NO. 44562-0

COURT OF APPEALS, DIVISION II
STATE OF WASHINGTON

STATE OF WASHINGTON, RESPONDENT

v.

RICHARD CARPENTER, APPELLANT

Appeal from the Superior Court of Pierce County
The Honorable Katherine M. Stolz

No. 11-1-05021-3

BRIEF OF RESPONDENT

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Table of Contents

Table of Authorities

State Cases

Federal and Other Jurisdictions

Constitutional Provisions

Rules and Regulations

Other Authorities

A. ISSUES PERTAINING TO APPELLANT'S ASSIGNMENTS OF ERROR.

1. Has defendant failed to show that the courtroom was closed during jury selection where the entire proceedings were held in an open courtroom in full view of the public?

2. Did the trial court properly deny defendant's request to discharge his attorney where the basis of the breakdown in communication was entirely due to defendant's refusal to cooperate with his attorney?

B. STATEMENT OF THE CASE.

1. Procedure

On December 15, 2011, the State charged RICHARD ANTHONY CARPENTER, hereinafter "defendant," with one count of robbery in the first degree and one count of unlawful possession of a firearm in the first degree. CP[1] 1-2. On March 28, 2012, the State filed an amended information, charging defendant with one count of assault in the first degree (Count I), one count of robbery in the first degree (Count II), and one count of unlawful possession of a firearm (Count III). CP 60-62.

[1] The Clerk's Papers are cited as "CP." The transcripts of the pretrial hearings and voir were not numbered sequentially with the trial transcipt. Therefore, citations to the pretrial hearings and voir dire will be to "RP," followed by the date of the hearing. Citiations to the trial transcript will be to "RP."

Counts I and II were alleged to have been committed while defendant was armed with a firearm. CP 60-62.

The case was called for trial on January 8, 2013, along with two unrelated cases[2] defendant had pending. RP 17. The parties anticipated trying this case first, as it encompassed the crime with the most serious penalty, but a late disclosure of an alibi witness by defendant delayed the start of this trial in favor of Cause No. 11-1-04931-2. RP 19-23.

On January 17, 2013, directly following the trial for Cause No. 11-1-04931-2, defendant was tried in this case. RP 86. The court began with a recount of security measures from the earlier trial and discussion of whether defendant was going to waive his presence[3] or cooperate with courtroom protocol. RP 86-95. The State then discussed a CrR 3.5 hearing[4] relating to this case, and suggested that the hearing be held during the course of the trial. RP 99.

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[2] The court also called Pierce County Cause Nos. 11-1-04931-2 (Court of Appeals Cause No. 44569-7) and 12-1-014398. Cause No. 12-1-01439-8 is not subject to appeal.

[3] The pretrial hearings, preliminary rulings, and security discussions were transcribed in both cases under appeal. For additional details regarding the parties' discussion of defendant's additional security measures, please see the procedure section of the State's response brief filed in Court of Appeals Cause No. 44569-7.

[4] A CrR 3.5 hearing was transcribed in Volume I of the verbatim report of proceedings on pages 56 to 73. That hearing was for statements admitted in Cause No. 11-1-04931-2, and not for this case. *See* RP 98-99.

Defendant's attorney asked to withdraw from the case prior to the start of testimony because he was concerned he could be a potential witness in the case. RP 124-28. The court denied the motion. RP 128-29.

Defendant waived his presence during the beginning of voir dire. RP 155-56. Defendant also declined to stipulate to a prior felony conviction for purposes of the unlawful possession of a firearm charge. RP 156. Later, defendant was present during jury selection, but was wearing an orange jumpsuit and strapped to a straight chair because he refused to dress in civilian clothing. RP 159-61. The court did order that defendant's spit hood be removed while the jury was present. RP 160.

The parties exercised peremptory challenges by passing a paper between them, listing the names of the jurors each party wanted removed from the panel. RP (1/24/13) 151. When the parties had exercised all of their challenges, they handed the list to the judge, who used the list to determine which people would be seated on the jury. RP (1/24/13) 155.

