearing a brown fur coat with an orange reflector vest underneath. RP 327. Johnson took the coat as evidence; it was in two pieces. RP 344, 358.

Rios arrived at the location of the detention and identified Tobin and Gomez as the two he had seen beating Lusko. RP 186, 325, 340. Rios indicated he had not actually seen Austin involved, so Johnson let him go. RP 340.

Meanwhile officer Azrielle Johnson responded to the restaurant, where medics were treating Lusko. RP 216-17. According to Azrielle Johnson, Lusko was lying on the ground “and all of his items from his pockets, like his cell phone and some stuff, were laying around him on the ground.” RP 216.

Azrielle Johnson testified Lusko was: “Very upset. Very – just shocked. He was in – you could tell he was in a lot of pain.” RP 219. According to Azrielle Johnson, Lusko “was very worried that his mother was going to be upset with him that this happened. And we were trying to calm him down.” RP 220. Azrielle Johnson claimed “He was talking about his coat and how the suspects had ripped it from him and taken it.” RP 220.



Lusko remembered the conversation differently:

Q [prosecutor]. Let me ask you, though, when you told them what had been stolen at that time –

A. I didn't tell them anything was stolen.

Q. Well, what about your coat?

A. I said waist up everything was gone. I didn't tell them anything. Apparently these people were wearing something that they couldn't imagine winning on the Price is Right. I mean, truly.

Q. And – but you told them that you had been wearing this fur coat. You told the police that?

A. Oh, yeah, when they asked me. Well, yes, yes.

RP 284.

Azrielle Johnson eventually took Lusko to the detention location. RP 226. She testified Lusko positively identified both Tobin and Gomez as two of his three attackers.<sup>9</sup> RP 227-228, 244. Azrielle Johnson testified Lusko also exclaimed, "That's my coat. He has my coat." RP 228. Tobin and Gomez were arrested and placed in the back of Aaron Johnson's patrol car. RP 348-49.

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<sup>9</sup> Lusko similarly testified that he identified the two men who were detained as two of his three attackers. RP 281. In court, however, Lusko did not identify Tobin as one of the men who attacked him. RP 265-67, 276.

Aaron Johnson told them everything they said was being recorded. Ex 23. Johnson's patrol car audio and video system had been activated while he was en route. RP 350.

While in the patrol car, Tobin was recorded saying, "Stick to the script. That's all. Shit, they got nothin' – nothin'. Assault, please. Old faggot (unintelligible)." Ex 23, page 1. According to the recording, Tobin further stated: "Came from your house, that's all I know. Okay? That's it and that's that. Oh, ... we were panhandling. . . . We were panhandling to get our own (cough) couple of beers." Ex 23, page 2.

Tobin also stated: "That's my jacket. I had it since I left your house this morning. Yeah. Anything else is less than civilized. That's my jacket. It's mine. I've had it ever since you've known me." Ex 23, page 3.

Toward the end of the recording, Tobin stated:

We didn't do nothin' . . . to nobody. And the boy's not even showin'. No. Gay ass queer. Physical violation of 1-409 of a homosexual. (Unintelligible) ... fucked up. And he got a house up here. Oh, you know (unintelligible) over there, you know, to the house. I should a grabbed onto the mother fucker. I should have, I should have. He won't get me. Queer ass motherfucker. And he's not showin', I guarantee it.

Matter of fact he probably liked it. Look, he liked it. That's why he's not gonna show – because

he liked it. Stick to the script. He liked it. Trust me ...  
(unintelligible). Who am I shittin' (unintelligible)?  
They'll try to separate us ... my boy ain't gonna roll on  
me; I ain't gonna roll on him. (Unintelligible).  
We're innocent.

Ex 23, page 4.

Tobin testified he made those statements in the heat of the moment and also to provide Gomez with a cover story. RP 436-439. Tobin had not participated in the assault, but saw Gomez and assaulting Lusko. RP 439.

Tobin testified he and Gomez had gone to Inay's that night for free food; around closing time, one of Inay's employees agreed to give Tobin some food from the buffet, so long as Tobin was discrete about it. RP 413, 416.

