72515-7

FILED
June 9, 2015
Court of Appeals
Division I
State of Washington

No. 72515-7-I

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

STATE OF WASHINGTON,

Respondent,

v.

EC EDWARD COBB,

Appellant.

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

APPELLANT'S OPENING BRIEF

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A. ASSIGNMENTS OF ERROR

1. Mr. Cobb's constitutional right to jury unanimity was violated in regard to the witness tampering charge.

2. Mr. Cobb's constitutional right to jury unanimity was violated in regard to count one, felony violation of a court order.

3. Mr. Cobb's constitutional right to a public trial was violated because the trial court conducted peremptory challenges in writing.

4. The trial court violated Mr. Cobb's constitutional right to be present at all critical stages of the proceeding.

5. The judgment and sentence must be corrected to reflect that the jury did not find that the crimes were "domestic violence" offenses.

B. ISSUES PERTAINING TO ASSIGNMENTS OF ERROR

1. The witness tampering statute provides that "each instance of an attempt to tamper with a witness constitutes a separate offense." RCW 9A.72.120(3). In this case, the State presented evidence of 15 separate alleged instances of an attempt to tamper with a witness. But the jury was not instructed it must unanimously agree on the same underlying act, and the State did not elect a particular act it was relying upon. Was Mr. Cobb's constitutional right to a unanimous jury verdict violated?

2. If the jury is instructed on multiple alternative means of committing a crime, but the State does not present sufficient evidence to prove each means beyond a reasonable doubt, the defendant's constitutional right to jury unanimity is violated unless the jury is instructed it must unanimously agree as to a particular means. Was Mr. Cobb's constitutional right to jury unanimity violated where the jury was instructed on multiple means but the State did not present sufficient evidence to prove each means and the jury was not instructed it must be unanimous as to the means?

3. The constitutional right to an open trial extends to the jury selection process. Was the constitutional right to an open trial violated where the trial court permitted the parties to exercise peremptory challenges in writing at sidebar and not out loud in open court?

4. A criminal defendant has a constitutional right to be present at all "critical stages" including the jury selection process. Was Mr. Cobb's constitutional right to be present violated where the attorneys conducted peremptory challenges at sidebar in writing, in Mr. Cobb's absence?

5. The judgment and sentence states that Mr. Cobb was convicted of "domestic violence" offenses and that "domestic violence"

was pled and proved. But the jury never reached agreement or filled out the verdict form indicating it found a "domestic violence" offense had occurred. Must the judgment and sentence be corrected to remove any reference to "domestic violence"?

C. STATEMENT OF THE CASE

EC Cobb and Monique Bojang have known each other for about seven years. 8/18/14RP 437. In April 2014, there was a no-contact order in place prohibiting Mr. Cobb from having contact with Ms. Bojang. Exhibit 1; 8/18/14RP 396, 444.

Ms. Bojang said that on April 29, 2014, Mr. Cobb called her and asked her to come over to his girlfriend's apartment in Kent so that he and Ms. Bojang could talk. 8/18/14RP 446. Ms. Bojang went to the apartment and Mr. Cobb let her inside. 8/18/14RP 449. Mr. Cobb's girlfriend, Louise Lucas, was not at home. 8/18/14RP 449.

Mr. Cobb and Ms. Bojang talked for about 45 minutes and then Ms. Bojang went back outside to her car. 8/18/14RP 450-51. Mr. Cobb followed soon afterward. 8/18/14RP 452. He got in the car and Ms. Bojang drove him to Jack in the Box, where they both got lunch. They returned to the parking lot of the apartment complex, where they sat in the car eating their food. 8/18/14RP 452-53.

Ms. Bojang said that after she and Mr. Cobb talked for a while longer in the car, Mr. Cobb became upset and aggressive. 8/18/14RP 454-55. She said he hit her with his fists and his open hand, in the face and along her side. 8/18/14RP 455-56. She said he stopped and they talked some more but then he began hitting her again. 8/18/14RP 456. There were three cycles of hitting. 8/18/14RP 456. Ms. Bojang called 911. 8/18/14RP 457.

A police officer arrived and contacted Ms. Bojang in her car. 8/18/14RP 414-15. The officer did not notice any injuries on Ms. Bojang. 8/18/14RP 421. She directed his attention to a scratch on her left cheek and a scratch on her bottom lip. 8/18/14RP 422. The officer did not observe any bruises, welts, or swelling on Ms. Bojang, nor any other injuries on her face. 8/18/14RP 429. Ms. Bojang said she did not need medical attention and was "fine." 8/18/14RP 466.

Police officers arrested Mr. Cobb. 8/18/14RP 527-28; 8/19/14RP 559.

Mr. Cobb was charged with one count of felony violation of a no-contact order. CP 10-11; RCW 26.50.110(1), (4), (5). The State alleged Mr. Cobb committed the crime by three alternative means: (a) by "intentionally assaulting" Ms. Bojang; (b) by "conduct which was

reckless and created substantial risk of death or serious physical injury" to Ms. Bojang; or (c) "at the time of the above violation [Mr. Cobb] did have at least two prior convictions for violating the provisions of" a no-contact order. CP 10.

The State also charged Mr. Cobb with an additional count of felony violation of a no-contact order, based on a number of telephone calls he allegedly made to Ms. Bojang from jail on the day of his arrest. CP 11, 266.[1] Finally, the State charged Mr. Cobb with one count of witness intimidation, based on a series of several telephone calls he allegedly made from jail between April 29 and August 4, 2014. CP 12.

Before trial, during jury selection, the attorneys and the court conducted peremptory challenges on paper and not out loud in court. 8/14/14/RP [voir dire] 50-52, 66; Sub #32.

At trial, in support of the witness intimidation charge, the State presented evidence of a total of 15 separate telephone calls that Mr. Cobb allegedly made from jail over a period of three months. 8/19/14RP 587-99; Exhibit 27(A and B) - Exhibit 41(A and B). No

[1] The State also charged Mr. Cobb with a third count of felony violation of a court order, based on telephone calls he allegedly made to Ms. Bojang on the day of the incident, while she was sitting in her car and before his arrest. CP 11, 264; 8/20/14RP 771. The jury acquitted him of that charge. CP 171.

unanimity instruction was provided to the jurors informing them that they must unanimously agree on a particular alleged act constituting the offense. The jury found Mr. Cobb not guilty of witness intimidation but guilty of the lesser-included offense of witness tampering. CP 168-69, 272-74.

The jury was instructed on all three charged alternative means of felony violation of a no-contact order for count one. CP 256. The jury was instructed it need not be unanimous as to which alternative was proved beyond a reasonable doubt, as long as each juror found that at least one alternative was proved beyond a reasonable doubt. CP 256. The jury found Mr. Cobb guilty of count one as charged. CP 172.

Additional facts are set forth in the relevant argument sections below.

