NO. 47057-8-II

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

STATE OF WASHINGTON,

Respondent,

v.

JARROD WIEBE,

Appellant.

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

The Honorable Scott Collier, Judge

BRIEF OF APPELLANT

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A. ASSIGNMENTS OF ERROR

1. The court violated appellant's Fifth Amendment privilege against self-incrimination by admitting his statements to police detectives, where police did not scrupulously honor appellant's invocation of his right to silence.

2. The court violated appellant's right to due process by assigning him a burden to prove he was not an accomplice as a defense to the charged offenses.

3. The trial court violated appellant's constitutional right to a public trial during jury selection.

Issues Pertaining to Assignments of Error

1. During custodial interrogation, police detectives asked appellant to tell his side of the story. Pretrial Ex 2, at 2. Appellant paused for 17 seconds and then said, "I, I have nothing to say." Id.; RP 41.[1] Despite this, police continued the interrogation, telling appellant it was a "fucked up situation" with long term consequences, warning him "this is the last chance" to tell his side of the story, and asking whether he was a "hardcore criminal that's out tying people up and doin[g] a bunch of bad stuff with guns" or

[1] The verbatim report of proceedings is referred to as "RP" and contained in three bound volumes, consecutively paginated.

"just a kid that made some bad decisions and can explain why and how?" Id.

Where appellant invoked his right to silence, and where the detectives failed to scrupulously honor that invocation, did the court's admission of appellant's statements violate his Fifth Amendment privilege to remain silent?

2. The state's theory was that appellant was guilty as an accomplice by acting as the lookout while others committed the charged crimes. In that vein, the jury was instructed that a person is an accomplice in the commission of a crime if, with knowledge that it will promote or facilitate the commission of the crime, he aids or agrees to aid another person in committing the crime. CP 46. However, the court also instructed the jury – over defense counsel's objection – that a person is not an accomplice if he terminates his complicity prior to the crime and either warns law enforcement or otherwise makes a good faith effort to prevent the commission of the crime. CP 48.

In so instructing the jury, did the court effectively force appellant to take on an affirmative defense and thereby assign to appellant a burden to prove he was not an accomplice, in violation of his right to due process?

3. Where the court took peremptory challenges based on a piece of paper silently passed back and forth between the parties, did the court violate appellant's constitutional right to a public trial?

B. STATEMENT OF THE CASE

1. Overview

Following a jury trial in Clark County Superior Court, appellant Jarrod Wiebe was convicted of the following counts: (1) first degree burglary; (2) first degree kidnapping; (3) first degree kidnapping; (4) first degree robbery; (5) second degree extortion; (6) first degree criminal impersonation; and (7)-(16) theft of a firearm (10 counts). RP 1040-1041. For counts (1)-(4), Wiebe was also convicted of two firearm enhancements, one for each gun two of his alleged accomplices carried. RP 1040-1041. Similarly, for count (5), Wiebe was convicted of one firearm enhancement for a gun one of his alleged accomplices carried. RP 1041.

The state's theory at trial was that Wiebe acted as an accomplice by standing outside and acting as a lookout, while three other men (Larry Kyle, Regan Davis and Ruben Vega) barged into the home of Casimiro Arellano and Manatalia Arevalos and committed the aforementioned crimes. RP 1082.

There was no allegation or evidence Wiebe was armed. RP 1077. Despite this, he was subject to 41.5 years of hard time by virtue of the enhancements. RP 1059-60, 1065. In light of the fact his accomplices pled out before Wiebe's trial and received much lighter sentences consisting of 14 years (Vega), 10 years (Kyle) and 4.5 years (Davis), the court imposed concurrent exceptional sentences below the standard range amounting to a base sentence of 4 years total.[2] CP 132; RP 1066, 1097. The court found the length of Wiebe's presumptive sentence and the disparity between it and those of his alleged accomplices "shocked the conscience." RP 1066-67, 1096.