Defendant waived his presence throughout the trial. *See* RP 174-75, 265, 322, 372, 413, 472-74, 562-63, 620, 724.

In the midst of trial, the parties held a CrR 3.5 hearing to determine of defendant's statements to Tacoma Police Officer Jared Williams were admissible. RP 328-335, 355-69. Officer Williams served a warrant to photograph defendant's injuries while he was in the jail. RP 332. When

Officer Williams looked at defendant's hands, defendant stated, "I know what you're thinking, but that's not..." RP 332, 355. Officer Williams read defendant Miranda warnings, which defendant waived. RP 356. Officer Williams asked defendant how he acquired the injuries on his palms, and defendant stated that he had gotten them while at work, approximately a week prior. RP 356. He also asked defendant where he had gotten a bruise on his hip. RP 357. At first defendant stated that he did not know, but later said that he had gotten it in an accident, where he ran into a brick wall. RP 357. For purposes of the 3.5 hearing, defendant testified that he was not informed of his ***Miranda*** warnings and that he told the officer that he had received all of his injuries from a biking accident. RP 362-63. The court admitted defendant's statements to Officer Williams. RP 369.

On February 5, 2013, the jury found defendant guilty as charged in the amended information, together with findings that defendant was armed with a firearm during the commission of Counts I and II. CP 200, 201, 202, 203, 204; RP 730-31.

On February 20, 2013, the court sentenced defendant to a high-end, standard-range sentence[5] of 216 months in custody, together with a 120 month enhancement for a total sentence of 336 months in custody. CP 224-237.

Defendant filed a timely notice of appeal. CP 240-254.

2. Facts

On December 6, 2011, 64-year-old Robert Bisom returned home from work between 4:30 and 5:00 p.m. RP 203, 212. Shortly after he arrived, someone knocked on his front door. RP 204. When Mr. Bisom opened the door, a man, later identified as defendant, pushed his way inside and demanded the keys to Mr. Bisom's car. RP 207-09.

Mr. Bisom told defendant to get out and the men began to fight. RP 211. Defendant pushed Mr. Bisom down to the ground, face down, and sat on top of him. RP 212, 291. While defendant was on top of Mr. Bisom, defendant grabbed a nearby computer cable and tried to put it around Mr. Bisom's neck in an attempt to choke him. RP 222. Mr. Bisom

[5] Defendant had an offender score of six on Counts I and II, giving him a standard range of 162-216 months on Count I and a standard range of 77-102 months on Count II. CP 224-237. Defendant had an offender score of four for Count III, giving him a standard range on that count of 12+-16 months. CP 224-237. The sentence enhancements on Counts I and II were each 60 months, to be served consecutively. CP 224-237.

gave up the fight at that point and agreed to open the safe where he kept his car keys. RP 223-24.

Mr. Bisom opened the safe, which contained his keys and a .22 caliber pistol. RP 225-26. He gave defendant the keys, but defendant also grabbed the gun out of the safe. RP 227. Mr. Bisom tried to keep the pistol away from defendant, but was unsuccessful. RP 229-30. When defendant had a hold of the gun, he pointed it at Mr. Bisom, stated, "I'm going to shoot you," and pulled the trigger. RP 230. The gun was loaded, but Mr. Bisom did not keep a round in the chamber, so the gun did not fire. RP 230-31.

Defendant left Mr. Bisom's house with the car keys and the gun and drove away in Mr. Bisom's car. RP 232. Mr. Bisom called 911. RP 232.

Responding officers took photographs of Mr. Bisom's injuries, which included a substantial laceration on his arm and scrapes and bruises on his head. RP 234, 238-39. Mr. Bisom gave the officers a description of defendant. *See* RP 247. A few days later the officers had Mr. Bisom review a photomontage, where he picked out defendant as the person who had come into his house. RP 247, 629.

