No. 44175-6-II

IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON

DIVISION TWO

STATE OF WASHINGTON,

Respondent,

v.

TIMOTHY CONOVER,

Appellant.

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

REPLY BRIEF OF APPELLANT

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TABLE OF CONTENTS

TABLE OF AUTHORITIES

Washington Supreme Court Decisions

Washington Court of Appeals Decisions

Decisions of Other Jurisdictions

Statutes

A. ARGUMENT

1. **A new trial should be granted because the courtroom doors were locked for half an hour while the court instructed the jury, in violation of the First and Sixth Amendments and article I, sections 10 and 22; the State's argument is without merit because there is no "de minimis" exception in Washington.**

As explained in the opening brief, the trial court violated the First and Sixth Amendments and article I, sections 10 and 22 by instructing the jury for half an hour in a locked courtroom and refusing to reinstruct the jury in open court after discovering the error. Brief of Appellant at 8-12. It is well-settled in Washington that proceedings may be closed "in only the most unusual circumstances," that there is no "de minimis" exception to the open-courts guarantee, and that violations may not be deemed harmless. *Id.* (citing, inter alia, *State v. Wise*, 176 Wn.2d 1, 288 P.3d 1113 (2012); *State v. Strode*, 167 Wn.2d 222, 217 P.3d 310 (2009)).

The State's argument in response fails by its own terms. The State avers: "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." Brief of Respondent at 3. Here, there was a closure of the courtroom and the trial court did not consider the *Bone-Club* factors. 2 RP 175-78. Thus, the court violated the

constitutional right to a public trial. *See State v. Bone-Club*, 128 Wn.2d 254, 258-59, 906 P.2d 325 (1995).

The State then claims that "there was no closure" because the bailiff had locked the doors without the judge's knowledge. Brief of Respondent at 4. This argument makes no sense. The fact that the trial judge did not intend for something to happen does not mean that it did not, in fact, happen. *See State v. Vanness*, 304 Wis. 692, 699, 738 N.W.2d 154 (Wis. 2007) ("the court's intent is irrelevant to determining whether the accused's right to a public trial has been violated"). Imagine if the bailiff had locked the courtroom doors without the judge's knowledge for the entire trial instead of for half an hour. Would the State really claim "there was no closure"?

The State cites only federal cases for the proposition that brief, inadvertent closures do not violate the constitutional right to a public trial. Brief of Respondent at 5-6. But our Supreme Court has never adopted this "de minimis" exception that may exist under the federal constitution, because our state constitution more strongly protects the right to a public trial. *State v. Easterling*, 157 Wn.2d 167, 181 n.12, 137 P.3d 825 (2006) (stating that although there is "arguably" room for concluding a violation of the federal constitutional right to a public trial may be "de minimis," such is not the case under the more-protective Washington Constitution);

see also id. at 186 (Chambers, J., concurring) ("[T]here is no case where the harm to the principle of openness, as enshrined in our state constitution, can properly be described as de minimis"); *accord State v. Sublett*, 176 Wn.2d 58, 149, 292 P.3d 715 (2012) (Wiggins, J., concurring); *State v. Paumier*, 176 Wn.2d 29, 32-37, 288 P.3d 1126 (2012) (reversing for public trial violation even though only four jurors were briefly questioned during voir dire outside public courtroom).

The State is also wrong in asserting, "Without 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." Brief of Respondent at 4. "[A] courtroom closure can occur even in the absence of an explicit court order." *State v. Njonge*, 161 Wn. App. 568, 575, 255 P.3d 753 (2011). The record in this case is absolutely clear that the doors to the courtroom were locked during the entire time the court instructed the jury. 2 RP 175-78. The fact that an assertive person eventually rattled the doors loudly does not mean a less-aggressive person did not try to enter earlier. Furthermore, the Supreme Court has never held a defendant must prove someone tried to enter during a closed proceeding in order to enforce the right to a public trial. *See, e.g., State v. Paumier*, 176 Wn.2d 29, 32-34, 288 P.3d 1126 (2012) (no claim that anyone tried to enter courtroom while four potential jurors were questioned in private; reversal required

anyway); *Wise*, 176 Wn.2d at 8 (reversing for public trial violation even though "[t]he record does not reflect whether any members of the public were present in the courtroom" when the judge decided to close a portion of voir dire).