Following sentencing, defense counsel filed a motion for reconsideration of the sentence on grounds the kidnapping charges should have merged with the robbery under State v. Korum, 120 Wn. App. 686, 86 P.3d 166 (2004) (merger applies where kidnap is merely incidental to robbery), reversed on other grounds, 157 Wn.2d 614, 141 P.3d 13 (2012), overruled by, State v. Berg, 181 Wn.2d 857, 337 P.3d 310 (2014) (whether kidnapping incidental to robbery irrelevant as to the sufficiency of the evidence regarding

[2] Under In re Mulholland, 161 Wn.2d 322, 166 P.3d 677 (2007), the court has discretion to run serious violent offenses concurrently, when proper mitigating factors apply.

the kidnap). CP 162-73. Despite the Supreme Court's then-recent decision in Berg, the prosecutor agreed Wiebe was entitled to the benefit of the law as it existed at the time of his offenses, which required merger of the kidnapping and robbery charges. CP 168-173; RP 1117-1118.

The court agreed and entered a Memorandum of Disposition indicating the kidnapping charges merged with the robbery and that Wiebe's new total sentence was 306 months, which included the 4-year base sentence plus the remaining 5 firearm enhancements (since the kidnapping counts merged, the firearm enhancements associated with them merged as well). CP 176; RP 1124-26.

2. Denial of Motion to Suppress Wiebe's Custodial Statements Made in Response to Continued Police Interrogation, Despite Wiebe's Statement He had Nothing to Say.

Wiebe moved to suppress statements he made during a police interview following his arrest on grounds police did not scrupulously honor his invocation of the right to silence.[3] CP 14-25. The relevant portion of the interview for purposes of the suppression motion is as follows:

[3] Detective Duncan Hoss acknowledged Wiebe was in handcuffs, was not free to leave and that the interview amounted to custodial interrogation. RP 30. The court agreed the interview was custodial interrogation. RP 58.

JS: Okay, this is Detective Jared Stevens with the Clark County Sheriff's Office. It is December 19th, 2013. It's 1742 hours. Currently at the Clark County Sheriff's Office West Precinct. With me in the room are or yeah Detective Sergeant Duncan Hoss and Jarrod, is it Wiebe?

JW: Wiebe.

JS: Wiebe. Wiebe, can you spell your last name for me?

JW: W-I-E-B as in boy, E again.

JS: And spell your first name for me.

JW: J-A-R-R-O-D.

JS: And what is your date of birth, Jarrod?

JW: 09/03/87

JS: Okay. And you have been advised of your rights, correct?

JW: Yes.

JS: And having those rights in mind you're still willing to talk to me, correct?

JW: Yes sir.

JS. Okay. Do you see the recorder in front a you here?

JW: Yes sir.

JS: Okay am I recording this with your permission?

JW: Yes sir.

JS: Okay. So stories have a beginning, a middle and an end. We learn that when we're all really young first learning how to read. Why don't you tell me the story about what, what happened today.

JW: I, I have nothing to say.

JS: You have nothing to say?

DH: All right. Here's, here's the deal Jarrod, we are going to complete a report. You got that right? From your Theft III's and stuff,[4] you know, we put down what happened. Well there's (inaudible) to be involved, right? We've talked to everybody else so we're gonna get their side of the story. All we're lookin for is your side of it. Now, you don't have to tell us, you know, you remember your rights, I can reread em if you want but I'm giving you the opportunity here cause this is the last chance you got to give your side of the story as to what happened, how you got here cause I got to be honest with you this is kind of a fucked up situation and it's got long term consequences. Now whether you want to be cooperative in it or not that's completely up to you. I don't care one way. If you decide that this interview is over tell me right now and I get to go home. But I'm willing to give you that chance and stick around if want it but this is the last chance. I'm not gonna coerce you into anything, I'm only gonna give you the opportunity but I want you to know that the charges that we're lookin at are significant and serious. So having that additional information in mind, we aint talking about your Theft III's now. It's completely up to you and I will give you fifteen seconds to decide whether you want to talk with us or not. That's fifteen seconds my friend. I can see you're worried about your future.

[4] Wiebe has a third degree theft conviction out of Issaquah Municipal court. RP 69.

> JS: Look man, none of us are new at this, it's not a whodunit. Now we're just trying to figure out why. Are you guys a bunch a hardcore criminals, are you a hardcore criminal that's out tying people up and doin a bunch a bad stuff with guns or are you just a kid that made some bad decisions and can explain why and how?

Ex 2 (pretrial), pages 1-2 (emphasis added).

