70017-1

70017-1

No. 70017-1-I

IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON

DIVISION ONE

STATE OF WASHINGTON,

Respondent,

v.

MATTHEW McHUGH MAGNANO,

Appellant.

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

The Honorable Dean C. Lum

BRIEF OF APPELLANT

THOMAS M. KUMMEROW
Attorney for Appellant

WASHINGTON APPELLATE PROJECT
1511 Third Avenue, Suite 701
Seattle, Washington 98101
(206) 587-2711

TABLE OF CONTENTS

TABLE OF AUTHORITIES

WASHINGTON CASES

OTHER STATE CASES

A. ASSIGNMENT OF ERROR

Mr. Magnano's right to a public trial, and the public's right to open proceedings, were violated when the courtroom was closed during the replay of the 911 recording for the jury.

B. ISSUE PERTAINING TO ASSIGNMENT OF ERROR

Under the First, Sixth and Fourteenth Amendments to the United States Constitution and article I, section 22 of the Washington Constitution, a criminal trial must be administered openly and publicly. Violation of that right is a structural error which results in reversal of the defendant's conviction. Here the trial court closed the courtroom while the jury heard, at its request, a replay of a 911 recording without conducting a *Bone-Club* analysis. Did the closure of the courtroom violate the constitutionally protected rights to open and public trials necessitating reversal of Mr. Magnano's conviction?

C. STATEMENT OF THE CASE

Matthew Magnano was charged with one count of second degree robbery.[1] CP 12-13. During jury deliberations, the jury sought a replay of the recording of the 911 call. CP 64; 11/28/2012RP 6. The trial court agreed to the jury's request, but after consultation with the

[1] Mr. Magnano was also charged with hit and run, but was acquitted by the jury of that count. CP 12-13, 67.

parties, determined the rehearing of the recording would be done in the courtroom. 11/28/2012RP 6-7. The court ruled that the jury's listening to the recording would be closed to the public, albeit in the courtroom:

> MR. DOYLE: Again, I'm also aware of the law. Lot of the case law that we have. So I want to very careful. If we do listen to the 911 recordings, I would just ask if it's going to be in open court, and the door's to be open that we don't have anybody walking in while they are discussing it. So I just ask that they not discuss while listening to it in open court, and that the deliberations must occur in the back room.
>
> THE COURT: Well, I'm not sure we need to leave the door open. It would just be a continuation of the deliberations.
>
> MR. DOYLE: And that would be fine too.
>
> THE COURT: So I intend to leave. I'm not going to be here. Lawyers or the client's [sic] are not going to be here. Just the bailiff will just start it, and she will leave the room, and she will tell them, tell the jurors, she is coming back in when it's done.
>
> MR. DOYLE: Okay. Is there a risk of anybody walking in?
>
> THE COURT: No, because I'm going to have my bailiff standing at the door and make sure nobody walks in.
>
> MR. DOYLE: That would be fine with me then.
>
> THE COURT: So to be clear, it's not a violation of open court rule, essentially it's not open court, it's just that they – happen to be conducting deliberations.

11/28/2012RP 7.

Mr. Magnano was subsequently convicted as charged. CP 66.

D. ARGUMENT

THE TRIAL COURT'S UNJUSTIFIED CLOSURE OF THE COURTROOM VIOLATED MR. MAGNANO'S RIGHT TO A PUBLIC TRIAL

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

Both the federal and state constitutions guarantee the accused the right to a public trial. U.S. Const. amend. VI ("In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial . . . "); Const. Article I, section 22 ("In criminal prosecutions the

accused shall have the right to . . . have a speedy public trial by an impartial jury . . .").

In addition, the public also has a vital interest in access to the criminal justice system. U.S. Const. amend. I (the First Amendment's guarantees of free speech and a free press also protect the right of the public to attend a trial); Const. Article I, § 10 ("Justice in all cases shall be administered openly, and without unnecessary delay."). These provisions provide the public and the press a right to open and accessible court proceedings. *State v. Easterling,* 157 Wn.2d 167, 174, 137 P.3d 825 (2006). "The public has a right to be present whether or not any party has asserted the right." *Presley v. Georgia,* 558 U.S. 209, 213-15, 130 S.Ct. 721, 175 L.Ed.3d 675 (2010).

Although the defendant's right to a public trial and the public's right to open access to the court system are different, they serve "complimentary and interdependent functions in assuring the fairness of our judicial system." *State v. Bone-Club*, 128 Wn.2d 254, 259, 906 P.2d 325 (1995).

> The requirement of a public trial is for the benefit of the accused; that the public may see he is fairly dealt with and not unjustly condemned, and that the presence of interested spectators may keep his triers keenly alive to a

> sense of their responsibility and to the importance of their functions.