D. ARGUMENT

1. Mr. Cobb's constitutional right to a unanimous jury verdict was violated in regard to the witness tampering conviction

a. Because the State presented evidence of several distinct acts of possible witness tampering, either the court was required to provide a unanimity instruction, or the State was required to elect a particular act it was relying upon

In Washington, an accused may be convicted only when a unanimous jury concludes that the criminal act charged in the information has been committed. State v. Kitchen, 110 Wn.2d 403, 409, 756 P.2d 105 (1988). When the prosecution presents evidence of several acts that could form the basis of the charge, either the State must tell the jury which act to rely upon in its deliberations, or the court must instruct the jury that all of them must agree that the same underlying criminal act has been proved beyond a reasonable doubt. State v. Petrich, 101 Wn.2d 566, 570, 683 P.2d 173 (1984). Failure to follow one of these options is "violative of a defendant's state constitutional right to a unanimous jury verdict and United States constitutional right to a jury trial." Kitchen, 110 Wn.2d at 409; Const. art. I, § 22; U.S. Const. amend VI. "The error stems from the possibility that some jurors may have relied on one act or incident and

some another, resulting in a lack of unanimity on all of the elements necessary for a valid conviction." Kitchen, 110 Wn.2d at 411.

Failure to provide a unanimity instruction when required is a manifest constitutional error that may be raised for the first time on appeal. State v. Moultrie, 143 Wn. App. 387, 392, 177 P.3d 776 (2008); RAP 2.5(a)(3).

The Petrich rule applies in cases where the State presents evidence of "several distinct acts" and does not apply where the evidence indicates a "continuing course of conduct." State v. Handran, 113 Wn.2d 11, 17, 775 P.2d 453 (1989). To determine whether criminal conduct constitutes one continuing act, the facts must be evaluated in a commonsense manner. Id. For example, "where the evidence involves conduct at different times and places, then the evidence tends to show 'several distinct acts.'" Id.

For the crime of witness tampering, the Legislature has already determined that "each instance of an attempt to tamper with a witness constitutes a separate offense." RCW 9A.72.120(3). The Legislature passed this amendment to the witness tampering statute in 2011, in response to the Washington Supreme Court's decision in State v. Hall,

168 Wn.2d 726, 230 P.3d 1048 (2010). See Laws 2011, ch. 165, § 1. In passing the new statute, the Legislature explained,

> In response to State v. Hall, 168 Wn.2d 726 (2010), the legislature intends to clarify that each instance of an attempt to intimidate or tamper with a witness constitutes a separate violation for purposes of determining the unit of prosecution under the statutes governing tampering with a witness and intimidating a witness.

Id.

The Legislature's decision to amend the statute in response to Hall demonstrates the Legislature's rejection of the court's reasoning in that case. In Hall, the defendant made several telephone calls to a potential witness while he was in jail pending trial on criminal charges, trying to persuade the witness not to testify, or to testify falsely. Hall, 168 Wn.2d at 729. Based on phone calls made on three separate dates, Hall was convicted of three counts of witness tampering. Id. The Supreme Court vacated two of the convictions, holding that only a single crime occurred because "the unit of prosecution is the ongoing attempt to persuade a witness not to testify in a proceeding." Id. at 734, 737. According to the Hall court, witness tampering is a "continuing offense" that is not "committed anew with each single act of attempting to persuade a potential witness not to testify or testify falsely." Id. at 730.

In response to Hall, the Legislature amended the witness tampering statute, which now reads: "each instance of an attempt to tamper with a witness constitutes a separate offense." RCW 9A.72.120(3); see Laws 2011, ch. 165, § 1. Thus, contrary to Hall, witness tampering is not a "continuing offense," but is instead committed anew each time a person "attempt[s] to tamper with a witness." RCW 9A.72.120(3). If the charge is based on a series of telephone calls, each individual call in which the offender attempts to tamper with a witness is a "separate offense." Id.

In order to safeguard the constitutional right to jury unanimity in a witness tampering case, therefore, if the State presents evidence of several telephone calls that could each form the basis of the charge, either the State must elect the act it is relying upon, or the court must instruct the jury that all of them must agree that the same underlying criminal act has been proved beyond a reasonable doubt. Petrich, 101 Wn.2d at 570.

b. Mr. Cobb's constitutional right to jury unanimity was violated because the jury was not provided with a unanimity instruction and the State did not elect the particular act it was relying upon

In this case, the State presented evidence of several distinct acts that could form the basis of the witness tampering charge. The State presented evidence of a total of 15 individual telephone calls that Mr. Cobb allegedly made from jail, in which he purportedly attempted to tamper with Ms. Bojang, a potential witness in the case. 8/19/14RP 587-99; Exhibit 27(A and B) – Exhibit 41(A and B). Yet the jurors were not provided with an instruction informing them they must unanimously agree on a particular act. Moreover, the State did not elect a particular act it was relying upon. See 8/20/14RP 786-87. To the contrary, the deputy prosecutor told the jury during closing argument that they could consider the entire "set of 15 calls" in deciding whether witness tampering had occurred. Id.

Because the jury was not instructed it must agree that the same underlying criminal act occurred, and the prosecutor did not elect which act it was relying upon, Mr. Cobb's constitutional right to jury unanimity was violated. Kitchen, 110 Wn.2d at 409; Petrich, 101 Wn.2d at 570.

c. The error is not harmless beyond a reasonable doubt, requiring that the conviction be reversed

The error is presumed prejudicial and will be deemed harmless only if no rational trier of fact could have a reasonable doubt as to whether each alleged telephone call established the offense beyond a reasonable doubt. See Kitchen, 110 Wn.2d at 411. If there was conflicting testimony as to whether any of the alleged calls supported the charge, or if a rational juror could have entertained reasonable doubt as to whether one or more of them actually established the offense, the conviction must be reversed. Id. at 412.

The unanimity error was not harmless because the evidence was not sufficient to prove that each separate telephone call established the elements of witness tampering beyond a reasonable doubt. To prove the crime, the State was required to prove the following elements:

> (1) That on or about April 29, 2014 to August 4, 2014, the defendant attempted to induce a witness or person he has reason to believe is about to be called as a witness in any official proceeding, or a person whom he has reason to believe may have information relevant to a criminal investigation, to testify falsely, or to withhold any testimony without right or privilege to do so, or to absent herself from such proceedings, or to withhold from a law enforcement agency information which she has relevant to a criminal investigation; and
>
> (2) That the other person was a witness or a person the defendant had reason to believe was about to

> be called as a witness in any official proceedings or a person whom the defendant had reason to believe might have information relevant to a criminal investigation; and
>
> (3) That the acts occurred in the State of Washington. . . .

CP 274; see RCW 9A.72.120.