At the suppression hearing, Hoss acknowledged there was a 17-second delay between the time Stevens asked Wiebe to tell the story of what happened and when Wiebe responded he had nothing to say. RP 41. When asked if "I have nothing to say" was the "functional equivalent" of "saying that I'm exercising my right to remain silent," Hoss answered "not necessarily." RP 41.

Stevens testified similarly. When asked what he took "I have nothing to say" to mean, he answered:

> I mean, at that point, oftentimes when you talk to suspects, they said they have nothing to say because they're ashamed; or they can't explain their actions or what happened. It's, you know, it's just a response to a question.

RP 47.

As for the rest of the interview, following the detectives' assertions it was a "fucked up situation" with "long term consequences" and question whether Wiebe was a "hardcore criminal[]" or just a "kid that made some bad decisions," Wiebe

stated he was just along for the ride and did not know what was planned. Ex 2, page 2. Wiebe explained that he, Kyle, Davis and Vega had driven to Clark County from Snohomish, but that he thought they were just taking a road trip. Ex 2, at page 4. He acknowledged that as they neared Clark County, however, someone said something about:

> someone who, who was in the wrong that needed to be like, like paid a visit to and consequences taken care and I, I was like, what, okay, and I don't know why I, just its so far away from home I didn't know what to do.

Ex 2, page 4.

Wiebe did not ask for clarification, but admitted "they said that I would just have to be a innocent bystander that just stands by and just overlooks[.]" Ex 2, page 4. Stevens followed up asking, "so you were gonna be the lookout," and Wiebe said yes. Ex 2, page 4.

When Stevens asked what happened when they reached Arellano's house, Wiebe responded:

> We proceeded to get out a the vehicle and Ruben knocked upon the door and that's when um, a person, you know, answered the door and he, and he spoke in Spanish. I didn't know what was being said, I was just standing there like I was told.
>
> . . .

> And he forces, you know, like he tried to, the person tried to close the door real quick and he forced his way into the house.

Ex 2, at 5. Wiebe said he stayed outside, while Kyle and Davis followed Vega inside. Ex 2, at 5. The door was closed, but Wiebe admitted he knocked on it when some people came by. Ex 2, at page 5. Sometime later, Kyle, Davis and Vega started bringing firearms out. Ex 2, at 5. Wiebe did not assist and did not know of anything else that may have been brought out, such as money or drugs. Ex 2, at 5.

Wiebe was dressed normally, but told the police Vega was wearing camouflage pants and a vest with the word "SWAT" on the front. Ex 2, at 6-7. Wiebe said Vega had a gun with a wooden handle tucked in the back of his pants. Ex 2, at 7. Kyle was wearing camouflage pants, a black coat and a hat. Ex 2, at 7. Wiebe was pretty sure he also had a gun. Ex 2, at 8. Davis was dressed in all-over camouflage. Ex 2, at 9. When asked if Davis had a gun, Wiebe responded, "I'm sure he did." Ex 2, at 9. But Wiebe said he did not see it. Ex 2, at 10. When asked, Wiebe said he thought Kyle, Davis and Vega must have put on their gear when they stopped at Walmart. Ex 2, at 8.

Kyle was driving as they left the residence, and Wiebe was sitting in the rear passenger seat. Ex 2, at 10. They were soon pulled over by the police. Ex 2, at 10.

In arguing the suppression motion, defense counsel pointed out there was dead silence for 17 seconds between the time Stevens asked Wiebe to tell his story and when Wiebe responded he had nothing to say. RP 52. As defense counsel argued, Weibe thought long and hard about his response. RP 52. Although Wiebe previously stated the detectives were recording with his permission, he clearly indicated he no longer wanted to talk. Wiebe's response he had nothing to say was the functional equivalent of Wiebe saying, I invoke my right to silence. Because the police did not scrupulously honor Wiebe's right to silence, his statements should be suppressed. RP 54-55

The court denied the motion to suppress, reasoning Wiebe's assertion, "I, I have nothing to say" was not an unambiguous invocation of his right to silence. CP 26-28. The court's Memorandum of Opinion states:

> The central deciding point is when the Defendant said "I, I have nothing to say." Did this end the interrogation and anything said afterwards should be suppressed in violation of his Miranda rights. I find that this was not an unambiguous and unequivocal

> invocation of his rights. He said he was willing to answer questions and did in fact start out answering some questions and then said he had nothing to say. Was that a response to the last question or an unambiguous and unequivocal invocation of his rights signaling the end of the interview? It's not clear to the court, so it stands to reason that it was not clear to the officers as well. Also, when the officers followed this up they reminded him of his rights and offered to read them again and informed the Defendant he didn't need to talk to them.