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

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

> We adhere to the constitutional principle that it is the right of the people to access open courts where they may freely observe the administration of civil and criminal justice. Openness of courts is essential to the courts' ability to maintain public confidence in the fairness and

> honesty of the judicial branch of government as being the ultimate protector of liberty, property, and constitutional integrity.

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

Whether the trial court violated the defendant's right to a public trial is a question of law reviewed *de novo*. *State v. Paumier,* 176 Wn.2d 29, 34, 288 P.3d 1126 (2012).

2. In order to close a courtroom, the trial court must analyze whether the closure is appropriate under the five *Bone-Club* factors.[2] The presumption of open, publicly accessible court hearings may be overcome "only by an overriding interest based on findings that closure is essential to preserve higher values and is narrowly tailored to preserve that interest." *Waller v. Georgia*, 467 U.S. 39, 45, 104 S.Ct. 2210, 81 L.Ed.2d 31 (1984), *citing Press-Enterprise I*, 464 U.S. at 510; *State v. Strode*, 167 Wn.2d 222, 227, 217 P.3d 310 (2009); *State v. Momah*, 167 Wn.2d 140, 148, 217 P.3d 321 (2009); *see also Presley*, 130 S.Ct. at 724 (circumstances in which the right to an open trial may

[2]Mr. Magnano neither agreed with, nor objected to, the trial court's closure of the courtroom. The fact that Mr. Magnano did not object does not bar him from raising this issue for the first time on appeal. *See State v. Wise*, 176 Wn.2d 1, 15, 288 P.3d 1113 (2012) (defendant's silence alone is not sufficient to be considered a waiver of his right to a public trial).

be limited "will be rare," and "the balance of interests must be struck with special care").

The trial court must articulate an "overriding interest" justifying any limit on public access, "along with findings specific enough that a reviewing court can determine whether the closure order was properly entered." *Strode*, 167 Wn.2d at 227. In order to protect the defendant's constitutional right to a public trial, a trial court may not conduct secret or closed proceedings "without, first, applying and weighing five requirements as set forth in *Bone-Club* and, second, entering specific findings justifying the closure order." *Easterling*, 157 Wn.2d at 175. The five criteria are "*mandated* to protect a defendant's right to [a] public trial." *In re Personal Restraint of Orange*, 152 Wn.2d 795, 809, 100 P.3d 291 (2004) (emphasis in original).

To determine if closure is appropriate, the trial court is required to consider the following factors and enter specific findings on the record to justify any ensuing closure: (1) the proponent of closure must show a compelling interest and, if based on anything other than defendant's right to a fair trial, must show serious and imminent threat to that right; (2) anyone present when the motion is made must be given an opportunity to object; (3) the least restrictive means must be used;

(4) the court must weigh the competing interests; and (5) the order must be no broader in application or duration than necessary. *Bone-Club*, 128 Wn.2d at 258-59; *see also Seattle Times Co. v. Ishikawa*, 97 Wn.2d 30, 36-39, 640 P.2d 716 (1982) (same). The trial court "must ensure" that the "five criteria are satisfied" *before* closing court proceedings. *Strode*, 167 Wn.2d at 227. *See also Waller,* 467 U.S. at 45 (the trial court must enter specific findings identifying the interest so that a reviewing court may determine if the closure was proper). Although a trial court may close all or part of a trial after considering the alternatives, it must "'resist a closure motion except under the most unusual circumstances.'" *Wise,* 176 Wn.2d at 11, *quoting Presley*,130 S.Ct. at 725. The court is required to consider "alternatives to closure" to ensure the least restrictive means of closure is adopted. *Paumier*, 176 Wn.2d at 35; *Wise*, 176 Wn.2d at 10.

The requirements for protecting the public's right to open courtrooms "mirrors" the requirements used in criminal cases. *Easterling*, 157 Wn.2d at 175. The court may not close the courtroom without "first, applying and weighing five requirements as set forth in *Bone-Club* and, second, entering specific findings justifying the closure order." *Id. citing Bone-Club*, 128 Wn.2d at 258-59; and *Ishikawa*, 97

Wn.2d at 37; *see also Easterling*, 157 Wn.2d at 174-75 (trial court must "*resist a closure motion except under the most unusual circumstance.*") (emphasis in original).

A member of the public is not required to assert the public's right of access in order to preserve this issue for appeal. *Easterling*, 157 Wn.2d at 176 n 8. Further, the court has an *independent duty* to assure the public's right to an open courtroom. *Presley,* 130 S.Ct. at 724-25.