For at least several of the jail telephone calls, the content of the call was insufficient to establish the elements of the crime beyond a reasonable doubt. The conversations that occurred were often vague and ambiguous and did not clearly amount to an attempt to tamper with a witness. For example, in the first call, allegedly placed by Mr. Cobb to his girlfriend Ms. Lucas on the afternoon of his arrest, Mr. Cobb did not clearly attempt to tamper with a witness.[2] In the conversation, Mr. Cobb denied slapping Ms. Bojang and asked Ms. Lucas to "make sure I get some money on my books." Exhibit 27B at 2-3. He requested that she call his sister and "tell her that, she'll know what to do as far as such-and-such is concerned and everything okay, and to make sure that she takes care of, of her business." Id. at 4. He told Ms. Lucas to

> [c]all her up, send her a text, or whatever and let her know what's going on. And that 'she was at the house,' that 'I wasn't nowhere, I didn't go nowhere' or whatever, 'she came over' . . . there and she needs to tell these people what she needs to tell 'em. Like she's been talking about saying.

[2] The transcript of the first telephone call, admitted as Exhibit 27B, is attached as Appendix A.

Id. at 5. He ended the call by telling Ms. Lucas to "stay sharp" and "see if you can get my sister to take care of that business and everything. To get that girl to go ahead and drop that." Id. at 7. Mr. Cobb was no more specific about what he was asking Ms. Lucas to do. He said nothing more that could be construed as an attempt to tamper with a witness.

Similarly, in a call allegedly placed by Mr. Cobb to Ms. Lucas two days later, Mr. Cobb said, "it sounds good right now, so we have a few things to work on and everything to, to pass on and everything and we'll see, we'll see how it goes, okay?"[3] Exhibit 31B at 2. He said, "this right here can be broken down if we do it now." Id. He concluded by saying,

> I had a real quick brief about you know what was being done, and what, what to do and things like that, and everything, and it sounded . . . cool, I'll leave it at that. As far as my sister, and things that we could relay, and everything then, you know, that's what we'll do.

Id. Again, it is not clear what the participants in this conversation were referring to, or what they intended. The call does not establish the elements of witness tampering beyond a reasonable doubt.

[3] A transcript of the call, admitted as Exhibit 31B, is attached as Appendix B.

Finally, in a call allegedly placed by Mr. Cobb to a male friend named "Loco" about a week later, Mr. Cobb told his friend, "it's not looking too good man."[4] Exhibit 34B at 3. He asked if Loco remembered "that number" for his "broad." Id. He told him to "do that man and, and say 'What do Yessirree gotta do, man, to get a pick up?' okay?" Id. He said, "I got a couple witnesses," and "we're gonna put things right." Id. at 4. He ended the call by saying, "we gotta play our parts now though and try to, you know, do it right." Id. at 6. Again, it is not clear what this conversation is about. The conversation does not amount to an attempt to tamper with a witness beyond a reasonable doubt.

Plainly the conversations that took place in each of these calls were insufficient to prove the elements of witness tampering. None of the calls demonstrates beyond a reasonable doubt an attempt to induce a witness to testify falsely, to withhold testimony, to absent herself from a proceeding, or to withhold relevant information from a law enforcement agency. See CP 274; RCW 9A.72.120. Many of the other calls are similarly cryptic and ambiguous. See Exhibits 27B – 41B. Thus, because a rational trier of fact could have a reasonable doubt as

[4] A transcript of the telephone call, admitted as Exhibit 34B, is attached as Appendix C.

to whether some of the alleged telephone calls established the offense beyond a reasonable doubt, the unanimity error was not harmless and the conviction must be reversed. Kitchen, 110 Wn.2d at 411-12.

2. The conviction for felony violation of a court order in count one must be reversed because the State did not present sufficient evidence to prove all three charged alternative means of committing the crime

Article I, section 21 requires a unanimous jury verdict in criminal cases. When the State alleges a defendant committed a crime by alternative means, and the jury is instructed on multiple means, the right to a unanimous jury requires the jury unanimously agree on the means by which it finds the defendant committed the offense. State v. Owens, 180 Wn.2d 90, 95, 323 P.2d 1030 (2014); Const. art. I, § 21. If the jury returns "a particularized expression" as to the means relied upon for the conviction, the unanimity requirement is met. State v. Ortega-Martinez, 124 Wn.2d 702,707-08,881 P.2d 231 (1994). But "[a] general verdict of guilty on a single count charging the commission of a crime by alternative means will be upheld only if sufficient evidence supports each alternative means." State v. Kintz, 3 169 Wn.2d 537, 552, 238 P.3d 470, 477-78 (2010) (citing Ortega-Martinez, 124 Wn.2d at707-08); Owens, 180 Wn.2d at 99.

Mr. Cobb may challenge the lack of a unanimous jury verdict as to each charged alternative means for the first time on appeal. State v. Peterson, 174 Wn. App. 828, 849 n.5, 301 P.3d 1060 (2013); RAP 2.5(a)(3).

In this case, the State charged three alternative means of felony violation of a court order in count one, and the jury was instructed on each of those means. The State alleged that Mr. Cobb knew of and willfully violated the terms of a court order for the protection of Ms. Bojang: (1) by intentionally assaulting Ms. Bojang; or (2) by conduct which was reckless and created substantial risk of death or serious physical injury to Ms. Bojang; or (3) at the time of the violation, Mr. Cobb had at least two prior convictions for violating the provisions of a protection order. CP 10; see RCW 26.50.110(1), (4), (5). The "to-convict" jury instruction contained each of these three alternative means. CP 256.

Yet, the jury was not instructed that it must unanimously agree as to the alternative means. Indeed, the trial court affirmatively instructed the jury they need *not* unanimously agree.[5] CP 256. That

[5] The deputy prosecutor compounded the error by telling the jury during closing argument that there were three possible alternative means of committing the crime and the jury need not be unanimous as to which alternative it relied upon. 8/20/14RP 769.

instruction is directly contrary to the Supreme Court's repeated urging that trial courts should instruct on the requirement of unanimity for alternative means crimes. Ortega-Martinez, 124 Wn.2d 717, n.2 (citing State v. Whitney, 108 Wn.2d 506, 511, 739 P.2d 1150 (1987)). In the absence of a particularized finding of unanimity as to the means, Mr. Cobb's conviction must be reversed unless each alternative is supported by sufficient evidence. Owens, 180 Wn.2d at 99. They are not.

Evidence is sufficient if, after viewing the evidence in the light most favorable to the State, a rational trier of fact could have found each alternative means beyond a reasonable doubt. Ortega-Martinez, 124 Wn.2d at 708.

The evidence was not sufficient to prove beyond a reasonable doubt that Mr. Cobb's conduct was reckless and created a substantial risk of death or serious physical injury to Ms. Bojang. Ms. Bojang testified that Mr. Cobb hit her with his fists and open hand, in the face and along her side. 8/18/14RP 455-56. But Ms. Bojang's injuries were minor. When the responding police officer first contacted Ms. Bojang, he did not notice that she had any injuries. 8/18/14RP 421, 429. She had to direct his attention to a scratch on her cheek and her lip.

8/18/14RP 422. She told the 911 operator that she did not need medical attention and was "fine." 8/18/14RP 466.