CP 27. Nonetheless, the court noted it was a "close call." RP 60, 64, 68.

3. <u>Instruction Relating to Accomplice Liability Given Over Defense Counsel's Objection</u>

At the state's request and over defense counsel's objection, the court gave the following instruction:

> A person is not an accomplice in a crime committed by another person if he or she terminates his or her complicity prior to the commission of the crime, and either gives timely warning to the law enforcement authorities or otherwise makes a good faith effort to prevent the commission of the crime.

CP 48 (Instruction 8); RP 931; RCW 9A.08.020(5)(b).

Defense counsel argued he was not raising this affirmative defense and did not want to be limited as to why the jury should doubt Wiebe acted as an accomplice:

> -- the reason I would object to that, Your Honor – I think that, first of all, I'm not raising that as a defense. I think that's kind of a – that's almost like an

> affirmative defense. I'm not raising that as a defense here, that, you know, he terminated his complicity and gave a timely warning or made an effort to prevent the commission of that crime. The danger that comes in, though, is that I don't want the jury to think that this is the only way that somebody could not be an accomplice here, in that, if that isn't shown, then nothing else makes any difference. I think it adds confusion to it. And so I would ask that that not be submitted to the jury.

RP 95.

4. Trial Testimony

Casimiro Arellano lives and works on a dairy farm in Ridgefield. RP 520. Around 2:20 p.m. on December 19, 2013, he and his wife Manatalia Arevalos were inside their trailer watching television when they heard a knock on the door. RP 523. Arevalos, who was sitting on the couch, told Casimiro it must be for him. RP 525, 626. Arellano testified that when he opened the door slightly to see who was there, "they" pushed it open and jumped on him. RP 526.

Arellano testified he saw 4 men, but the first one through the door was wearing a vest with a black .9mm gun in the front and a baseball style hat. RP 527, 529-30, 541. One of the men spoke Spanish and was possibly Mexican. RP 531. According to Arellano, these men were approximately age 40. RP 532. The

third was older with gray hair, wearing clothes typical of a soldier or hunter. RP 531-534. Arellano described the fourth man as younger, with a goatee or beard. RP 532. He did not remember what the younger man was wearing. RP 534. At trial, he identified Wiebe as the fourth man. RP 556.

The first man wanted to know where to find "Francisco." RP 527. Arellano testified he told the men his name was Casimiro, but the men grabbed him and tied his hands behind his back with "white plastics." RP 530. According to Arellano, they sat him on the couch and asked for money and drugs. RP 530. Arellano testified the Spanish-speaking man also said that immigration, police and dogs were coming. RP 530.

Arellano testified the men did not physically restrain his wife, but that she continued to sit on the couch next to him, after the men reportedly pushed Arellano onto the couch. RP 536.

Arellano testified the Spanish-speaking man was doing all the talking and demanded money and drugs; Arellano acknowledged he had been investigated for drugs in the past. RP 534.

Arellano told the men he did not have drugs, but he did have weapons. RP 534. Arellano testified that when the men continued

to hassle him, his wife stood up and offered to show them where the weapons were, if they left Arellano alone. RP 536-37. Arevalos went into the bedroom with the longer, gray-haired man and Spanish-speaking man to get the guns. RP 537-538. Meanwhile, the first man with the baseball cap stayed with Arellano. RP 537. Arellano testified the fourth man was outside at this time, but that he brought two other dairy farm workers inside.[5] RP 538, 575-76.

Reportedly, the long-haired man brought the guns out from the bedroom and put them by the front door. RP 539. According to Arellano, the younger man helped take the guns out to the car. RP 540.

Arellano claimed the Spanish speaking man also asked for $10,000.00 in exchange for not taking Arellano and his wife to jail. RP 540. At that point, Arevalos reportedly stood up and accused the men of not being police, because police don't ask for money. RP 541.