On December 8, 2011, Tacoma Police Officer Matthew Graham arrested defendant on an unrelated matter. RP 347. During a search

incident to arrest, he found Mr. Bisom's car keys in defendant's front trouser pocket. RP 349, 637-38. Later that day, Tacoma Police Officer Jared Williams visited defendant in the jail in order to photograph injuries on defendant's body. RP 376-77. Defendant initially told Officer Williams that he did not know how he had acquired injuries to his palms and abdomen, but later told him that he had injured his hands at work and his torso when he ran into a brick wall. RP 390-91.

On January 3, 2012, Pierce County Sheriff's Deputy Dennis Robinson recovered Mr. Bisom's car where it had been abandoned in University Place, Washington. RP 420-21. The car was in good condition and had no damage to the steering column or ignition. RP 427, 659-60. Deputy Robinson also recovered Mr. Bisom's .22 caliber pistol from under the driver's seat. RP 422.

Defendant was precluded from possessing a firearm due to a prior felony conviction. RP 623-24.

Defendant did not testify, but his girlfriend, Shaunte Brown, testified on his behalf. RP 476. According to Ms. Brown, defendant was with her the entire evening of December 6, 2011, starting at 6:00 p.m. RP 484, 491. Defendant did not have a car that day and a friend had to give them a ride home after Ms. Brown got off work. RP 487. Ms. Brown testified that she and defendant walked various places before her friend

came. RP 485-86. Ms. Brown claimed that, at some point, defendant had dropped his work identification card and had to back track over their path to find it while she went on without him. RP 492-93, 524. When defendant caught up with her, he showed her a set of keys he had found in the trash. RP 493. According to Ms. Brown, she did not tell anyone she had an alibi for defendant for almost a year because, "nobody asked [her]." RP 541-45.

C. ARGUMENT.

1. AS JURY SELECTION OCCURRED IN AN OPEN COURTROOM, DEFENDANT FAILS TO SHOW ANY CLOSURE OF THE COURTROOM.

a. RAP 2.5(a)(3) Should Be Applied to Right to Public Trial Cases, As It Is To Other Constitutional Rights.

Ordinarily an appellate court will consider a constitutional claim for the first time on appeal only if the alleged error is manifest and truly of constitutional dimension. ***State v. McFarland***, 127 Wn.2d 322, 332–33, 899 P.2d 1251 (1995); ***State v. Davis***, 41 Wn.2d 535, 250 P.2d 548 (1952); RAP 2.5(a)(3). Such a restriction is necessary because the failure to raise an objection in the trial court "deprives the trial court of [its] opportunity to prevent or cure the error" thereby undermining the primacy of the trial court. ***State v. Kirkman***, 159 Wn.2d 918, 926, 155 P.3d 125

(2007); ***State v. Scott***, 110 Wn.2d 682, 687, 757 P.2d 492 (1988) (the constitutional error exception in RAP 2.5(a)(3) is not intended to afford criminal defendants a means for obtaining new trials whenever they can identify a constitutional issue not litigated below). A defendant attempting to raise a claim for the first time on appeal must show both a constitutional error and prejudice to his rights. ***Kirkman***, 159 Wn.2d at 926-27. A defendant can demonstrate actual prejudice on appeal by making a "plausible showing ... that the asserted error had practical and identifiable consequences in the trial of the case." ***Kirkman***, 159 Wn.2d at 935.

Prior to the adoption of RAP 2.5 the Washington Supreme Court held that a closed courtroom claim could be raised on appeal even if there was no objection on this ground in the trial court. ***State v. Marsh***, 126 Wash. 142, 145-46, 217 P.705 (1923).

> At common law, constitutional issues not raised in the trial court were not considered on appeal, with just two exceptions. If a defendant's constitutional rights in a criminal trial were violated, such issue could be raised for the first time on appeal. Secondly, where a party raised a constitutional challenge affecting the jurisdiction of the trial court, an appellate court could also reach the issue.