The bottom line is that the trial court adopted a "de minimis" exception to the constitutional right to a public trial even though this Court and the Supreme Court have repeatedly declined to endorse such an exception. *Compare* 2 RP 176 *to Paumier*, 176 Wn.2d at 32-37; *Easterling*, 157 Wn.2d at 180-86; *State v. Leyerle*, 158 Wn. App. 474, 485, 242 P.3d 921 (2010) (voir dire of **one** potential juror outside public courtroom **for two minutes** could not be dismissed as a de minimis violation; reversal required). The trial court did not have the authority to ignore the holdings of this Court and the Supreme Court. This Court should reverse and remand for a new trial. Brief of Appellant at 8-12.

2. The trial court erred in overruling Mr. Conover's objection to the reasonable-doubt instruction, because this Court and the Supreme Court have held the jury's job is not to find the truth but to determine whether the State proved its case.

As explained in the opening brief, the trial court erred in instructing the jury, over Mr. Conover's objection, that it could find the State proved its case beyond a reasonable doubt if the jury had "an abiding belief in the truth of the charge." A jury's role is not to find the truth, and

a claim that the jury should search for the truth misstates the jury's duty and sweeps aside the State's burden. Brief of Appellant at 12-16 (citing *State v. Emery*, 174 Wn.2d 741, 278 P.3d 653 (2012); *State v. Berube*, 171 Wn. App. 103, 286 P.3d 402 (2012)); *see also State v. Anderson*, 153 Wn. App. 417, 429, 220 P.3d 1273 (2009), *review denied* 245 P.3d 226 (2010).

The State responds that the instruction is proper, but the only case it cites predates *Emery* and *Berube*. Brief of Respondent at 6-7 (citing *State v. Pirtle*, 127 Wn.2d 628, 904 P.2d 245 (1995)). As already explained in the opening brief, the portion of *Pirtle* cited focused on the "abiding belief" language rather than the phrase "the truth". Brief of Appellant at 15. To the extent it condoned a search for the truth, it has been abrogated by *Emery* and numerous decisions of this Court. Because this Court and the Supreme Court have now recognized that it is improper to tell the jury its job is to find the truth, the State's argument should be rejected.

3. The State concedes that Mr. Conover's right to due process was violated when the trial court calculated his offender score based on the prosecutor's unsupported criminal history allegation.

As explained in the opening brief, the sentencing court violated Mr. Conover's right to due process by calculating his offender score based on the prosecutor's one-page "Statement of Criminal History," where the

prosecutor presented no certified judgments or other evidence proving his criminal history. Brief of Appellant at 16-19 (citing, inter alia, *State v. Hunley*, 175 Wn.2d 901, 287 P.3d 584 (2012)).

The State concedes the error. Brief of Respondent at 3, 14. This Court should accept the concession, vacate the sentence, and remand for resentencing. *Hunley*, 175 Wn.2d at 906 n.2.

4. The sentencing court erred in running the bus-zone enhancements consecutively rather than concurrently.

As explained in the opening brief, the sentencing court erred in ordering the bus-zone enhancements on the three counts to run consecutively to each other rather than concurrently. The enhancements do increase the standard range for each count, but the sentences for those counts (each within the enhanced range) are to run **concurrently**. Brief of Appellant at 19-24.

In response to certain Supreme Court cases, the legislature amended the portion of the statute dealing with **firearm** enhancements to clarify that those enhancements run consecutively to each other when imposed on multiple counts. The legislature did **not** similarly amend the bus-zone enhancement statute, however, indicating these enhancements are to run concurrently when the same enhancement is applied to multiple counts. Brief of Appellant at 19-24.

The State correctly notes that the legislature did amend the bus-zone enhancement statute in response to *State v. Jacobs*, 154 Wn.2d 596, 115 P.3d 281 (2005). Brief of Respondent at 8-10. However, it did not amend it in the same way it amended the firearm enhancement statute in response to *In re Charles*, 135 Wn.2d 239, 955 P.2d 798 (1998). The natural inference of the post-*Jacobs* amendment is that multiple enhancements attached to **a given count** run consecutively to each other, **not** that where the same enhancement is applied to different counts those enhancements run consecutively to each other. *See Jacobs*, 154 Wn.2d at 602 (holding that **two different enhancements on the same count run concurrently**); *Gutierrez v. Department of Corrections*, 146 Wn. App. 151, 155-56, 188 P.3d 546 (2008) (**legislature amended RCW 9.94A.533(6) in response to *Jacobs***).