The State's evidence showed, at most, that Mr. Cobb's conduct amounted to a simple assault. It was far from reckless to the point of placing Ms. Bojang at substantial risk of death or serious physical injury. Thus, because the State did not prove one of the charged alternative means of committing the crime beyond a reasonable doubt, Mr. Cobb's constitutional right to jury unanimity was violated and the conviction must be reversed. Owens, 180 Wn.2d at 99; Ortega-Martinez, 124 Wn.2d at 708.

3. Conducting peremptory juror challenges in writing violated the constitutional guarantee of a public trial

Prior to trial, after the parties had questioned the potential jurors and conducted challenges for cause, the court invited the attorneys to approach the bench and submit their peremptory challenges in writing. 8/14/14RP[voir dire] 50. The court excused two potential jurors based on the peremptory challenges, without stating out loud which party had challenged the jurors. 8/14/14RP[voir dire] 50. The court then filed the document setting forth the peremptory challenges in the court file. 8/14/14RP[voir dire] 51-52; Sub #32. This procedure, conducted in

writing at the bench and not out loud in open court, violated the constitutional guarantee of an open and public proceeding.

The Sixth Amendment to the United States Constitution and article I, section 22 of the Washington Constitution guarantee the right to a public trial. Waller v. Georgia, 467 U.S. 39, 104 S. Ct. 2210, 81 L. Ed. 2d 31 (1984); State v. Wise, 176 Wn.2d 1, 288 P .3d 1113 (2012). The state constitution also requires that "[j]ustice in all cases shall be administered openly." Const. art. I, § 10. Whether the constitutional right to a public trial has been violated is a question of law, subject to de novo review on appeal. State v. Smith, 181 Wn.2d 508, 513, 334 P.3d 1049 (2014).

The right to a public trial is the right to have a trial open to the public. In re Pers. Restraint of Orange, 152 Wn.2d 795, 804-05, 100 P .3d 291 (2004). This is a core safeguard in our system of justice. Wise, 176 Wn.2d at 5-6. An open and public judicial process helps assure fair trials, deters perjury and other misconduct by participants, and tempers biases and undue partiality. Id. It is a check on the judicial system, provides for accountability and transparency, and assures that whatever transpires in court will not be secret or unscrutinized. Id. The public trial right is also 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.'" State v. Bone-Club, 128 Wn.2d 254, 259, 906 P.2d 325 (1995) (quoting In re Oliver, 333 U.S. 257, 270 n.25, 68 S. Ct. 499, 92 L. Ed. 2d 682 (1948)).

Washington employs the "experience and logic" test to determine whether a particular proceeding implicates the public trial right. State v. Sublett, 176 Wn.2d 58, 72-73, 292 P.3d 715 (2012); Id. at 136 (Stephens, J., concurring) (adopting test from Press-Enterprise Co. v. Superior Court, 478 U.S. 1, 106 S. Ct. 2735, 92 L. Ed. 2d 1 (1986)). Where experience and logic counsel that a particular proceeding must be open, a trial court's failure to conduct a Bone-Club analysis justifying a closure will result in a new trial. State v. Paumier, 176 Wn.2d 29, 35, 288 P.3d 1126 (2012). A violation of the public trial right is structural, meaning prejudice is per se presumed to inhere in the violation. Wise, 176 Wn.2d at 13~14. A public trial right violation may be raised for the first time on appeal and does not require an objection at trial to preserve the error. State v. Njonge, 181 Wn.2d 546, 334 P.3d 1068 (2014).

In analyzing public trial right cases, this Court examines (1) whether the public trial right is implicated; (2) if so, whether there was a closure; and (3) if there was a closure, whether it was justified. Smith, 181 Wn.2d at 513.

a. Peremptory challenges implicate the public trial right[6]

The Washington Supreme Court has held the public trial right attaches to the voir dire portion of jury selection. See Wise, 176 Wn. 2d at 12 n.4; In re Pers. Restraint of Morris, 176 Wn.2d 157, 174, 288 P.3d 1140 (2012) (Chambers, J., concurring). Application of the experience and logic test is necessary to determine whether the public trial right attaches to other portions of the jury selection process. State v. Slert, 181 Wn.2d 598, 605, 334 P.3d 1088 (2014). Applying the experience prong, the Court asks "whether the place and process have

[6] The divisions of the Court of Appeals have reached divergent results on the question whether juror challenges are subject to the constitutional right to an open trial. See State v. Anderson, __ Wn. App. __, 2015 WL 2394961 (No. 45497-1-II, May 19, 2015) (holding that, under "experience and logic" test, juror challenges for cause implicate constitutional public trial right); State v. Marks, 184 Wn. App. 782, 339 P.3d 196 (2014) (holding peremptory challenges do not implicate constitutional public trial right); State v. Dunn, 180 Wn. App. 570, 575, 321 P.3d 1283 (2014) (same); State v. Love, 176 Wn. App. 911, 920, 309 P.3d 1209 (2013), review granted, 181 Wn.2d 1029 (2015) (same). To the extent those decisions are inconsistent with the argument presented here, they should not be followed.

historically been open to the press and general public." Press-Enterprise Co., 478 U.S. at 8. The logic prong asks "whether public access plays a significant positive role in the functioning of the particular process in question." Id. If the answer to both is yes, a qualified right of public access attaches. Id. at 9.

Experience shows peremptory challenges have historically been open to the press and general public in Washington. This is evidenced by statutes governing the exercise of such challenges, court rule, foreign case law and Washington's own jurisprudence.

Washington statutes governing jury selection indicate challenges have historically been made in open court. For instance, RCW 4.44.240 provides that when a party excepts to a challenge and the relevant facts must be determined,

> the rules of evidence applicable to testimony offered upon the trial of an ordinary issue of fact shall govern. The juror challenged, or any other person otherwise competent may be examined as a witness by either party. If the challenge is sustained, the juror shall be dismissed from the case; otherwise, the juror shall be retained.

Significantly, before its amendment in 2003, this statute referred to this process as a "trial of a challenge." Former RCW 4.44.240 (2002); Code 1881 § 218. The next statutory provision provides: "[t]he challenge, the exception, and the denial may be made orally. The judge

shall enter the same upon the record, along with the substance of the testimony on either side." RCW 4.44.250. These provisions indicate that the evidence gathering function and legal question of juror bias are part of the same proceeding, to which the public trial right attaches.

Washington court rules governing jury selection likewise indicate challenges have historically been made in open court. CrR 6.4(b) provides:

> A voir dire examination shall be conducted for the purpose of discovering any basis for challenge for cause and for the purpose of gaining knowledge to enable an intelligent exercise of peremptory challenges. The judge shall initiate the voir dire examination by identifying the parties and their respective counsel and by briefly outlining the nature of the case. The judge and counsel may then ask the prospective jurors questions touching their qualifications to serve as jurors in the case, subject to the supervision of the court as appropriate to the facts of the case.

In State v. Wilson, Division II found this rule supported the conclusion that historically, for-cause and peremptory challenges have been made in open court, as opposed to administrative excusals made before voir dire begins, to which the public trial right does not attach. State v. Wilson, 174 Wn. App. 328, 342-44, 298 P.3d 148 (2013).