State v. WWJ Corp., 138 Wn.2d 595, 601, 980 P.2d 1257, 1260 (1999) (citations omitted). These common law rules were replaced in 1976 by the adoption of the Rules of Appellate procedure, and specifically RAP 2.5(a).

WWJ Corp., 138 Wn.2d at 601. As noted in a recent opinion, *see* ***State v. Beskurt***, 176 Wn.2d 441, 449-50, 293 P.3d 1159 (2013) (Madsen, J., *concurring*), when the Supreme Court decided ***State v. Bone-Club*** in 1995, it cited to the rule in ***Marsh*** without taking into consideration of the impact of RAP 2.5(a)(3). *See* ***State v. Bone-Club***, 128 Wn.2d 254, 257, 906 P.2d 325 (1995). This failure to consider the impact of RAP 2.5(a)(3) has persisted in other decisions. *See, e.g.,* ***State v. Brightman***, 155 Wn.2d 506, 514–15, 122 P.3d 150 (2005).

As three justices of the Supreme Court recently concluded, the appellate courts should refuse to apply a rule that conflicts with the Rules of Appellate Procedure and subverts the intent of RAP 2.5(a). ***State v. Beskurt***, 176 Wn.2d 441, 449-51, 293 P.3d 1159 (2013) (Madsen, J., *concurring*). The Court in ***Bone-Club*** did not consider the change effected by RAP 2.5(a); its holding that a public trial error need not be raised in the trial court to be considered on appeal should be corrected.

Respect for *stare decisis* requires a clear showing that an established rule is incorrect and harmful before it is abandoned. ***State v. Devin***, 158 Wn.2d 157, 168, 142 P.3d 599 (2006). In this instance, the rule is incorrect because it contradicts the spirit and letter of the Rules of Appellate Procedure adopted by this Court. It is harmful in at least three respects: 1) the trial court is denied the opportunity to correct any error

when no objection is required to preserve the issue for review; 2) it allows a defendant to participate in procedures and practices in the trial court that are to his benefit, yet still claim that these practices are the basis for error in the appellate court; and 3) as the ***Marsh*** rule does not require a defendant to show a manifest error or any actual prejudice before obtaining new trial, public respect for the court is diminished and judicial resources are wasted when retrial is given as a remedy when it is evident from the record that there is no prejudice to the defendant.

These harms can be seen in the case now before the court. The trial court had the parties indicate their peremptory challenges in writing on a paper that was passed back and forth; neither party voiced an objection to this procedure. CP 273-75, 276; RP (1/24/13) 151. Defendant exercised three peremptory challenges thereby eliminating venire persons he did not want on his jury. CP 276. Had defendant objected to this procedure and argued it constituted a violation of his right to an open courtroom, the trial court might have opted for different procedure just to eliminate a potential claim.

Defendant cannot articulate any practical and identifiable negative consequences to his trial or show that he was prejudiced by the use of the written process to indicate peremptory challenges. His failure to object to what he now claims was a courtroom closure and a denial of his right to a

public trial, coupled with his inability to establish resulting actual prejudice, should preclude appellate review. Despite the fact that he cannot show any actual prejudice from the procedures used, defendant nevertheless, argues that he is entitled to a new trial. This is an abuse of the judicial process that should not be condoned.

This court should find that defendant's failure to object brings this issue under RAP 2.5(a)(3) in that he has failed to show an issue of truly constitutional magnitude that has caused him actual prejudice. As such, this court should refuse to review the claim.

b. The Courtroom Was Open Throughout Voir Dire Proceedings.

A criminal defendant's right to a public trial is found in article I, section 22 of the Washington Constitution, and the Sixth Amendment to the United States Constitution; both provide a criminal defendant the right to a "public trial by an impartial jury." The state constitution also provides that "[j]ustice in all cases shall be administered openly," which grants the public an interest in open, accessible proceedings, similar to rights granted in the First Amendment of the federal constitution. Wash. Const. article I, section 10; ***State v. Lormor***, 172 Wn.2d 85, 91, 257 P.3d 624 (2011); ***Seattle Times Co. v. Ishikawa***, 97 Wn.2d 30, 36, 640 P.2d 716 (1982); ***Press–Enterprise Co. v. Superior Court***, 464 U.S. 501, 104 S.