Next door to Inay's is a Mexican restaurant. RP 413. With the restaurant's permission, Tobin was charging his electric wheelchair there. RP 413. Tobin had the wheelchair because his mother had recently needed it, before passing away, and Tobin was trying to sell it. RP 410. Tobin was wearing a reflective vest, because he had recently worked as a flagger. RP 411.

Tobin testified a number of people were still outside Inay's, "festive and being happy." RP 417. Gomez was on the corner talking to other people, when Tobin saw Lusko, who asked him for

a cigarette. RP 417. When Tobin said no, Lusko asked for a "Christmas hug." RP 419. Tobin agreed but Lusko grabbed his face and tried to kiss him. RP 419. Tobin was not receptive and Gomez came over to see what was happening; Tobin testified he and Gomez had been lovers in the past. RP 409, 420.

Tobin told Gomez nothing was wrong, and Lusko apologized and offered to share some marijuana. RP 420. As they went around the corner to smoke, Lusko said he forgot his coat and knocked on the restaurant's side door. RP 422-24. After Rios gave Lusko his coat, he rejoined Tobin and Gomez and they walked down to some steps. RP 425. Tobin remembered Lusko knocking over Gomez's beer, but described it as not a big deal. RP 425.

After smoking some marijuana, Tobin decided to go get his food; it was with his wheelchair at the Mexican restaurant. RP 426-27. Tobin had a couple of bites but returned to the steps when he heard yelling and screaming. RP 427.

As Tobin came around the corner, he saw Gomez and a tall, dark man assaulting Lusko. RP 427. Tobin believed the tall dark man to be John Austin. RP 427. When Tobin asked, "What the hell are you guys doing," Austin ran around the corner, apparently heading south on 14<sup>th</sup>. RP 429. Tobin pulled Gomez off Lusko and

ushered him up toward the front of the restaurant, where Tobin retrieved his wheelchair. RP 429-30. Around this same time, Tobin saw Rios approaching, and therefore, believed aid would be coming as well. RP 429.

Tobin and Gomez were heading south on 15<sup>th</sup> when Austin “came out from nowhere” and joined them. RP 434. Tobin testified Austin had Lusko’s coat. RP 434. After going through it, Austin discarded it. RP 434. Tobin – who had been sick and was cold – picked it up. “And at that point the police rolled up.” RP 434.

## 2. Peremptory Challenges

The court explained peremptory challenges would be made by passing a piece of paper back and forth:

As far as peremptory challenges go, there’s a sheet of paper that the parties will pass back and forth. Did you have a chance to see it? And if you pass, in other words, if you are happy, you’ll need to – when you – if you pass your turn, right pass, and then you’ll be limited only to jurors who are not in the box, anyone that comes in afterwards for your peremptory challenges.

When you’re all done and you accept the panel, sign it, and then it will be presented here. I will be instructing the jury on all of the ins and outs of trial, the typical script of instructions, while you’re doing that. And my experience is the amount of time it takes to do all those instructions gives you ample time to do that. And if you’re not done at the time I’m doing instructions, we just wait until you are.

So, when you're doing it, I'll everyone have their number up here so you can see them. And you'll simply have to keep track of – you know, there's going to be 13 in here and how many are gone and where we are. Makes sense?

MS. NAVE [prosecutor]: Thank you, Your Honor.

MS. GRIFFIN [defense counsel]: Thank you.

RP 129.

In contrast, the court explained challenges for cause would occur in "open court:"

Challenges for cause need to be done before we get to the peremptory challenge stage. So, if there's a challenge for cause that you develop while you're questioning the juror, simply, in open court at that time, indicate, address the Court that you would like to ask that that juror be excused for cause.

RP 129.

The transcript indicates that after voir dire, the court began instructing the jurors as it previously indicated it would to allow the parties to exercise peremptory challenges as directed:

(Voir dire.)

(Recess.)

THE COURT: Welcome back. Please be seated, ladies and gentlemen. We're ready to proceed, and as promised, I'm going to give you some additional instructions. And while I'm doing this, the attorneys are going to be making their selections on paper and

then they're going to deliver them to me, and then I will announce them. And so this applies to the trial. And so as if all of you were going to be on this trial, serving as this jury of 13, I just ask that you pay close attention.

...

Can I get your signatures on this, counsel? That is literally the best timing I have ever seen happen. The attorneys have concluded their selections just as I've completed my remarks.

