NO. 263541-III

COURT OF APPEALS
DIVISION III
OF THE STATE OF WASHINGTON

State of Washington,

Respondent,

v.

Jerry Allen Herron,

Appellant.

Appeal From The Superior Court Of Whitman County
Case No. 07-1-00022-9
The Honorable David Frazier

SUPPLEMENTAL BRIEF OF RESPONDENT RE: DEFENDANT'S STANDING TO RAISE PUBLIC'S RIGHT TO HAVE PUBLIC TRIAL-- AN ARTICLE 1, SECTION 10 ARGUMENT

Denis P. Tracy, WSBA # 20383
Whitman County Prosecutor

P.O. Box 30
Colfax, WA 99111-0030
509-397-6250

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I. INTRODUCTION

This court has asked for a supplemental brief on the following question: What is the defendant's standing to raise an Article 1, Section 10 argument? This is the State's supplemental brief on that question.

II. ARGUMENT

To the extent the defendant argues that the *public's* right to have a public trial was violated by the limited jury selection questioning that was done in chambers on the record, at *the defendant's specific request*, this court should not hear such arguments, because the defendant does not have standing to bring them.

Article 1, Section 10 of the Washington State Constitution provides: "Justice in all cases shall be administered openly."

A defendant does not have standing to assert the rights - constitutional or otherwise - of others. *Rakas v. Ilinois*, 439 U.S. 128, 138,58 L. Ed. 2d 387,99 S. Ct. 421 (1978) (search and seizure); *State v. Walker*, 136 Wn.2d 678,685 (1998) (failure of police officers to obtain husband's consent to search marital residence did not invalidate search as to wife); *In re Benn*, 134 Wn.2d 868, 909 (1998) (failure to challenge search of the jail cell of another inmate was not ineffective assistance of

counsel); *State v. Jones*, 68 Wn. App. 843,847, review denied, 122 Wn.2d 1018, (1993) (one cannot assert the Fourth Amendment rights of another); *State v. Gutierrez*, 50 Wn. App. 583 (violation of Fifth Amendment rights may not be asserted by a co-defendant), review denied, 110 Wn.2d 1032 (1988). Note that the defendants in *Easterly, Orange, Brightman*, and *Bone-Club* asserted on appeal their personal rights to a public trial and, thus, the issue of standing was not addressed. Nor has this writer found the issue to have been expressly decided in other open courtroom cases.

It seems that in this case, the defendant essentially requests automatic standing to assert the rights of the public. Automatic standing has been debated in the search and seizure context. *See State v. Kypreos*, 110 Wn. App. 612 (2002). Proponents of automatic standing claim that if the defendant cannot assert the rights of others, wrongful searches will not be addressed, police misconduct will not be curtailed, and illegal evidence will be admitted in courts.

But, even if persuasive in the search and seizure context, automatic standing would be counterproductive in the public trial context. If the defendant does not waive his personal right to a public trial, he can vindicate that right on appeal. If he waives the right, and if he encourages the trial court to (allegedly) violate the public's right, as this defendant did, then he was an important cause in its violation. In effect, automatic

standing in the public trial context would provide an incentive for defendants to encourage trial judges to close courtrooms -- or to remain silent when the courtroom is closed -- in the hope that they could take advantage of the closure on appeal. Thus, automatic standing would lead to more violations of Article I, section 10, rather than fewer violations.

By contrast, in the search and seizure context, the defendant does not participate in, or control, the decision of police to conduct a search, so he cannot, in effect, cause a Fourth Amendment violation. So, whatever the merits of automatic standing in the search and seizure context, those merits will have the opposite effect as applied to the open administration of justice.

In addition, as a matter of fundamental fairness, a defendant who leads the trial court to violate the public's right to the open administration of justice should not get a windfall on appeal by asserting the very rights he helped to (allegedly) violate in the trial court, especially where it served his interest in the trial court to conduct a portion of the voi dire in chambers, as he requested, and thereby potentially violate the public's right. In essence, a ruling that defendant lacks standing to assert the public's rights in this case, would not offend fundamental fairness.

III. CONCLUSION

For these reasons, an appellant should not be permitted to assert the public's rights under Aricle I, section 10. The Court is respectfully requested to find that defendant lacks standing to raise an Article 1, Section 10 argument.

Respectfully submitted this 24 day of Aug. 1, 2013.

Denis Tracy, WSBA 20383
Whitman County Prosecutor
Attorney for the State

IN THE SUPERIOR COURT OF THE STATE OF WASHINGTON
IN AND FOR THE COUNTY OF WHITMAN

STATE OF WASHINGTON, Plaintiff, v. Jerry Allen Herron, Defendant,	No. 263541-III AFFIDAVIT OF MAILING

STATE OF WASHINGTON)
COUNTY OF WHITMAN)

Amanda Pelissier, being first duly sworn, deposes and says as follows: That on the 24th day of April, 2013, I caused to be mailed in the United States Post Office at Colfax, Washington, with postage fully prepaid thereon, a full, true and correct copy(ies) of the original **Supplemental Brief of Respondent** on file herein to the following named person(s) at the following address(es):

Mailed to :Jeffrey K Finer at 505 W Riverside Ave 600, Spokane, WA 99201
Mailed to: Jerry Herron at 1913 S Mintle #35, Airway Heights, WA 99001

DATED this 24th day of April, 2013.

Amanda Pelissier
Amanda Pelissier

SIGNED before me on this 24th day of April, 2013.

LORIE HAYES
NOTARY PUBLIC
STATE OF WASHINGTON
COMMISSION EXPIRES OCTOBER 1, 2014

NOTARY PUBLIC in and for the State of Washington, residing at: Colfax
My Appointment Expires: ~~06-09-2014~~ Oct 1 2014

Denis P. Tracy
Whitman County Prosecuting Attorney
P.O. Box 30, Colfax, WA 99111-0030
(509) 397-6250, Fax (509) 397-5659