Ct. 819, 78 L. Ed. 2d 629 (1984). The public trial right "serves to ensure a fair trial, to remind the prosecutor and judge of their responsibility to the accused and the importance of their functions, to encourage witnesses to come forward, and to discourage perjury." ***State v. Sublett***, 176 Wn.2d 58, 72, 292 P.3d 715 (2012). "There is a strong presumption that courts are to be open at all trial stages." ***Lormor***, 172 Wn.2d at 90. The right to a public trial includes voir dire. ***Presley v. Georgia***, 558 U.S. 209, 130 S. Ct. 721, 175 L. Ed. 2d 675 (2010).

Whether the right to a public trial has been violated is a question of law reviewed de novo. ***State v. Momah***, 167 Wn.2d 140, 147, 217 P.3d 321 (2009). The right to a public trial is violated when: 1) the public is fully excluded from proceedings within a courtroom, ***State v. Bone–Club***, 128 Wn.2d 254, 257, 906 P.2d 325 (1995) (no spectators allowed in courtroom during a suppression hearing), and ***State v. Easterling***, 157 Wn.2d 167, 172, 137 P.3d 825 (2006) (all spectators, including codefendant and his counsel, excluded from the courtroom while codefendant plea-bargained); 2) the entire voir dire is closed to all spectators, ***State v. Brightman***, 155 Wn.2d 506, 511, 122 P.3d 150 (2005); 3) and is implicated when individual jurors are privately questioned in chambers, *see* ***State v. Momah***, 167 Wn.2d 140, 146, 217 P.3d 321 (2009) and ***State v. Strode***, 167 Wn.2d 222, 224, 217 P.3d 310 (2009) (jury

selection is conducted in chambers rather than in an open courtroom without consideration of the ***Bone–Club*** factors). In contrast, conducting individual voir dire in an open courtroom without the rest of the venire present does not constitute a closure. ***State v. Erickson***, 146 Wn. App. 200, 189 P.3d 245 (2008).

When faced with a claim that a trial court has improperly closed a courtroom, the Washington Supreme Court has held that the reviewing court determines the nature of the closure by the presumptive effect of the plain language of the court's ruling, not by the ruling's actual effect. ***In re Personal Restraint of Orange***, 152 Wn.2d 795, 807-8, 100 P.3d 291 (2004).

In the case now before the Court, defendant argues that the procedure used by the court for exercising peremptory challenges constituted a courtroom closure. The record shows the following occurred: At the close of questioning, the court informed the venire that the attorneys would be exercising challenges, a process that did not require their participation. RP (1/24/13) 151. The parties exercised their peremptory challenges by passing a piece of paper between them. CP 276. While this was occurring, the court stated:

> THE COURT: All right. This next part of this, the attorneys are going to be passing a sheet of paper back and forth as they pick their jury. This does not require audience

> participation; so at this point, you're free to talk among yourselves quietly. Get out your electronic, you know, books, your Nooks, Kindles, whatever, your magazines, whatever you choose to entertain yourselves.

RP (1/24/13) 151. The court then spent a little time telling the jurors about the history of courtroom seating. RP (1/24/13) 151-53. The court also asked one of the jurors to remove his court-provided hearing device while the parties were discussing their peremptory challenges. RP (1/24/13) 153-54. When the parties completed their peremptory challenges, they handed the paper to the court. RP (1/24/13) 154. The court then called out the jurors who would be serving on the case. RP (1/24/13) 155-56. No objections were raised regarding either party's use of peremptory challenges. RP (1/24/13) 155-57. The written sheet indicating the peremptory challenges used by each side was filed, thereby making it a public document. CP 276.