All right. Ladies and gentlemen, I'm going to read a list of juror numbers, and these will be those individuals that will be the first group excused from this panel. And after that I will seat in order the remaining wave of jurors who will go take some positions in the jury box. And after that I'll excuse those that we don't use.

So, I want to make sure and thank all of you. So if I'm going to excuse you and I don't get a chance to do it again, on behalf of the Court and the parties, thank you very much for your service. This process can't work without the participation and sacrifice of everyone, whether you ultimately sit in the jury box or not. So, thank you. And your instructions will be to return to the first floor jury assignment area. And hopefully continue on with a good and productive jury service.

(The jury was sworn and impaneled).<sup>[10]</sup>

RP 138-39; Supp. CP \_\_ (sub. no. 56, Peremptory Challenges, 8/13/12).

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<sup>10</sup> Undersigned counsel is in the process of having this portion of jury selection transcribed.

C. ARGUMENT

1. THE EVIDENCE IS INSUFFICIENT TO SUSTAIN TOBIN'S CONVICTION FOR ROBBERY.

In every criminal prosecution, due process requires that the State prove every fact necessary to constitute the charged crime beyond a reasonable doubt. In re Winship, 397 U.S. 358, 364, 25 L. Ed. 2d 368, 90 S. Ct. 1068 (1970). Where a defendant challenges the sufficiency of the evidence, the proper inquiry is, when viewing the evidence in the light most favorable to the prosecution, whether there was sufficient evidence for a rational trier of fact to find guilt beyond a reasonable doubt. Jackson v. Virginia, 443 U.S. 307, 319, 61 L. Ed. 2d 560, 99 S. Ct. 2781 (1979); State v. Green, 94 Wn.2d 216, 220-21, 616 P.2d 628 (1980).

A person commits robbery when "he or she unlawfully takes personal property from the person of another or in his or her presence against his or her will by the use or threatened use of immediate force, violence, or fear of injury to that person . . . ." RCW 9A.56.190. "Such force or fear must be used to obtain or retain possession of the property, or to prevent or overcome resistance to the taking . . . ." Id. Moreover, the crime requires an



intent to steal. State v. Kjorsvik, 117 Wn.2d 93, 98, 812 P.2d 86 (1991).

The State failed to present evidence sufficient for jurors to reasonably conclude force was used *to obtain or retain* possession of Lusko's coat. Rather, the evidence indicates the coat was taken as an afterthought following the assault, after Lusko was unconscious. Therefore, Tobin's first degree robbery conviction must be reversed and dismissed. See State v. Hickman, 135 Wn.2d 97, 103, 954 P.2d 900 (1998) (dismissal with prejudice proper remedy for failure of proof).

The most recent and thorough discussion of the robbery statute's requirements is found in State v. Allen, 159 Wn.2d 1, 147 P.3d 581 (2006). Allen was a 5-4 decision in which the majority found the evidence sufficient to convict the defendant of aggravated first-degree murder with robbery as the aggravating factor. Allen, 159 Wn.2d at 11. Although the Court was split on whether the evidence in that particular case was sufficient to demonstrate a robbery, there was no split on the robbery statute's requirements, discussed at length in the dissenting opinion authored by Justice Alexander. See Allen, 159 Wn.2d at 11-16 (Alexander, J., dissenting).

As pointed out by Justice Alexander, Washington long ago departed from the broader view that the use of any force prior to a theft necessarily demonstrates robbery. Id. at 12 (citing State v. Handburgh, 119 Wn.2d 284, 293, 830 P.2d 641 (1992)). Rather, “the force must relate to the taking or retention of property, either as force used directly in the taking or retention or as force used to prevent or overcome resistance ‘to the taking.’” Id. at 13 (quoting State v. Johnson, 155 Wn.2d 609, 611, 121 P.3d 91 (2005)).

Thus, consistent with this relatively narrow definition of robbery, “the mere taking goods from an unconscious person, without force, or the intent to use force, is not robbery, unless such unconsciousness was produced expressly for the purpose of taking the property in charge of such person.” State v. Larson, 60 Wn.2d 833, 835, 376 P.2d 537 (1962) (quoting 2 Francis Wharton, Wharton’s Criminal Law § 1092, at 1390 (12<sup>th</sup> ed. 1932)).