Other Washington cases similarly suggest peremptory challenges have historically been made in open court. See State v.

Njonge, 181 Wn.2d 546, 334 P.3d 1068 (2014); State v. Jones, 175 Wn. App. 87, 303 P.3d 1084 (2013). In Njonge, the court considered whether observers were excluded from the courtroom during hardship excusals of prospective jurors, in violation of Njonge's public trial rights. Njonge, 181 Wn.2d at 548-49. In finding no public trial right violation, the court found the record did not establish that the public had actually been excluded. Id. at 557-59. The Njonge opinion implicitly recognizes the public trial right attaches to hardship excusals; the right had simply not been violated in that case.

In Jones, Division II held the public trial right attaches to the selection of alternate jurors. Jones, 175 Wn. App. at 101-03. In finding the experience prong supported openness, the court relied primarily on the fact that historically, alternates were subject to the same challenges as regular jurors, which generally occurs as part of jury selection in open court. Id. at 101.

Finally, foreign case law also indicates that historically, for-cause and peremptory challenges have been conducted in open court. See People v. Harris, 10 Cal. App. 4th 672, 12 Cal. Rptr. 2d 758 (1992). In Harris, the court held that conducting peremptory challenges in chambers violated Harris's right to a public trial. Id. at 689.

The aforementioned authorities demonstrate that peremptory challenges are intimately tied to, and part of, the jury selection process that is presumptively open to the public.

The next question is whether public access plays a significant role in the functioning of peremptory challenges. Logically, exercising challenges in open court implicates the core concerns of the constitutional right to a public trial—basic fairness to the accused—in that it helps to ensure an impartial jury is selected, and to remind the trial court of the importance of its functions. See Sublett, 176 Wn.2d at 72. "The peremptory challenge is an important state-created means to the constitutional end of an impartial jury and a fair trial." State v. Saintcalle, 178 Wn.2d 34, 62, 309 P.3d 326 (2013) (Madsen, C.J., concurring) (internal quotation marks and citation omitted). Public oversight during peremptory challenges furthers the goals of an impartial jury and fair trial. See id. at 41-42 (lead opinion) (noting the importance of effective procedures for identifying racially motivated challenges, as racial discrimination "undermines public confidence in the fairness of our system of justice").

Although the parties' peremptory challenges conducted in writing in this case were later filed in the court file, Sub #32, this does

not sufficiently protect the core concerns of the public trial right. In State v. Filitaula, the Court found no public trial right violation when peremptory challenges were conducted on paper because a member of the public could later access the form the parties had filled out in exercising their peremptory challenges. State v. Filitaula, 184 Wn. App. 819, 823-24, 339 P.3d 221 (2014).

But contrary to the Court's reasoning in Filitaula, a piece of paper filed in the court file fails to adequately insure the right to a public trial. For example, members of the public would have to know the sheet documenting peremptory challenges had been filed and that it was subject to public viewing. Further, even if members of the public could recall which juror name or number was associated with which individual, they also would have to recall the identity, gender, and race of those individuals to determine whether protected group members had been improperly targeted. Thus, public access to a sheet of paper after the fact is simply inadequate to protect the right to a public trial.

Moreover, Wise held that individual questioning of jurors in chambers, even when the questioning was recorded and transcribed, violated the public trial right. 176 Wn.2d at 12-13. By analogy, filing a peremptory challenge sheet or similar document is also insufficient to

protect the public trial right. In short, the Court should hold the proceeding at issue here—the exercise of peremptory challenges on paper—implicates the public trial right.

b. The peremptory challenge portion of jury selection was closed

As stated, the court called the parties up to the bench to exercise peremptory challenges on paper. 8/14/14RP[voir dire] 50-52; Sub #32. This portion of jury selection occurred outside the hearing of the jurors or any spectators in the courtroom. Peremptory challenges were exercised through the use of a piece of paper passed back and forth between the parties. Id. The court did not announce out loud which party challenged which juror. The end result is that the public was excluded to the same extent as if the courtroom doors had been locked.

Physical closure of the courtroom is not the only situation that violates the public trial right. For example, a closure occurs when a juror is privately questioned in an inaccessible location such as the judge's chambers, State v. Strode, 167 Wn.2d 222, 226-27, 217 P.3d 310 (2009), or the public hallway outside the courtroom, State v. Leyerle, 158 Wn. App. 474, 483-84, 242 P.3d 921 (2010). Here, members of the public were no more able to approach the bench and the attorneys and listen to an intentionally private jury selection process

than they would be able to enter a locked courtroom, access the judge's chambers or participate in a private hearing in a hallway. The practical impact is the same—the public was denied the opportunity to scrutinize events.

c. The closure was not justified, requiring reversal

Under Bone-Club, (1) the proponent of the closure must show a compelling interest for closure and, when closure is based on a right other than the accused's right to a fair trial, a serious and imminent threat to that compelling interest; (2) anyone present when the closure motion is made must be given an opportunity to object to the closure; (3) the proposed method for curtailing open access must be the least restrictive means available for protecting the threatened interests; (4) the court must weigh the competing interests of the proponent of closure and the public; and (5) the order must be no broader in its application or duration than necessary to serve its purpose. Bone-Club, 128 Wn.2d at 258-60.

Here, nothing on the record indicates the court considered any of the Bone-Club factors before closing the proceeding. The closure therefore was not justified and reversal is required. Paumier, 176 Wn.2d at 35.

4. Mr. Cobb was denied his constitutional right to be present at all critical stages of trial

A criminal defendant has a fundamental right to be present at all critical stages of a trial. Rushen v. Spain, 464 U.S. 114, 117, 104 S. Ct. 453, 78 L. Ed. 2d 267 (1983); State v. Irby, 170 Wn.2d 874, 880-81, 246 P.3d 796 (2011).

The federal constitution does not explicitly guarantee the right to be present, but the right is rooted in the Sixth Amendment's confrontation clause and the Fourteenth Amendment's due process guarantee. United States v. Gagnon, 470 U.S. 522, 526, 105 S. Ct. 1482, 84 L. Ed. '2d 486 (1985); U.S. Const. amends. VI, XIV. Under the federal constitution, a defendant has the right to be present "whenever his presence has a relation, reasonably substantial, to the fullness of his opportunity to defend against the charge." Snyder v. Massachusetts, 291 U.S. 97, 105-06, 54 S. Ct. 330, 78 L. Ed. 2d 674 (1934). Stated another way, "the presence of a defendant is a condition of due process to the extent that a fair and just hearing would be thwarted by his absence." Id. at 107-08.

The federal constitutional right to be present for jury selection is well recognized.[7] See Lewis v. United States, 146 U.S. 370, 373-74, 13 S. Ct. 136, 36 L. Ed. 1011 (1892); Gomez v. United States, 490 U.S. 858, 873, 109 S. Ct. 2237, 104 L. Ed. 2d 923 (1989); State v. Wilson, 141 Wn. App. 597, 604, 171 P.3d 501 (2007).