Defendant has failed to identify any ruling of the court that closed the courtroom to any person. All jury selection was conducted in the courtroom as opposed to the judge's chambers or the jury room. Defendant can point to no Washington case that has found a courtroom closure under these circumstances. Rather, defendant argues that conducting the peremptory challenge process in writing effectively "closed" the courtroom.

The right to a public trial serves to ensure a fair trial, to remind the prosecutor and judge of their responsibility to the accused and the importance of their functions, to encourage witnesses to come forward, and to discourage perjury. ***Brightman***, 155 Wn.2d at 514 (citing ***Peterson v. Williams***, 85 F.3d 39, 43 (2d Cir. 1996)). But not every interaction between the court, counsel, and defendants will implicate the right to a public trial. ***Sublett***, 176 Wn.2d at 71. To decide whether a particular process must be open to the press and the general public, the court in ***Sublett*** adopted the "experience and logic" test formulated by the United States Supreme Court in ***Press–Enterprise Co. v. Superior Court***, 478 U.S. 1, 8, 106 S. Ct. 2735, 92 L. Ed. 2d 1 (1986). ***Sublett***, 176 Wn.2d at 73, 141.

> The first part of the test, the experience prong, asks "whether the place and process have historically been open to the press and general public." The logic prong asks "whether public access plays a significant positive role in the functioning of the particular process in question." If the answer to both is yes, the public trial right attaches and the Waller or Bone–Club factors must be considered before the proceeding may be closed to the public. We agree with this approach and adopt it in these circumstances.

Sublett, 176 Wn.2d at 73. Applying that test, the court held that no violation of Sublett's right to a public trial occurred when the court considered a jury question in chambers. ***Sublett***, 176 Wn.2d at 74–77. "None of the values served by the public trial right is violated under the

facts of this case.... The appearance of fairness is satisfied by having the question, answer, and any objections placed on the record." ***Sublett***, 176 Wn.2d at 77.

Division III of the Court of Appeals recently addressed whether challenges for cause done in a sidebar constituted a courtroom closure under the experience and logic test in ***State v. Love***, 176 Wn. App. 911, 309 P.3d 1209 (2013). As to the experience prong the court concluded:

> The history review confirms that in over 140 years of cause and peremptory challenges in this state, there is little evidence of the public exercise of such challenges, and some evidence that they are conducted privately. Our experience does not require that the exercise of these challenges be conducted in public.

Love, 176 Wn. App. at 919. Under the logic prong, the court found that none of the purposes of the public trial right were furthered by a party's actions is making a challenge for cause or a peremptory challenge as a challenge for cause creates an issue of law for the judge to decide and a peremptory challenge "presents no questions of public oversight." ***Love***, 176 Wn. App. at 919. The court concluded that use of a side bar to conduct challenges for cause did not constitute a courtroom closure. ***Love***, 176 Wn. App. at 920.

In addition to the historical review conducted in ***Love***, there is some additional authority that the public announcement of a peremptory

challenge in open court by the party exercising the challenge is not a widespread practice. When the United States Supreme Court decided that it was just as improper for a criminal defendant to excuse a potential juror for an improper reason as it was a prosecutor, the court commented that "it is common practice not to reveal the identity of the challenging party to the jurors and potential jurors[.]" ***Georgia v. McCollum***, 505 U.S. 42, 53 n.8, 112 S. Ct. 2348 (1992), citing Underwood, *Ending Race Discrimination in Jury Selection: Whose Right Is It, Anyway?*, 92 Colum.L.Rev. 725, 751, n. 117 (1992).

In the case now before the court, defendant does not point to any ruling of the court that excluded spectators or any other person from the courtroom during the voir dire process. The record indicates that all of voir dire and the exercise of peremptory challenges were carried out in an open courtroom. Peremptory[6] challenges were made by the attorneys in open court, albeit by a written process. CP 276; RP (1/24/13) 151. Presumably, defendant could see the peremptory sheet and discuss the process with his attorney while it was going on. The written record of the process was reviewed by the court and filed, making it available for public inspection. CP 276. None of the peremptory challenges were contested and there was no need for the court to make any decisions on the

peremptory challenges. RP(1/24/13) 151-56. The record offers no basis to assume that anything occurred during this process other than the written communication, among counsel and the court, of the names of the prospective jurors each counsel had decided to excuse by the right of peremptory challenge. Anyone can look at the peremptory challenge sheet and see exactly which party exercised which peremptory against which prospective juror and in what order. CP 276.