The Supreme Court of Massachusetts has explained the reasoning behind this approach:

“Robbery may be punished more severely than larceny from the person. The principal policy served by this greater punishment is deterrence of the use of force (and the accompanying risk to human life) to obtain money or other property. This policy is not served where the intent to steal is not formed until after the assault. We conclude, therefore, that where

the intent to steal is no more than an afterthought to a previous assault, there is no robbery.”

Allen, 159 Wn.2d at 14 (quoting Commonwealth v. Moran, 387 Mass. 644, 646, 442 N.E.2d 399, 401 (1982) (citations omitted)).

Lusko testified he woke up in time to see his assailants walking away and putting on his clothes. Lusko did not testify his coat was taken prior to his becoming unconscious. Rather, he testified he woke up naked from the waist up. The obvious implication of Lusko’s testimony is that the coat was taken from him while he was unconscious. This is precisely the type of circumstances described by the Massachusetts court, quoted in Allen, where the intent to steal is no more than an afterthought to a previous assault. In other words, there was no robbery.

In response, the state may point to officer Johnson’s testimony where she claimed Lusko said his assailants ripped his coat from him. However, Lusko clarified he merely told police he had been wearing a coat. And as the trial made clear, Lusko has a colorful way of describing things. Indeed, Lusko’s statement that the coat was ripped from him is not inconsistent with his testimony that it was taken from him while unconscious. The out-of-court statement attributed to him therefore is not sufficient evidence of

robbery in light of Lusko's trial testimony under oath. This Court should accordingly reverse Tobin's conviction.

2. THE TRIAL COURT VIOLATED TOBIN'S RIGHT TO A PUBLIC TRIAL BY CONDUCTING PEREMPTORY CHALLENGES PRIVATELY.

Jury selection in this case occurred on August 14, 2012. RP 130-139. After questioning was complete, the court directed counsel to exercise peremptory challenges by passing a piece of paper back and forth. RP 128, 139. The court then excused certain jurors and seated other veniremembers in the excused jurors' seats. RP 139. This private procedure violated Tobin's right to a public trial.

The Sixth Amendment to the United States Constitution and article I, section 22 of the Washington Constitution guarantee the accused a public trial by an impartial jury.<sup>11</sup> Presley v. Georgia, 558 U.S. 209, 130 S. Ct. 721, 724, 175 L. Ed. 2d 675 (2010); State v. Bone-Club, 128 Wn.2d 254, 261-62, 906 P.2d 629 (1995). Additionally, article I, section 10 of the Washington Constitution provides that "[j]ustice in all cases shall be administered openly,

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<sup>11</sup> The Sixth Amendment provides in pertinent part that "[i]n all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury . . . ." Article I, section 22 provides that "[i]n criminal prosecutions the accused shall have the right . . . to have a speedy public trial by an impartial jury . . . ."

and without unnecessary delay.” This latter provision gives the public and the press a right to open and accessible court proceedings. Seattle Times Co. v. Ishikawa, 97 Wn.2d 30, 36, 640 P.2d 716 (1982).

While the right to a public trial is not absolute, a trial court may restrict the right only “under the most unusual circumstances.” Bone-Club, 128 Wn.2d at 259. Before a trial judge can close any part of a trial, it must first apply on the record the five factors set forth in Bone-Club. Orange, 152 Wn.2d at 806-07, 809. A violation is presumed prejudicial and is not subject to harmless error analysis. State v. Wise, 176 Wn.2d 1, 16-19, 288 P.3d 1113 (2012); State v. Strode, 167 Wn.2d 222, 231, 217 P.3d 310 (2009); State v. Easterling, 157 Wn.2d 167, 181, 137 P.3d 825 (2006); In re Personal Restraint of Orange, 152 Wn.2d 795, 814, 100 P.3d 291 (2004).

The public trial right applies to “the process of juror selection,’ which ‘is itself a matter of importance, not simply to the adversaries but to the criminal justice system.” Orange, 152 Wn.2d at 804 (quoting Press-Enter. Co. v. Superior Court, 464 U.S. 501, 505, 104 S. Ct. 819, 78 L. Ed. 2d 629 (1984)). The right to a public trial includes “circumstances in which the public's mere

presence passively contributes to the fairness of the proceedings, such as deterring deviations from established procedures, reminding the officers of the court of the importance of their functions, and subjecting judges to the check of public scrutiny.” State v. Slerf, 169 Wn. App. 766, 772, 282 P.3d 101 (2012)<sup>12</sup> (quoting State v. Bennett, 168 Wn. App. 197, 204, 275 P.3d 1224 (2012)).