"Jury selection is the primary means by which [to] enforce a defendant's right to be tried by a jury free from ethnic, racial, or political prejudice, or predisposition about the defendant's culpability." Gomez, 490 U.S. at 873. The defendant's presence "is substantially related to the defense and allows the defendant 'to give advice or suggestion or even to supersede his lawyers.'" Wilson, 141 Wn. App. at 604 (quoting Snyder, 291 U.S. at 106).

In contrast to the United States Constitution, article 1, section 22 of the Washington Constitution explicitly guarantees the right to be present,[8] and provides even greater rights. Irby, 170 Wn.2d at 885 n.6. Under our state provision, the defendant must be present to participate "'*at every stage of the trial when his substantial rights may be*

[7] Consistent with this constitutional guarantee, CrR 3.4(a) explicitly requires the defendant's presence "at every stage of the trial including the empanelling of the jury."

[8] Article I, section 22 provides: "In criminal prosecutions the accused shall have the right to appear and defend in person, or by counsel."

affected.'" Id. at 885 (quoting State v. Shutzler, 82 Wash. 365, 367, 144 P. 284 (1914) (emphasis in Irby). This right does not turn "on what the defendant might do or gain by attending," but "rather on the chance that a defendant's 'substantial rights may be affected' at that stage of trial." Id. at 885 n.6.

Whether there has been a violation of the constitutional right to be present at trial is a question of law the Court reviews de novo. Irby, 170 Wn.2d at 880. There was a violation in Mr. Cobb's case when he was excluded from the proceeding in which the court called counsel to the bench and conducted peremptory challenges in writing, during which jurors 3 and 9 were struck from the jury. 8/14/14RP[voir dire] 50-52; Sub #32. Only counsel, and not Mr. Cobb, were called up to the bench. Id.

Jury selection is a "critical" stage of trial to which the right to be present attaches. Irby, 170 Wn.2d at 883-84. In Irby's case, the trial court required prospective jurors to complete a questionnaire and, based on the jurors' responses, the court and counsel used email to excuse seven members of the jury pool "for cause." Id. at 877-78. The Court held that (1) the email exchange between the court and counsel was a portion of the jury selection process that Irby had a constitutional

right to attend, and (2) the trial court violated his right to be present by excusing jurors for cause in his absence. Id. at 882. Under the court's decision in Irby, the bench conference between the trial court and counsel in this case was likewise a portion of the jury selection process that Mr. Cobb had a constitutional right to attend. The trial court violated his right to be present by excusing jurors based on peremptory challenges in his absence.

Other cases are in accord. See State v. Miller, 184 Wn. App. 637, 646-47, 338 P.3d 873 (2014), review denied, 182 Wn.2d 1024 (2015) (right to be present violated by court's excusal of juror in Miller's absence); People v. Williams, 858 N.Y.S.2d 147, 52 A.D.3d 94, 96-97 (2008) (exclusion of defendant from sidebar conference where jurors excused by agreement violated right to be present; court refused to speculate that defendant could overhear conversations).

In sum, Mr. Cobb's constitutional right to be present was violated by the jury selection procedure. Violation of the right to be present is presumed prejudicial and the State must prove it was harmless beyond a reasonable doubt. Irby, 170 Wn.2d at 885-86. In Irby, the error was not harmless where the State could not show that the jurors who were excused in Irby's absence had no chance to sit on the

jury. Id. Similarly, here, the State cannot prove the error was harmless beyond a reasonable doubt because it cannot show that the two jurors excused in Mr. Cobb's absence—jurors 3 and 9—had no chance to sit on the jury. Thus, the convictions must be reversed.

5. The judgment and sentence must be corrected to reflect that the jury did not find the crimes were "domestic violence" offenses

The State alleged that each of the charged crimes was a "domestic violence" offense. CP 10-12. Specifically, the State alleged Mr. Cobb committed the crimes "against a family or household member," and each crime was "a crime of domestic violence as defined under RCW 10.99.020."[9] CP 10-12.

The jury was instructed to find, on a special verdict form, whether Mr. Cobb and Ms. Bojang were "members of the same family or household prior to or at the time the crime was committed."[10] CP 167. The jury was unable to agree on an answer to this question and therefore left the verdict form blank. CP 167; 8/21/14RP 848. Nonetheless, the judgment and sentence states that Mr. Cobb was convicted of three "domestic violence" offenses, and that "Domestic

[9] RCW 10.99.020(5) defines a "domestic violence" offense as a crime "committed by one family or household member against another."

[10] "Family or household members" was defined in a separate jury instruction. CP 275.

violence as defined in RCW 10.99.020 was pled and proved for count(s) I, III, IV." CP 221-22.

The judgment and sentence is erroneous because it states that "domestic violence" was pled and proved but the jury failed to reach a verdict on the "domestic violence" question. Because "domestic violence" was *not* pled and proved, the judgment and sentence must be corrected to remove any reference to "domestic violence."

E. CONCLUSION

Mr. Cobb's constitutional right to jury unanimity was violated in regard to both the witness tampering conviction and the felony violation of a no-contact conviction in count one, requiring that those convictions be reversed. Both the constitutional right to an open trial, and Mr. Cobb's constitutional right to be present, were violated by the procedure used during jury selection, requiring that all of the convictions be reversed. In addition, an error in the judgment and sentence requires that it be corrected.

Respectfully submitted this 9th day of June, 2015.

/s Maureen M. Cyr

_____

MAUREEN M. CYR (WSBA 28724)
Washington Appellate Project - 91052
Attorneys for Appellant

APPENDIX A

27B

SUPERIOR COURT OF WASHINGTON FOR KING COUNTY

STATE OF WASHINGTON, Plaintiff, vs. EC EDWARD COBB, Defendant.	No. 14-1-03362-8 KNT TRANSCRIPT OF CALL 1

Call One – To (206) 478-6498, from BA# 2140115319898, on 4/29/2014 @ 15:36 hrs

OPERATOR: For English press one. For a collect call… Enter your pin number now. Please enter the area code and phone number you are calling now. Your total available talk time for this call is five minutes. Additional called party restrictions may apply. If you are an attorney you should not accept this call unless you are certain that your name is on the Do Not Record list if your name and number is not on the list this call will be recorded. Contact the jail immediately to have your name and number added to the attorney list. This call is from a correctional facility and is subject to monitoring and recording. After the beep press one to accept this policy or press two and hang up. To continue press one, to disconnect press two.

Daniel T. Satterberg, Prosecuting Attorney
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To continue press one to disconnect press two. You may hear silence during the acceptance of your call. Please continue to hold. Hello this is a free call from…

CALLER: Yessirree.

OPERATOR: …an inmate at King County Correctional Facility. If you are an attorney you should not accept this call unless you are certain that your name is on the Do Not Record list. If your name and number is not on the list this call will be recorded. Contact the jail immediately to have your name and number added to the attorney list. This call is from a correctional facility and is subject to monitoring and recording. After the beep press one to accept this policy or press two and hang up. To accept this free call press one. Thank you for using Securus. You may start the conversation now.