3. The trial court's closure of the courtroom to replay the 911 recording without conducting a *Bone-Club* analysis violated the public trial right. Here, there was no question the courtroom was closed and no question that the trial court did not conduct the required *Bone-Club* analysis. *See State v. Lormor*, 172 Wn.2d 85, 93, 257 P.3d 624 (2011) ("[A] 'closure' of a courtroom occurs when the courtroom is completely and purposefully closed to spectators so that no one may enter and no one may leave."). The only remaining question is whether there is a public trial right to the closure of the courtroom for the jury to listen to the recording.[3] While no published Washington decision has

[3] The trial court's conclusion that the jury rehearing the audio recording in the courtroom was merely part of deliberations was plainly erroneous. Jury deliberations must be conducted in private. *See State v. Cuzick*, 85 Wn.2d 146, 149,

addressed this precise issue, Mr. Magnano submits the trial court's closure violated the public trial right.

To determine whether the public trial right attaches to a particular trial proceeding, this Court applies the "experience and logic" test. *State v. Sublett*, 176 Wn.2d 58, 72-73, 292 P.3d 715 (2012) (plurality). This test consists of two prongs: first, the experience prong asks "'whether the place and process have historically been open to the press and general public.'" *Id.* at 73, *quoting Press–Enterprise Co. v. Superior Court*, 478 U.S. 1, 8, 106 S.Ct. 2735, 92 L.Ed.2d 1 (1986)(*Press-Enterprise II)*. Second, the logic prong asks "'whether public access plays a significant positive role in the functioning of the particular process in question.'" *Id.* at 73, *quoting Press–Enterprise II*, 478 U.S. at 8. Unless the answer to both prongs is yes, the public trial right does not attach to the particular proceeding. *Id.* at 73.

In *Sublett,* the jury submitted a question to the trial court seeking clarification of a jury instruction. *Sublett*, 176 Wn.2d at 67. The trial court met with counsel in chambers to address the question. *Id.* at 67. Counsel agreed to the trial court's answer to the jury question, which stated that the jury must reread its instructions. *Id.* at

---

530 P.2d 288 (1975) ("[J]ury must reach its decision in private, free from outside influence.").

67. The Supreme Court applied the experience and logic test and held that a public trial right violation had not occurred. *Id.* at 72. The Court concluded that: "Because the jury asked a question concerning the instructions, we view this as similar in nature to proceedings regarding jury instructions in general. Historically, such proceedings have not necessarily been conducted in an open courtroom." *Id.* at 75.

Here, historically, preventing the jury from placing undue emphasis on a 911 recording admitted into evidence has established the rule that the trial judge must control the jury's access to replays. *See State v. Frazier,* 99 Wn.2d 180, 188-91, 661 P.2d 126 (1983) (trial court's act of admitting audiotape but not playback machine assured that trial judge controlled number of times jury could rehear audiotape). In order to maintain control, courts have recommended the jury rehear the audiotape *in open court*. *See State v. Koontz,* 145 Wn.2d 650, 657, 41 *P.*3d 475 (2002); *State v. Clapp,* 67 Wn.App. 263, 273–74, 834 P.2d 1101 (1992)(court allowed jury to hear tape and review transcript three times in open court but did not allow tape or transcript to be taken to jury room). In addition, most courts expressly hold that any replay of video-recorded statements or testimony must occur in open court. *See, e.g., State v. Burr,* 195 N.J. 119, 135, 948 A.2d 627 (2008) (any

playback of the videotape must occur in open court); *State v. Dixon,* 259 Neb. 976, 987, 614 N.W.2d 288 (2000) (where court decides to allow some repetition of the tape-recorded evidence for the jury, it should do so in open court), *reversed on other grounds, State v. Smith,* 284 Neb. 636, 653, 822 N.W.2d 401 (2012); *State v. Gould*, 241 Conn. 1, 15, 695 A.2d 1022 (1997) (replay of videotaped deposition testimony must be done in open court under the supervision of the trial judge); *Young v. State,* 645 So.2d 965, 968 (Fla.1994) (if requested by jury, trial judge may permit jury to view video-recorded statement of witness twice in open court); *Martin v. State,* 747 P.2d 316, 320 (Okla.Crim.App.1987) (error to submit video-recorded testimony of child sex abuse victim to jury for unrestricted and repeated viewing during deliberations); *Chambers v. State,* 726 P.2d 1269, 1276 (Wyo.1986) (video-recorded statements may never be submitted to jury for unsupervised viewing); *Watkins v. State,* 237 Ga. 678, 681, 229 S.E.2d 465 (1976) (error for the trial judge to permit the testimony of appellant to be replayed to the jury in the jury room; jury should have been returned to the courtroom to hear the testimony in the presence of

the parties). Under the experience prong of the *Sublett* test, rehearing of testimony by the jury has been conducted in open court.[4]

Similarly, under the logic test, these hearings have been open. The rehearing of testimony by the jury encompasses many of the same rights as the rest of the trial, such as the right of the defendant to be present with counsel and the hearing of testimony by the jury. *Sublett*, 176 Wn.2d at 74, applying logic test in *Press-Enterprise II,* 478 U.S. at 12. Further, having the jury rehear the testimony or evidence in open court provides greater transparency and appearance of fairness and furthers the goals of the First Amendment and article I, section 22 regarding the openness of criminal trials. Thus, under the logic test, the rehearing or replaying of testimony or evidence by the jury must be done in open court.