It should be noted that under ***McCollum***, both the prosecution and defense are forbidden from removing a juror with a peremptory challenge for an improper purpose. Thus, if there was a concern that a juror was being removed for an improper reason, it is immaterial which party exercised a peremptory against that juror. Any potential juror who felt that he or she was being improperly removed from the jury could raise his or her concern with the trial court. Under the written process used here, the court would know who had exercised its peremptory against that person and could decide whether it was necessary for that party to explain its reasons for doing so. The procedure used below protects the values of the public trial right.

Defendant has failed to identify any closure of the courtroom during voir dire and fails to show how the procedures used in an open

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[6] There were no challenges for cause. RP(1/24/13) 150.

court undermined the purposes of the public trial right. Anyone sitting in the court room would know which jurors were excused. The parties carefully recorded the names of the prospective jurors who were removed by peremptory challenge, as well as the order in which each challenge was made and the party who made it. CP 276. This document is easily understood, and it was made part of the open court record, available for public scrutiny. These procedures satisfied the court's obligation to ensure the open administration of justice.

Defendant has failed to show that any of the values served by the public trial right was violated by use of the written peremptory challenge procedure during the voir dire process when the written document created in the peremptory process is later filed, making it a public record. He relies on ***State v. Paumier***, 176 Wn.2d 29, 32-33, 288 P.3d 1126 (2012) and ***State v. Wise***, 176 Wn.2d 1, 7-8, 288 P.3d 1113 (2012) to support his argument, but both of these cases involve situations where the prospective jurors were questioned in chambers, but the matter was transcribed as if it were in open court. Brief of Appellant at 19. Defendant suggests that, like those cases, the filing of the peremptory sheet after the fact precludes the public from raising a concern. However, unlike ***Paumier*** and ***Wise***, the peremptory challenges were performed in open court, in full view of the public. The court announced which jurors would be seated on the jury, which had the effect of informing the public which jurors had been

challenged. Any public spectator with a concern could have raised the issue immediately, before the jury was sworn.

As defendant has failed to show that any improper closure of the courtroom occurred, this issue is without merit.

2. THE TRIAL COURT DID NOT COMMIT ERROR WHEN IT DENIED DEFENDANT'S REQUEST TO DISCHARGE HIS ATTORNEY WHERE THE BASIS OF THE BREAKDOWN IN COMMUNICATIONS WAS DUE TO DEFENDANT'S REFUSAL TO COOPERATE WITH HS ATTORNEY.

A criminal defendant has a constitutional right to receive effective representation from his attorney. ***Wheat v. United States***, 486 U.S. 153, 159, 108 S. Ct. 1692, 100 L. Ed. 2d 140 (1988). This right does not guarantee a defendant the right to her counsel of choice or to counsel with whom she has a meaningful attorney-client relationship. ***Wheat***, 486 U.S. at 159; ***Daniels v. Woodford***, 428 F.3d 1181, 1197 (9th Cir.2005), *cert. denied*, 550 U.S. 968 (2007); ***State v. Varga***, 151 Wn.2d 179, 200, 86 P.3d 139 (2004). Furthermore, a qualified appointed counsel, and not the client, is generally in charge of the choice of trial tactics and the theory of defense. ***United States v. Wadsworth***, 830 F.2d 1500, 1509 (9th Cir.1987).