CALLER: Hello.

FEMALE: Hi.

CALLER: Hi.

FEMALE: Can you ask somebody else to help just a minute. I'll be, okay alright I'll be there. Hey.

CALLER: Oh so you know where I'm at.

FEMALE: Yeah.

CALLER: Alright so, so I got a head's up. The girl said that I had slapped or something.

FEMALE: That you what?

CALLER: You said, she told somebody I slapped her. So.

FEMALE: Mmm, well you didn't slap her did you?

CALLER: No, no I didn't. She still came over to the house and…

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FEMALE: Mmm.

CALLER: …she still came over (unintelligible) …I have to just prove my case I guess, because I wasn't where she was, came over to where I was. (Unintelligible)… You know what I'm saying?

FEMALE: Talk into the phone.

CALLER: Excuse me.

FEMALE: Now I can hear you. I couldn't hear you.

CALLER: Oh we, she came over to the house though, and that's how, that I guess, she wasn't trying to say that she wasn't doing that. She seen that, she didn't like that she wasn't going for it and that, and that just what it was, period.

FEMALE: Mmm.

CALLER: So anyway I, I don't know can you make sure I get some money on my books, fast. And then I'm gonna try to work on this case as soon as possible. Call my sister…

FEMALE: Uhmm (yes).

CALLER: …hey, just take my sister's number down, okay.

FEMALE: Uhmm.

CALLER: You ready?

FEMALE: Okay.

CALLER: 702…

FEMALE: …hmm…

CALLER: …702…

FEMALE: …uhmm…

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CALLER: ...823...

FEMALE: ...823...

CALLER: ...yeah 823-6633 and that's (unintelligible) okay...

FEMALE: ...66...

CALLER: ...33...

FEMALE: ...33?

CALLER: Yes. Yes ma'am.

FEMALE: Okay well I can't hear you, this phone's messing up.

CALLER: You hear me?

FEMALE: Yeah I hear you now.

CALLER: Alright, so call her up and then tell her that, she'll know what to do as far as such-and-such is concerned and everything okay, and to make sure that she takes care of, of her business.

FEMALE: Uhmm (yes).

CALLER: And because she's supposed to do, you know what I'm saying, you know how to talk to her, that's my sister and everything, okay.

FEMALE: Uhmm (yes).

CALLER: But that's what it was.

FEMALE: Uhmm (yes).

CALLER: You take the (unintelligible)...

FEMALE: Uhmm (yes).

CALLER: Have you?

FEMALE: No I haven't yet I'm at work I couldn't I will when I get home.

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CALLER: Okay. I can't wait to see you.

FEMALE: Really.

CALLER: A little bit.

FEMALE: Well stop lying then.

CALLER: Fuck, I ain't mad at you.

FEMALE: Well, what do you know, well I'm not mad at you either.

CALLER: No I'm not mad at you. You're kind a hard to work with but I ain't mad at you thought it's understandable (unintelligible)…

FEMALE: Uhmm (yes), yeah well maybe we just need to do what we said we were gonna do.

CALLER: Alright, well whatever I'll be outta here soon, okay.

FEMALE: Umm.

CALLER: It's good for the circumstances but we need, we need to you know do our things accordingly to ask (unintelligible)…

FEMALE: Hmm.

CALLER: Okay so call her up.

FEMALE: Okay.

CALLER: Call her up, send her a text, or whatever and let her know what's going on. And that "she was at the house," that "I wasn't nowhere, I didn't go nowhere" or whatever, "she came over"…

FEMALE: Uhmm (yes).

CALLER: …there and she needs to tell these people what she needs to tell 'em. Like she's been talking about saying (unintelligible)…anyway so, okay.

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FEMALE: Okay.

CALLER: Yeah.

FEMALE: Okay.

CALLER: Alright, when you coming down here?

FEMALE: Well as soon as I check on (unintelligible)…out see what's happening.

CALLER: And see if you can slap some money…

FEMALE: And I'll be there.

CALLER: …slap, I know you will, but slap some money on there real quick. That's why I'm sitting here eating (unintelligible)…

FEMALE: Uhmm (yes).

CALLER: …I'm gonna order something on commissary okay.

FEMALE: Alright, they didn't break my computer, did they?

OPERATOR: You have one minute left.

CALLER: Nuh-uh, they didn't even come in the house, babe.

FEMALE: Oh okay, I could hear the thing, I could hear the thing from here.

CALLER: I came outside, you know what I'm saying. "Are you all serious?" (Unintelligible)…

FEMALE: Gosh.

CALLER: I'm tired, so I'm just tired though and…

FEMALE: Well, I still love you.

CALLER: You better. What you mean, you still?

FEMALE: 'Cause I still do.

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CALLER: Yeah. Alright then well I'm glad that you gave me the last thoughts that you gave me and everything 'cause you looked kind a good when I seen ya this morning in bed and everything so. You know…

FEMALE: Uhmm (yes).

CALLER: Meanwhile…(unintelligible)…just stay sharp and….

FEMALE: Well I am.

CALLER: …see if, see if you can get my sister to take care of that business and everything. To get that girl to go ahead and drop that. But I'm not gonna have you call her straight through and everything because that's not your concern.

FEMALE: Alright.

CALLER: But my sister will talk to you though if she knows, okay.

FEMALE: Uhmm (yes).

CALLER: Alright well I hope you're having a good day.

FEMALE: No I'm not.

CALLER: So you better be you (unintelligible)…

FEMALE: I'm not I got a chance to…

OPERATOR: Thank you for using Securus. Goodbye.

End of Call

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APPENDIX B

SUPERIOR COURT OF WASHINGTON FOR KING COUNTY

STATE OF WASHINGTON, Plaintiff, vs. EC EDWARD COBB, Defendant.	No. 14-1-03362-8 KNT TRANSCRIPT OF CALL 5

Call Five – To (206) 478-6498, from BA#2140115319898, on 05/01/2014 @ 20:40 hrs.

...

CALLER: So far my, my sister and everything's involved and everything, and, you know I'm hearing that...

FEMALE: Uhmm (yes).

CALLER: ...I'm hearing that they already, you know, backed all the way up and everything, you feel me, so...

FEMALE: Oh yeah, uhmm.

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CALLER: …so know that it sounds good right now, so we have a few things to work on and everything to, to pass on and everything and we'll see, we'll see how it goes, okay?

FEMALE: Uhmm (yes). Virginia knows where it's at where (unintelligible)…give 'em to (Unintelligible) or find out where (Unintelligible) take the papers. So then, what? So I'll get those, (unintelligible) and then what?

CALLER: And I was, I'm very embarrassed of myself that I had let things get like that and it was just if I should a seen that I was, my next step was coming in here, okay? But it's not no big thing baby…

FEMALE: Uhmm (yes).

CALLER: …there's cats in here get, getting ready to just looking at real serious sentences and things like that, okay.