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[5] Raudel Sedano testified somebody called for him and his nephew Lucilo Sedano to go inside the house and may have opened the door. RP 666, 668. When Sedano and his nephew went inside, 3 men were inside and had Arellano tied up on the couch. RP 666. The fourth man remained outside. RP 666. Other than asking whether Sedano and his nephew knew Francisco, the men did not interact with Sedano and his nephew. RP 669-670. After the men left, Sedano and his nephew went back to work. RP 671. Lucilo Sedano testified similarly, except he said someone opened the door from inside, and the fourth man outside stayed outside the entire time. RP 676-683. Lucilo Sedano also testified the outside man was dressed normally. RP 685.

When Arellano said their money was in the bank, the Spanish-speaking man asked how much he had on him. RP 543. Arellano said about $400.00 and stood up to allow his wife to take it from his pocket and hand it to the Spanish-speaking man. RP 543. According to Arellano, everyone but the Spanish-speaking man left. RP 544.

Arellano testified the Spanish-speaking man lingered to say he was going to get a card with his number to call in case the government came. RP 544. But he got in the car and left with the others. RP 545.

Arellano testified the younger man never demanded money or drugs and did not have a weapon. RP 577. Arellano did not know whether he was in the house when the Spanish-speaking man patted down the other dairy farm workers. RP 576. The younger man did not take any money from Arellano. RP 577. Arellano did not know if he was in the house when the Spanish-speaking man demanded $10,000.00. RP 579.

Arevalos testified similarly to Arellano (RP 623-646). Before showing the older man and Spanish-speaking man the guns in the bedroom, she sat willingly next to Arellano on the couch. RP 634, 636. However, she testified that when the 3 men first came inside,

she was going to get up from the couch but the men told her not to. RP 656. Once Arevalos explained she was going to turn off the television, they said ok. RP 656.

Unlike Arellano, however, Arevalos testified the younger man stayed outside the whole time, except for when he reportedly brought in the two other dairy farmer workers and when he reportedly helped take the guns outside. RP 628, 632, 634, 640, 654.

Arevalos identified Wiebe as the one who stayed outside. RP 651. Wiebe did not enter with the other 3 men; he was not inside when the 3 men tied Arellano up and demanded drugs and guns; and he was not present when the Spanish-speaking man demanded $10,000.00 or took Arellano's money. RP 632, 654-655. However, Arevalos testified she did not see Wiebe try to stop what the others were doing. RP 656.

Around 2:20 p.m. on December 19, 2013, Ridgefield police officer Cathy Doriot was patrolling on South Hillhurst Road, near the dairy farm, when she saw a white Isuzu Trooper drive past with no rear license plate. RP 454, 462. Doriot initiated a traffic stop and the Trooper pulled into a nearby driveway. RP 455. Doriot noticed a man leave from the passenger seat. RP 456. As the

passenger left, the driver got out and approached Doriot's patrol car. RP 456.

The driver said he was there to pressure wash; Doriot saw a man pressure washing up by the house at the end of the driveway. RP 456. When Doriot asked about the plates, the driver said he borrowed the car and the plates were inside, which the driver retrieved. RP 457. Doriot asked for identification and the driver said his name was Larry Kyle and that he might have ID in the car. RP 457.

Around this time, Kirk Peterson – the man who had been pressure washing – approached Doriot's patrol car. RP 458. Doriot was acquainted with Peterson and asked if he knew Kyle. RP 459. When Peterson said no (RP 502), Doriot became uneasy and took Kyle into custody. RP 459. She instructed the car's other occupants to put their hands in the air and called for back-up. RP 459-60.

Peterson testified that immediately beforehand, while pressure washing, he saw a Hispanic man walking down the driveway; the Hispanic man said he was looking for Christmas trees. RP 496-97. The man eventually left after confirming Peterson did not have any Christmas trees. RP 499-500. Peterson

was able to tell police which way the Hispanic man headed. RP 502.

Lieutenant Roy Rhine arrived and assisted in taking the rear driver's side passenger into custody. RP 460. He had gray hair, was dressed in camouflage and identified as Regan Davis. RP 461, 702. While Rhine was taking Davis into custody, he saw a magazine for a pistol on the backseat. RP 462, 703.

