No. 90782-0

IN THE SUPREME COURT OF THE STATE OF WASHINGTON

STATE OF WASHINGTON,

Respondent,

v.

TIMOTHY CONOVER,

Petitioner.

RESPONSE TO PETITION FOR REVIEW

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I. IDENTITY OF RESPONDENT

The State of Washington, represented by Susan I. Baur, Prosecuting Attorney for Cowlitz County, by and through her deputy, David L. Phelan, responds to Petitioner Conover's request for review of the Court of Appeals opinion in No. 44175-6-II, affirming his conviction.

II. ISSUES PRESENTED FOR REVIEW

1.) Should this Court grant review regarding whether or not the inadvertent locking of a courtroom during trial, regardless of the length of time, constitutes a "closure" implicating the constitutional right to a public trial?

2.) Should this Court grant review regarding whether or not to reverse *State v. Pirtle*, where this court previously held that inclusion of the "abiding belief" language was not error?

3.) Should this Court grant review regarding whether or not RCW 9.94A.533(6) intended to run school bus stop enhancements consecutive to one another?

III. STATEMENT OF THE CASE

The Respondent generally accepts the Appellant's recitation of the facts.

IV. ARGUMENT

1.) THIS COURT SHOULD DENY REVIEW BECAUSE THERE WAS NO PUBLIC TRIAL RIGHT VIOLATION

There was no public trial right violation. A public trial right violation occurs when there is a closure of the courtroom and the trial

court does not consider the *Bone-Club* factors. *State v. Brightman*, 155 Wn.2d 506, 515(2005). Because there was no specific attempt to close the courtroom for any of the proceedings, there can be no public trial right violation.

There was no "closure" of the courtroom. The Washington State Supreme Court declared that "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." *State v. Lormor*, 172 Wn.2d 85, 93, 257 P.3d 624 (2011). No closure occurred in this case because the courtroom was never purposefully closed to spectators.

The record shows there was no purposeful closure of the courtroom. The situation only occurred because a bailiff inadvertently forgot to unlock the courtroom doors. The court never intended to exclude any member of the public. 2 CP 178. The doors were locked for approximately 27 minutes. 2 CP 177. The doors had been locked over the lunch-hour to secure electronics in the courtroom. 2 CP 178. There was no sign or announcement suggesting that the door was locked. 2 CP 178. As soon as the error was discovered as to the locked doors, the one person who had tried to enter the courtroom was allowed to enter. 2 CP 178. Without any evidence of a member of the public being excluded, or an order from the court closing the courtroom, there is no evidence of a closure. The

facts here simply do not amount to a "closure" for purposes of the public trial right.

No court in the State of Washington has held that anything even approaching these facts was a closure that warranted reversal. Every case cited by the Appellant is based on a purposeful closure of the courtroom. The Washington State Supreme Court has recognized, in *State v. Brightman,* that there are some cases involving brief and inadvertent closures that do not necessarily implicate or violate the public trial right. 155 Wn.2d at 517, *citing Peterson v. Williams*, 85 F.3d 39, 42-43 (2nd Cir. 1996) (Short inadvertent closure not a violation) *and U.S. v. Al-Smadi*, 15 F.3d 153, 154-55 (10th Cir. 1994)(trial ran 20 minutes after courthouse door locked and defendant's family excluded, not a violation), *and Snyder v. Coiner*, 510 F.2d 224, 230 (4th Cir. 1975)(bailiff's decision to deny people from entering or leaving courtroom during argument for a short time and corrected quickly by the judge not a violation).

It IS relevant whether the closure was intentional or inadvertent, in spite of the Appellant's citation to *Walton v. Briley.* In that case, the trial court held the first two portions of the jury trial were held in the late evening, after the courthouse had been closed and locked for the night. *Walton v. Briley*, 361 F.3d 431, 432 (7th Cir. 2004). Interested parties were prevented from entering the courtroom on three separate occasions. *Id.* The specific decision by

the judge as to the timing of trying the case led to a *de facto* closure, since the decision directly resulted in the exclusion of the public. Moreover, exclusion was an obvious and likely result. Even that court, however, acknowledged that different circumstances could lead to different results, distinguishing a 10th circuit case on the fact that the trial there began during normal hours and ran late, as opposed to the trial in *Walton*, which only began after the courthouse had closed for the night. *Id.* at 433, *citing Al-Smadi*, 15 F.3d at 154. So, even the court that said it is constitutionally irrelevant whether the closure was intentional, acknowledged the difference between an intentional act that precluded the public, and an inadvertent closure.

There was no purposeful closure of the courtroom, so there can be no public trial violation. Moreover, the only person who tried to enter the courtroom during the time of the inadvertent closure was immediately allowed to enter. No person of the public was actually excluded from the proceedings. Because there was no public trial right violation, this court should deny the Petitioner's request for review.

2.) THIS COURT SHOULD DENY REVIEW BECAUSE THE LANGUAGE IN WPIC 4.01 PASSES CONSTITUTIONAL MUSTER, AS THIS COURT HELD IN *PIRTLE*

The reasonable doubt instruction given in this case was lawful and appropriate, there was no error. The particular language in question, the "abiding belief" statement at the end of WPIC 4.01, has

been vetted by this very court in *Pirtle*. It is not error to include the bracketed text containing the abiding belief language. *State v. Pirtle*, 127 Wn.2d 628, 658 (1995). The inclusion of such language in this case was not error.

The Petitioner's argument for review based on the instruction requires this court to find that the abiding belief language amounts to an improper instruction on reasonable doubt. *Pirtle* made clear that the abiding belief language was not improper. *Id.* Unless this court wishes to reconsider it's determination in *Pirtle*, review is unnecessary. This case does not warrant review.