Whether to substitute counsel is a matter within the discretion of the trial court. ***State v. Schaller***, 143 Wn. App. 258, 267, 177 P.3d 1139 (2007). The defendant must show good cause to justify appointment of

new counsel, as shown by a conflict of interest, an irreconcilable conflict, or a complete breakdown in attorney-client communication. ***Varga***, 151 Wn.2d at 200. If the attorney-client relationship completely collapses, the refusal to substitute new counsel violates the defendant's right to effective assistance of counsel. ***United States v. Moore***, 159 F.3d 1154, 1158 (9th Cir.1998). However, "it is well settled that a defendant is not entitled to demand a reassignment of counsel on the basis of a breakdown in communications where he simply refuses to cooperate with his attorney[]." ***State v. Thompson***, 169 Wn. App. 436, 457-58, 290 P.3d 996 (2012) (quoting ***Shaller***, 143 Wn. App. at 271).

Here, the trial court did not abuse its discretion when it declined to consider defendant's equivocal request for a new attorney where nothing in the record showed that there was any conflict of interest, irreconcilable conflict, or a complete breakdown in attorney-client communication that was not wholly one-sided. It was apparent that defendant's attorney was making substantial efforts to communicate with defendant, and defendant refused to cooperate with any effort that did not result in his immediate release from custody. RP (5/11/12) 1-2. Counsel indicated that, if the communication issue was just with him, he would withdraw as attorney, but noted that defendant's refusal to cooperate extended to other people involved to help with the defense and that called into question defendant's competency. RP (5/11/12) 3. The court concluded that defendant's competency would have to be addressed before it could assess any other

issue. RP (5/11/12) 5. Throughout the rest of the hearing, defendant indicated that he did not want a competency evaluation and that he was innocent of all charges. RP (5/11/12) 5-9. When the court granted the motion for the competency evaluation, but ordered it to be conducted at the jail, defendant asked, "Judge, can I make a request of a, a new attorney?" RP (5/11/12) 9. The court told defendant to put the request in writing so he could consider it. RP (5/11/12) 9. The trial court did not abuse its discretion in asking defendant to make his motion in writing, as the court would not consider an issue as serious as substitution of counsel while defendant's competency was still at issue.

When the parties returned for the results of defendant's competency evaluation, counsel indicated that defendant still refused to speak to him. RP (5/18/12) 6. Counsel was unsure if defendant's refusal to speak to him was a competency issue or a tactic. RP (5/18/12) 6. The court noted that two evaluators found him competent and the most recent evaluation did not refute those findings. RP (5/18/12) 7. The court asked defendant about his motion to fire his attorney and mentioned he had not seen anything in writing. RP (5/18/12) 14. Defendant stated that he was not allowed a pencil or a kite. RP (5/18/12) 14-15. The court denied defendant's motion, concluding that "this is just partly his way of trying to manipulate getting what he wants." RP (5/18/12) 15. The court obviously concluded that, since defendant was competent, his refusal to cooperate with his attorney was a tactic.

A substantial record was created throughout the course of the hearings describing the breakdown in communication and the reasons for it. The record shows that counsel was making constant efforts to communicate with defendant, but to no avail. Clearly the court determined that defendant's lack of cooperation was not a breakdown in communication that warranted a new attorney. As the breakdown in communication was entirely based on defendant's refusal to talk to his attorney, the trial court did not abuse its discretion when it denied defendant's request to fire him.

D. CONCLUSION.

For the reasons stated above, the State respectfully requests this court to affirm defendant's convictions.

DATED: APRIL 16, 2014.

MARK LINDQUIST
Pierce County
Prosecuting Attorney

KIMBERLEY DEMARCO
Deputy Prosecuting Attorney
WSB # 39218

Certificate of Service:
The undersigned certifies that on this day she delivered by ~~U.S. mail~~ or ABC-LMI delivery to the attorney of record for the appellant and appellant c/o his attorney true and correct copies of the document to which this certificate is attached. This statement is certified to be true and correct under penalty of perjury of the laws of the State of Washington. Signed at Tacoma, Washington, on the date below.

4/16/14
Date Signature

PIERCE COUNTY PROSECUTOR

April 16, 2014 - 9:59 AM

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