Rhine also took the rear passenger-side passenger into custody. RP 460-61, 487, 705. In the process, Rhine saw at least two pistols and a black "raid-type" vest on the back bench between where the two rear passengers had been sitting. RP 704. Rhine also noticed several "zip ties" in the map pocket behind the front passenger seat. RP 711. Wiebe identified himself and told Rhine the man who left was Ruben Vega and likely armed. RP 705-06.

Around this time, police at the traffic stop heard about the incident at the dairy farm and began to surmise they had stopped the suspects unknowingly. RP 462, 709. With the help of a police dog, police located Vega nearby. RP 709, 725.

Detective Stevens obtained a search warrant for the Trooper. RP 763. Numerous firearms were removed from the Trooper, 10 of which Arellano identified as taken from his house.

RP 563-566, 780-797. Police also recovered a .10mm Smith and Wesson pistol in a black tactical vest on the backseat, a .45 Colt pistol under the front passenger seat, and a .45 Springfield pistol under the left rear seat. RP 566-567, 792, 798-99. Police also recovered tactical gear, including a black jacket with "police" written on the back, a load-bearing vest with the word "swat" on it, and a load-bearing vest with a cross-draw holster in front and a blue baseball hat with "CIA" written on it. RP 801-809, 870. Inside a backpack, they found a pistol case for a Colt pistol and identification belonging to Vega. RP 812, 814.

Detective Stevens testified he took a cell phone from Wiebe at the time of arrest. RP 866, 873. Stevens obtained a search warrant for a data dump of the cell phone. RP 875. Stevens testified there were incoming and outgoing calls on December 19, 2013, but no calls to 911 or the police. RP 876.

C. ARGUMENT

1. THE COURT'S ADMISSION OF APPELLANT'S STATEMENTS TO POLICE VIOLATED HIS FIFTH AMENDMENT PRIVILEGE AGAINST SELF-INCRIMINATION.

Contrary to the trial court's conclusion, Wiebe's assertion, "I, I have nothing to say," was an unequivocal invocation of his right to

silence. It was uttered 17 seconds after Detective Stevens asked Wiebe to tell his side of the story. Pretrial Ex 2, at 2. Moreover, following Wiebe's assertion he had nothing to say, Stevens asked, "You have nothing to say?" Id. The transcript indicates Wiebe remained silent at this point, further indicating his intent not to talk. Pretrial Ex 2, at 2.

Despite this, Hoss began to paint a picture for Wiebe as to what a "fucked up situation" it was with "long term consequences" and pressured Wiebe by stating he had only 15 seconds to decide whether he wanted to talk. Id. This was an attempt to wear Wiebe down, not a scrupulous honoring of his right to silence. Regardless of the detective's subjective interpretation of Wiebe's statement "I have nothing to say," any *reasonable* officer would have interpreted Wiebe's statement as an unequivocal assertion of the right to remain silent. United States v. Bushyhead, Sr., 270 F.3d 905 (9th Cir. 2001) ("I have nothing to say" was invocation of right to silence"). The court erred in concluding otherwise.

Whether Wiebe invoked his right to remain silent is a mixed question of law and fact that is ultimately subject to de novo review. In re Pers. Restraint of Cross, 180 Wash.2d 664, 680–81, 327 P.3d 660 (2014). This Court reviews the trial court's findings of fact for

substantial evidence and its legal conclusions from those findings de novo. State v. Broadaway, 133 Wash.2d 118, 131, 942 P.2d 363 (1997).

The Fifth Amendment to the United States Constitution provides that "[n]o person ... shall be compelled in any criminal case to be a witness against himself." To counteract the inherent compulsion of custodial interrogation, police must administer Miranda warnings. Miranda v. Arizona, 384 U.S. 436, 479, 86 S.Ct. 1602, 16 L.Ed.2d 694 (1966). Miranda requires that the defendant "be warned prior to any questioning that he has the right to remain silent, that anything he says can be used against him in a court of law, that he has the right to the presence of an attorney, and that if he cannot afford an attorney one will be appointed for him prior to any questioning if he so desires." Id. Once a suspect invokes his right to remain silent, police may not continue the interrogation or make repeated efforts to wear down the suspect. Id. at 473–74, 86 S. Ct. 1602; State v. Piatnitsky, 180 Wash.2d 407, 412, 325 P.3d 167 (2014), cert. denied, __ U.S. __, 135 S.Ct. 950, 190 L.Ed.2d 843 (2015).