If the legislature wanted to do what the State argues it did, it would have amended all of the enhancement statutes in response to *Charles. See Jacobs*, 154 Wn.2d at 603 ("Where the Legislature uses certain statutory language in one instance, and different language in another, there is a difference in legislative intent."). It did not do so. It left the bus-zone statute alone after *Charles,* but amended it in response to *Jacobs* to allow for "stacking" multiple enhancements to increase a standard range. *Gutierrez*, 146 Wn. App. at 156. This is fundamentally different from

running single enhancements across multiple counts consecutively. *See id.* at 155 (an enhancement is not a separate provision but rather something that increases the standard range for a given count).

In sum, because RCW 9.94A.533(6) does not contain language similar to that of RCW 9.94A.533(3)(e), bus-zone enhancements do not run consecutively to other bus-zone enhancements on other counts. The trial court erred in stacking the enhancements across counts rather than using them to increase the standard range for each count and then running the resulting enhanced sentences concurrently. The remedy is reversal and remand for resentencing.

5. The findings on the aggravating factor should be stricken because Mr. Conover's convictions were not "major violations of the Uniform Controlled Substances Act."

As noted in the opening brief, this Court should remand for striking of the findings that each conviction in this case was "a major violation" of the Uniform Controlled Substances Act. No count involved more than a single transaction, and the State failed to prove that the quantities sold were "substantially large than for personal use." Furthermore, if that aggravating factor could be applied in this case, it would be unconstitutionally vague. Brief of Appellant at 24-28.

The State cites *Reynolds* for the proposition that a "major violation" aggravator may be entered under the "three separate transactions" prong even where each transaction was prosecuted as a separate crime. Brief of Respondent at 11 (citing *State v. Reynolds*, 80 Wn. App. 851, 856, 912 P.2d 494 (1996)). But this issue was not raised in *Reynolds*. Rather, the defendant argued – and this Court agreed – that this aggravating factor does not apply to a transaction involving "material in lieu of a controlled substance." *Reynolds*, 80 Wn. App. at 856. *Reynolds* does not address Mr. Conover's argument that the "three separate transactions" aggravator does not apply where none of the offenses for which the defendant was convicted involved more than one transaction.

In addition to the fact that the plain language of the statute shows this prong does not apply (see Brief of Appellant at 25-26), the prong does not apply under the rule that an aggravating factor should not be imposed where the relevant fact was already taken into account in computing the standard range. *State v. Saltz*, 137 Wn. App. 576, 583, 154 P.3d 282 (2007); *State v. Butler*, 75 Wn. App. 47, 53, 876 P.2d 481 (1994). The fact that Mr. Conover engaged in three separate transactions was already taken into account in computing the standard range, because the State charged each count separately and each conviction then counted against

Mr. Conover in calculating the offender score. CP 61-62. Thus, this fact may not also be used to impose an aggravating factor.

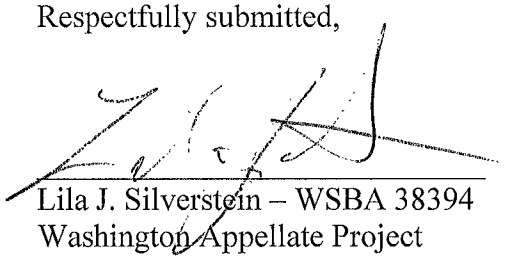
As for the "substantially larger than for personal use" prong, the State's evidence showed that although some people use only $20 worth at a time, many people have $100-a-day habits and the amount Mr. Conover sold was $350-$400 worth. 1 RP 36-37. Thus, the amount Mr. Conover sold is not "substantially larger than for personal use," and if it can be so construed, the statute is unconstitutionally vague as applied. Brief of Appellant at 26-28. The State argues that nobody would use the amount Mr. Conover sold in one day, but does not explain why "personal use" must mean "one day's use." The statute does not say "one day's use," and, to the extent the phrase "personal use" is ambiguous, the rule of lenity requires it be construed in Mr. Conover's favor. *Jacobs*, 154 Wn.2d at 603. Thus, this Court should remand for striking of the findings on the aggravating factor.

B. CONCLUSION

For the reasons set forth above and in the opening brief, Mr. Conover asks this Court to reverse his convictions and remand for a new trial. In the alternative, the case should be remanded for resentencing because the trial court improperly calculated the offender score and incorrectly ran the enhancements on multiple counts consecutively rather than concurrently. Finally, the findings on the aggravating factor should be stricken.

DATED this 23rd day of September, 2013.

Respectfully submitted,



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	)	
APPELLANT.	)	

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