Under the experience and logic test enunciated in *Sublett*, the trial court's decision to close the courtroom during the replaying of the 911 recording violated Mr. Magnano's right to a public trial.

---

[4] CrR 6.15(f)(1), which provides that "In its discretion, the court may grant a jury's request to rehear or replay evidence," is silent on whether any rehearing or replaying has to be done in open court. As Mr. Magnano has argued, courts in Washington and other jurisdictions have recommended this occur in open court to prevent the jury from giving this testimony undue weight.

4. Mr. Magnano is entitled to reversal of his conviction and remand for a new trial. The presumptive remedy for a public trial right violation is reversal and remand for a new trial. *Paumier,* 176 Wn.2d at 35; *Orange,* 152 Wn.2d at 814; *Easterling*, 157 Wn.2d at 179-80. There is no requirement that the defendant prove prejudice when his right to a public trial has been violated. *Paumier*, 176 Wn.2d at 37, *citing Wise,* 176 Wn.2d at 19. Further, there is no *de minimus* exception to the remedy of reversal. *Easterling,* 157 Wn.2d at 180.

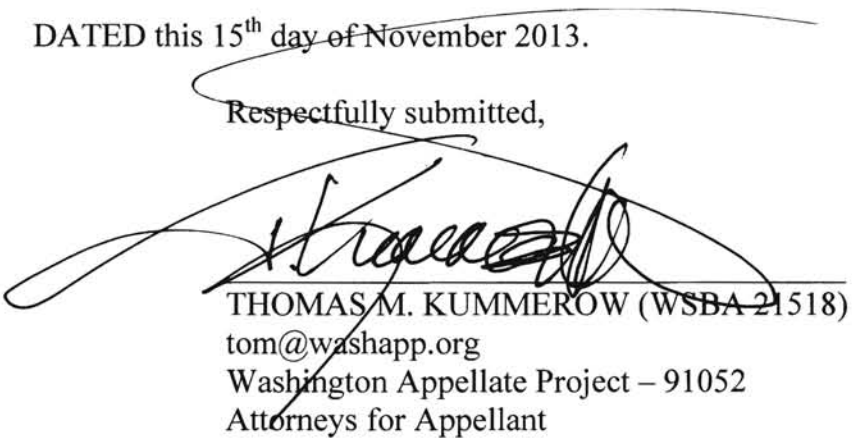
The trial court's error in replaying the 911 recording for the jury in the absence of the public requires reversal of Mr. Magnano's conviction and remand for a new trial.

E. CONCLUSION

For the reasons stated, Mr. Magnano requests this Court reverse his conviction and remand for a new trial.

DATED this 15th day of November 2013.

Respectfully submitted,



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

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

STATE OF WASHINGTON,	)	
	)	
Respondent,	)	
	)	NO. 70017-1-I
v.	)	
	)	
MATTHEW MAGNANO,	)	
	)	
Appellant.	)	

DECLARATION OF DOCUMENT FILING AND SERVICE

I, MARIA ARRANZA RILEY, STATE THAT ON THE 15TH DAY OF NOVEMBER, 2013, I CAUSED THE ORIGINAL **OPENING BRIEF OF APPELLANT** TO BE FILED IN THE **COURT OF APPEALS – DIVISION ONE** AND A TRUE COPY OF THE SAME TO BE SERVED ON THE FOLLOWING IN THE MANNER INDICATED BELOW:

[X] KING COUNTY PROSECUTING ATTORNEY APPELLATE UNIT KING COUNTY COURTHOUSE 516 THIRD AVENUE, W-554 SEATTLE, WA 98104	(X) ( ) ( )	U.S. MAIL HAND DELIVERY _____
[X] MATTHEW MAGNANO 853101 WASHINGTON STATE PENITENTIARY 1313 N 13TH AVE WALLA WALLA, WA 99362	(X) ( ) ( )	U.S. MAIL HAND DELIVERY _____

SIGNED IN SEATTLE, WASHINGTON THIS 15TH DAY OF NOVEMBER, 2013.

X_____

Washington Appellate Project
701 Melbourne Tower
1511 Third Avenue
Seattle, WA 98101
Phone (206) 587-2711
Fax (206) 587-2710