FEMALE: Uhmm (yes).

CALLER: This right here, this right here can be broken down if we do it now.

FEMALE: Uhmm (yes).

CALLER: I had a, I had some, I had a real quick brief about you know what was being done, and what, what to do and things like that, and everything, and it sounded…

FEMALE: Uhmm (yes).

CALLER: … cool, I'll leave it at that. As far as my sister, and things that we could relay, and everything then, you know, that's what we'll do.

…

End of Call

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APPENDIX C

34B

SUPERIOR COURT OF WASHINGTON FOR KING COUNTY

STATE OF WASHINGTON, Plaintiff, vs. EC EDWARD COBB, Defendant.	)	No. 14-1-03362-8 KNT
	)	TRANSCRIPT OF CALL 8

Call Eight – To (206) 852-4745, from BA#2140115319898, on 05/10/2014 @ 15:26 hrs

OPERATOR: For English press one. For a collect call press one. For, enter your pin number now. Please enter the area code and phone number you are calling now. You will be asked to verify your name now. Please say your full name after the beep.

CALLER: Mr. Yessirree.

OPERATOR: Thank you I recognize your voice. You have 52 cents. This call will cost 13 cents for the first minute and 13 cents for each additional minute plus any applicable telecom or sales taxes. Your total available talk time for this call is three minutes. Additional called party restrictions may apply. If you are an attorney you should not accept this call unless you are certain that your name is

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on the Do Not Record list if your name and number is not on the list your call will be recorded. Contact the jail immediately to have your name and number added to the attorney list. This call is from a correctional facility and is subject to monitoring and recording. After the beep press one to accept this policy or press two and hang up. To continue press one, to disconnect press two. You may hear silence during the acceptance of your call. Please continue to hold. Hello this is a free call from…

CALLER: Mr. Yessirree.

OPERATOR: …an inmate at King County Correctional Facility. If you are an attorney you should not accept this call unless you are certain that your name is on the Do Not Record list if your name and number is not on the list your call will be recorded. Contact the jail immediately to have your name and number added to the attorney list. This call is from a correctional facility and is subject to monitoring and recording. After the beep press one to accept this policy or press two and hang up. To accept this free call press one, to refuse, thank you four using Securus you may start the conversation now.

MALE: Hello.

CALLER: Hello.

MALE: What's up?

CALLER: (Unintelligible)…where you at?

MALE: Hello.

CALLER: Yeah where you at?

MALE: Shit, just got outta jail.

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CALLER: You said what?

MALE: I'm about to go downtown what's up with you?

CALLER: Oh shit man it's not looking too good man.

MALE: What happened?

CALLER: Shit man, I don't, you know? Oh shit man oh, you know, the broad came over to the house and stuff, man, trippin' and stuff, man. She acted like she was coming over there to, to talk, to talk with, with her girl and everything man, but then she seen me in the house and everything and started trippin,' man. You know what I'm saying? And people telling me, putting their hands on me and stuff like that and everything, man, but on some other, on, on some other things though. You remember that number right?

MALE: What number?

CALLER: The, the number man that, uh, for the brizz-ahd man.

MALE: Your, your broad's?

CALLER: Yeah, yeah, yeah, yeah.

MALE: It's probably in my phone somewhere.

CALLER: Yeah, do that man and, and say "What do Yessirree gotta do, man, to get a pick up?" okay?

MALE: A pick up?

CALLER: Because I'm, yeah to get a, "What do, what do Yessirree gotta do to get a pick up? Can you, you know can you pick…

MALE: Okay.

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CALLER: …yeah, can you pick him up," you know what I'm saying? Break it down however you gotta break it down your way, man, but you know say "Yessirree," you know what I'm saying?

MALE: So what are you in there for?

CALLER: Man, I'm in here for a no contact order violation.

MALE: Oh god, man, and she came to your spot?

CALLER: Yeah she did that.

MALE: And they still gave you the no contact order?

CALLER: Yeah they did that.

MALE: No, they can't do that because she came to your residence. You didn't call her over there, she (unintelligible), how does that sound…you feel me?

CALLER: Okay I know but she, she's lying and everything, man, so I got a couple witnesses and everything and, man, we're gonna put things right…

MALE: Well she, she, well and so old girl…

CALLER: I got a couple witnesses. Old girl wasn't even at the house, man, so the other one came over there acting like she was looking for her, man, but that's not even really what the case was. But you know what I'm saying, but anyway man to make a long story short and everything, go ahead and break that down everything man, real quick, man, and if…

OPERATOR: You have one minute left.

CALLER: …you can provide, if you can provide any…

MALE: As what?

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CALLER: Yeah just, just go ahead and do it like that and everything and then, then I'm gonna try to stand out of it as much as I can. You know, you know that you know the youngster man that, that Venom in here for?

MALE: Yeah.

CALLER: Yeah that's baby, that's baby Lay's nephew.

MALE: Yes it is.

CALLER: Yeah he's in here with me right now in this unit, and so is…

MALE: You downtown Seattle?

CALLER: No, no I'm up here, he's down there but I'm up here with, I'm up here with Caution, right here in Kent.

MALE: Oh, for real?

CALLER: Yeah.

MALE: (Unintelligible)….

CALLER: So do that for me as soon as you can, Loco, and I'm gonna try to stay in touch with you man as much as I can, okay.

MALE: Yeah man that's crazy you know.

CALLER: Yeah.

MALE: You should a' left that bitch alone, cuz, left that old retarded shit alone.

CALLER: Oh you know a long time ago. It's (unintelligible)…

MALE: Well at least you'll (unintelligible)…, too.

CALLER: That's my, no, no that's my word though, nigga, I never in my life, nigga make a mistake like that again. Nigga, that's my word (unintelligible)…everything I stand for, okay, but on this man…

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MALE: No look…

CALLER: Man, though, we gotta play our parts now though and try to, you know, do it right (unintelligible)…

MALE: The same shit, you do the same shit…

OPERATOR: Thank you for using Securus, goodbye.

End of Call

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

STATE OF WASHINGTON,	)	
	)	
Respondent,	)	
	)	NO. 72515-7-I
v.	)	
	)	
EC COBB,	)	
	)	
Appellant.	)	

DECLARATION OF DOCUMENT FILING AND SERVICE

I, MARIA ARRANZA RILEY, STATE THAT ON THE 9TH DAY OF JUNE, 2015, 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 [paoappellateunitmail@kingcounty.gov] APPELLATE UNIT KING COUNTY COURTHOUSE 516 THIRD AVENUE, W-554 SEATTLE, WA 98104	( ) ( ) (X)	U.S. MAIL HAND DELIVERY AGREED E-SERVICE VIA COA PORTAL
[X] EC COBB 777576 COYOTE RIDGE CORRECTIONS CENTER PO BOX 769 CONNELL, WA 99326	(X) ( ) ( )	U.S. MAIL HAND DELIVERY _____

SIGNED IN SEATTLE, WASHINGTON THIS 9TH DAY OF JUNE, 2015.

X_____

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