31050-7-III

COURT OF APPEALS

DIVISION III

OF THE STATE OF WASHINGTON

STATE OF WASHINGTON, RESPONDENT

v.

BENITO GOMEZ, APPELLANT

APPEAL FROM THE SUPERIOR COURT

OF WALLA WALLA COUNTY

APPELLANT'S REPLY BRIEF

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A. ARGUMENT

1. THE TRIAL COURT VIOLATED MR. GOMEZ'S CONSTITUTIONAL PUBLIC TRIAL RIGHT.

Both criminal defendants and the public have a constitutional right to public trials. U.S. Const. amend. VI; Wash. Const. art. I, §§ 10, 22; *see also State v. Wise*, 176 Wn.2d 1, 9, 288 P.3d 1113 (2012). Here, the trial court closed the courtroom by prohibiting members of the public from entering the courtroom after court was in session. (RP 153-154).

The State argues that preventing members of the public from entering or exiting the courtroom once court is in session is standard courtroom protocol, or "common expectations for decorum in a courtroom." (Resp. Br. at 9-13). To the contrary, our Supreme Court has ruled that this is a courtroom closure. *See State v. Sublett*, 176 Wn.2d 58, 71, 292 P.3d 715 (2012) (a courtroom closure "occurs when the courtroom is completely and purposefully closed to spectators so that no one may enter and no one may leave.") (*quoting State v. Lormor*, 172 Wn.2d 85, 93, 257 P.3d 624 (2011)). Before closing a trial to the public, a trial court must consider the five factors set forth in *State v. Bone-Club*. *See Wise*, 176 Wn.2d at 12; *State v. Bone-Club*, 128 Wn.2d 254, 258-59, 906 P.2d 325 (1995). This was not done here.

A trial court may impose courtroom security measures under specific circumstances. *State v. Jaime*, 168 Wn.2d 857, 865, 233 P.3d 554

(2010). But our Supreme Court has rejected security reasons as a basis for closing a trial to the public without considering the factors set forth in *Bone-Club*. *See In re Pers. Restraint of Orange*, 152 Wn.2d 795, 810, 100 P.3d 291 (2004); *State v. Brightman*, 155 Wn.2d 506, 511, 514-518, 122 P.3d 150 (2005); *see also State v. Njonge*, 161 Wn. App. 568, 579-580, 255 P.3d 753 (2011), *review granted*, 176 Wn.2d 1031, 299 P.3d 19 (2013).

The State also argues:

> The protocol described here is no different from what is expected of any theater attendee. Attendees are discouraged from entering or exiting in such a way as would disrupt proceedings. This is what the judge described.

(Resp. Br. at 10-11).

A theater attendee is far different from a courtroom spectator. A courtroom spectator is not a theater patron. The courtrooms of our state are not theaters. They are venues in which numerous constitutional protections apply to both persons accused of crimes and the public.

The State refers to material outside the record, a document from the Washington Courts' website. (Resp. Br. at 11). The record does not indicate that the document referred to by the State was before the trial court. Therefore, this court should not consider it.

Finally, the State argues that all parts of the trial were open to the public, and that the public could enter and exit the courtroom. (Resp. Br.

at 13). The record shows otherwise. (RP 153-154). The trial court stated: "[w]e do not allow people to come into the courtroom after the court is in session[.]" (RP 153). Because the plain language of the trial court's ruling imposes a courtroom closure, it is the State's burden to overcome the strong presumption that the courtroom was closed. *Brightman*, 155 Wn.2d at 516. The State has not met this burden. Therefore, Mr. Gomez is entitled to a new trial.

The State submitted a statement of additional authorities, citing numerous out-of-state cases, and stating that these cases are "relative to" the "experience and logic test." These out-of-state cases are not applicable here. This is not a case of first impression where this court should look to out-of-state cases for guidance. In addition, at least one of these cases is directly contrary to Washington law. *See People v. Woodward*, 4 Cal. 4th 376, 841 P.2d 954 (1992). In *Woodward*, the California Supreme Court followed a "de minimis" rationale when rejecting a public trial argument. *Woodward*, 4 Cal. 4th at 385-86. Washington has not adopted a *de minimis* standard in the context of the public trial right. *See State v. Easterling*, 157 Wn.2d 167, 180-81, 137 P.3d 825 (2006).

In addition, although our Supreme Court has not considered whether the public trial rights under the state and federal constitutions are

equal, it has acknowledged that article I, § 10 of our state constitution has no federal parallel. *See Wise*, 176 Wn.2d at 9, n.2; *see also Easterling*, 157 Wn.2d at 181, n.12.

Finally, the "experience and logic test" concerns whether the public trial right is implicated at all, based upon the nature of the court proceeding where the closure occurred. *See Sublett*, 176 Wn.2d at 73. The "experience and logic test" is met here, where the trial was ordered closed anytime court was in session, including during witness testimony. (RP 153-154); *see also Sublett*, 176 Wn.2d at 73. Further, no one was allowed to enter the courtroom while a witness was testifying, and that violated the right of the public to the open administration of justice. Wash. Const. art. I, § 10.

2. COMMUNITY CUSTODY CONDITIONS MAY BE CHALLENGED FOR THE FIRST TIME ON APPEAL.

The State argues that this court should not review Mr. Gomez's challenge to four of his community custody conditions, because he did not object to the challenged conditions in the trial court. (Resp. Br. at 17-21). A defendant may raise objections to community custody conditions for the first time on appeal. *State v. Bahl*, 164 Wn.2d 739, 744-45, 193 P.3d 678 (2008); *State v. Jones*, 118 Wn. App. 199, 204, 76 P.3d 258

(2003). This court should consider Mr. Gomez's challenge to four of his community custody conditions.

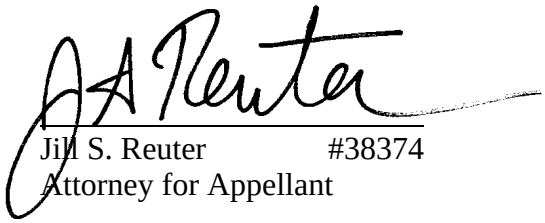
B. CONCLUSION

The trial court violated Mr. Gomez's constitutional public trial right by prohibiting the public from entering the courtroom once court was in session, without considering the factors set forth in *State v. Bone-Club*, 128 Wn.2d at 258-59. Mr. Gomez is entitled to a new trial.

This court should also consider Mr. Gomez's challenge to four of his community custody conditions.

Dated this 18th day of July, 2013.

JANET GEMBERLING, P.S.



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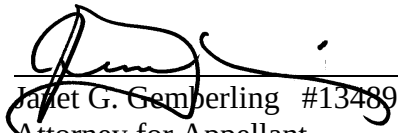

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IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON,

DIVISION III

STATE OF WASHINGTON,	)	
	)	
Respondent,	)	No. 31050-7-III
	)	
vs.	)	CERTIFICATE
	)	OF MAILING
BENITO GOMEZ,	)	
	)	
Appellant.	)	

I certify under penalty of perjury under the laws of the State of Washington that on July 18, 2013, I served a copy of Appellant's Reply Brief in this matter by email on the Attorney for the Respondent, receipt confirmed, pursuant to the parties' agreement:

Teresa Jeanne Chen
tchen@wapa-sep.wa.gov

I certify under penalty of perjury under the laws of the State of Washington that on July 18, 2013, I mailed a copy of Appellant's Reply in this matter to:

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Signed at Spokane, Washington on July 18, 2013.

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