The peremptory challenge process, an integral part of jury selection,<sup>13</sup> is one such proceeding: While peremptory challenges may be exercised based on subjective feelings and opinions, there are important constitutional limits on both parties’ exercise of such challenges. Georgia v. McCollum, 505 U.S. 42, 49, 112 S. Ct. 2348, 120 L. Ed. 2d 33 (1992); Batson v. Kentucky, 476 U.S. 79, 106 S. Ct. 1712, 90 L. Ed. 2d 69 (1986). Based on these crucial constitutional limitations, public scrutiny of the exercise of peremptory challenges is more than a procedural nicety; it is required by the constitution. See Slerf, 169 Wn. App. at 772 (explaining need for public scrutiny of proceedings).

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<sup>12</sup> In Slerf, this Court reversed Slerf’s conviction, holding that an in-chambers conference at which various jurors were dismissed based on their answers to a questionnaire violated his right to a public trial. 169 Wn. App. at 778-79.

<sup>13</sup> People v. Harris, 10 Cal.App.4th 672, 684, 12 Cal.Rptr.2d 758 (1992).

The procedure in this case violated the right to a public trial to the same extent as any in-chambers conference or other courtroom closure would have. Even though the procedure occurred in an otherwise open courtroom, any assertion that the procedure was in fact public should be rejected. The procedure was similar to a sidebar, which occurs outside of the public's scrutiny, and thus violates the appellant's right to a fair and public trial. Slert, 169 Wn. App. at 774 n. 11 (rejecting argument that no violation occurred if jurors were actually dismissed not in chambers but at a sidebar and stating "if a side-bar conference was used to dismiss jurors, the discussion would have involved dismissal of jurors for case-specific reasons and, thus, was a portion of jury selection held wrongfully outside Slert's and the public's purview"); see also Harris, 10 Cal.App.4th at 684, (exercise of peremptory challenges in chambers violates defendant's right to a public trial); cf. People v. Williams, 26 Cal.App.4th Supp. 1, 7-8, 31 Cal.Rptr.2d 769 (1994) (peremptory challenges could be held at sidebar to permit party opponent to make motion based on state version of Batson, 476 U.S. 79, if challenges and party making them were then announced in open court).

The trial court violated appellant's constitutional right to a public trial by taking peremptory challenges during a private proceeding. And while there is no Washington case containing identical facts, the private proceeding was no less a violation of the right to a public trial than the closed voir dire sessions that Washington courts have repeatedly held to violate the public trial right. Because the error is structural, prejudice is presumed, and thus reversal is required. Wise, 176 Wn.2d at 16-19.




D. CONCLUSION

The evidence is insufficient to sustain Tobin's first degree robbery conviction. In addition, the trial court violated Tobin's right to a public trial by having counsel exercise peremptory challenges in a manner removed from public scrutiny. For the first reason, this Court should reverse and dismiss the robbery conviction. For the second reason, this Court should reverse both convictions.

Dated this 29<sup>th</sup> day of March, 2013

Respectfully submitted

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

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STATE OF WASHINGTON )

Respondent, )

v. )

CARL TOBIN, )

Appellant. )

COA NO. 69328-0-II

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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 29<sup>TH</sup> DAY OF MARCH, 2013, I CAUSED A TRUE AND CORRECT COPY OF THE **BRIEF OF APPELLANT** TO BE SERVED ON THE PARTY / PARTIES DESIGNATED BELOW BY EMAIL AND/OR DEPOSITING SAID DOCUMENT IN THE UNITED STATES MAIL.

[X] CARL TOBIN  
DOC NO. 909668  
COYOTE RIDGE CORRECTIONS CENTER  
P.O. BOX 769  
CONNELL, WA 99326

**SIGNED** IN SEATTLE WASHINGTON, THIS 29<sup>TH</sup> DAY OF MARCH, 2013.

x Patrick Mayovsky