3.) THIS COURT SHOULD DENY REVIEW BECAUSE THERE IS NO AMBIGUITY REGARDING THE LEGISLATURE'S INTENT THAT SCHOOL-ZONE ENHANCEMENTS RUN CONSECUTIVE TO ONE ANOTHER

There is no ambiguity regarding the legislature's intent that school zone enhancements run consecutive to one another. The point of statutory construction, and the court's overall objective, is to determine the legislature's intent. *Dep't of Ecology v. Campbell & Gwinn, L.L.C.*, 146 Wn.2d 1, 9 (2002). "[I]f the statute's meaning is plain on its face, then the court must give effect to that plain meaning as an expression of legislative intent." *Id.* at 9-10. Such "plain meaning" is determined by looking to the ordinary meaning of the statute, as well as the context of the statute, related provisions and the statutory scheme as a whole. *Wash. Pub. Ports Ass'n v. Dep't of Revenue*, 148 Wn.2d 637, 645 (2003). If there is still room for more

than one meaningful interpretation, the statute is ambiguous. *Id.* If ambiguous, the court would apply the rule of lenity and apply the statute in favor of the defendant. *In re PRP of Charles*, 135 Wn.2d 239, 249 (1998). The rule of lenity, however, only applies when there is no significant evidence of contrary legislative intent. *Id.* There is evidence that the legislature intended consecutive application of all enhancements under RCW 9.94A.533(6).

The legislature intended school zone enhancements to run consecutive to all other sentencing provisions, as well as one another. The evidence of legislative intent is shown by the legislature's response to *State v. Jacobs*, 154 Wn.2d 596 (2005). The Court in that case interpreted former RCW 9.94A.310(6), which read "twenty-four months shall be added to the standard sentence range for any ranked offense involving a violation of Chapter 69.50 RCW if the offense was also a violation of RCW 69.50.435 or 9.94A.605". *Id.* at 601-02. Petitioners had been sentenced to two enhancements under then RCW 9.94A.310(6), the bus stop enhancement (RCW 69.50.435) and the enhancement for manufacturing methamphetamine with someone under the age of 18 present (then RCW 9.94A.605). *Id.* at 600. Both enhancements applied to a single count of unlawful manufacture of methamphetamine. *Id.* After substantial analysis, the Court found that former RCW 9.94A.310(6) was ambiguous as to whether or not it intended for the enhancements to run consecutive to one another and

applied the rule of lenity. *Id.* at 604. The following year, the legislature amended the statute adding language meant to clear up the ambiguity.

In response to *Jacobs*, the legislature amended RCW 9.94A.533(6) in 2006, adding a sentence, "All enhancements under this subsection shall run consecutively to all other sentencing provisions, for all offenses sentenced under this chapter." Looking to the House Bill Report governing the change to the statute, it is clear that the intent of the change was to ensure all such enhancements under that provision run consecutive to each other and everything else. The House Bill report noted that in *Jacobs*:

> ...the defendants challenged the statutory language regarding the sentence enhancements for violations of the UCSA on the grounds that they believed multiple sentence enhancements should be applied concurrently instead of consecutively. The courts concluded that the statutory language appeared ambiguous and as a result, under the rule of lenity, it was ruled that sentencing courts should apply multiple sentencing enhancements concurrently to each other.

H.B. REP. on Second Substitute H.B. 6239, 59th Leg., Reg. Sess., at 7, 13-14 (2006). Though the legislature put the wrong citation in the House Bill Report (citing the Court of Appeals case that had actually upheld the application of consecutive sentences), the remarks clearly and accurately describe the Court's decision in *Jacobs*. This reference is contained in a number of different bill reports. ENGROSSED SECOND SUBSTITUTE on Final Bill Report S.B. 6239, 59th Leg., Reg.

Sess., at 4 (Wash.2006); ENGROSSED SECOND SUBSTITUTE S.B. 6239, 59th Leg., Reg. Sess., at 2, 5 (Wash.2006); H.B. REP.. on Second Substitute H.B. 6239, 59th Leg., Reg. Sess., at 7, 13–14 (2006). There is clear notice of the intent of the legislature.

The Petitioner's argument regarding the legislature's failure to add the specific language suggesting that multiple enhancements applied under the same statute should run consecutive to one another wilts in light of the legislative intent show by the specific reference to *Jacobs*. Remember, in *Jacobs*, this Court ruled on whether two enhancements, BOTH from RCW 9.94A.533(6) could be run consecutive to one another. The intent of the legislature is clear. Enhancements applied under RCW 9.94A.533(6) must be run consecutive to **any** other sentencing provision, including other enhancements applied under that section.

Because there is clear evidence of legislative intent, this court should deny review.

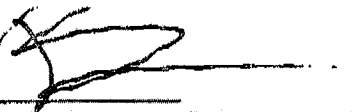
V. CONCLUSION

The Supreme Court of Washington should deny the Petition for Review. No new constitutional issues are raised, there are no splits of authority, and the decision of the Court of Appeals is consistent with the law of the State of Washington.

Respectfully submitted this 17th day of October, 2014.

SUSAN I. BAUR

Prosecuting Attorney

By: 

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CERTIFICATE OF SERVICE

Michelle Sasser, certifies the Response to Petition For Review was served electronically via e-mail to the following:

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I CERTIFY UNDER PENALTY OF PERJURY UNDER THE LAWS OF THE STATE OF WASHINGTON THAT THE FOREGOING IS TRUE AND CORRECT.

Signed at Kelso, Washington on October 17th, 2014.

Michelle Sasser

Michelle Sasser

OFFICE RECEPTIONIST, CLERK

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Received 10-17-14

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Attached, Please find the Response to Petition for Review regarding the above-named Petitioner.

If you have any questions, please contact this office.

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