Miranda sets a low bar for invocation of the right: "If the individual indicates in any manner, at any time prior to or during

questioning, that he wishes to remain silent, the interrogation must cease." Miranda, 384 U.S. at 473–74, 86 S.Ct. 1602 (emphasis added). However, suspects must "unambiguously" express their desire to be silent. Piatnitsky, 180 Wash.2d at 413, 325 P.3d 167; see also State v. Hodges, 118 Wash.App. 668, 673, 77 P.3d 375 (2003) (invocation of the right to remain silent must be "clear and unequivocal").

The test as to whether a suspect's invocation of his right to remain silent was unequivocal is an objective one, asking whether "'a reasonable police officer in the circumstances would understand the statement'" to be an invocation of Miranda rights. Piatnitsky, 180 Wash.2d at 413, 325 P.3d 167 (quoting Davis v. United States, 512 U.S. 452, 459, 114 S.Ct., 2350, 129 L.Ed.2d 362 (1994)). In Piatnitsky, our Supreme Court recently stated the test as follows, "[t]o be unequivocal, an invocation of Miranda requires the expression of an objective intent to cease communication with interrogating officers." Id. at 412, 325 P.3d 167 (footnote omitted). Once a suspect has clearly invoked the right to remain silent, police questioning must immediately cease. Cross, 180 Wash.2d at 674; see Michigan v. Mosley, 423 U.S. 96, 104, 96 S.Ct. 321, 46 L.Ed.2d 313 (1975) (invocation of right to remain silent must be

"'scrupulously honored'" by police and has the effect of "'cut[ting] off questioning'") (quoting Miranda, 384 U.S. at 479, 474, 86 S.Ct. 1602).

The analysis is context-specific. The court does not examine the statement or conduct in isolation; rather, the statement is considered in the context of the circumstances leading up to the alleged invocation. Cross, 180 Wash.2d at 682–83. While "an accused's post request responses to further interrogation may not be used to cast retrospective doubt on the clarity of the initial request itself," the defendant's invocation "may be characterized as ambiguous or equivocal as a result of events preceding the request or of nuances inherent in the request itself." Smith v. Illinois, 469 U.S. 91, 99–100, 105 S.Ct. 490, 83 L.Ed.2d 488 (1984). This determination requires a case-by-case analysis. Medina v. Singletary, 59 F.3d 1095, 1101 (11th Cir.1995) (quoting Christopher v. Florida, 824 F.2d 836, 840 (11th Cir.1987)).

"I have nothing to say" is an unequivocal invocation of the right to silence. United States v. Bushyhead, 270 F.3d 905 (9th Cir. 2001). After his arrest, Bushyhead was taken to the hospital where he was restrained by handcuffs and leg restraints. FBI Special Agent Olsen testified that he approached Bushyhead in the

hospital. According to Olsen, Bushyhead's shoes appeared unstained but his socks were saturated with blood. As he approached, agent Olsen held a printed Miranda warning statement in his hand. Olsen was permitted to testify at trial that Bushyhead said, "I have nothing to say, I'm going to get the death penalty anyway." The district court instructed the jury that the statement was to be used only "for the limited purpose of tending to show the defendant was conscious of having committed a homicide." The district court permitted reference to this statement both in the prosecutor's opening and closing arguments. Bushyhead, 270 F.3d at 908.

On appeal, Bushyhead argued admission of his statement "I have nothing to say, I'm going to get the death penalty anyway" violated his Fifth Amendment privilege against self incrimination. Bushyhead, 270 F.3d at 911. The Ninth Circuit agreed:

> Bushyhead's statement was not an unsolicited confession but the invocation of silence itself. In the post-Miranda context, the Court has unequivocally held that a person's statement invoking his right to silence is part of the "silence" that must be protected. "With respect to Post-Miranda warnings 'silence,' we point out that silence does not mean only muteness; it includes the statement of a desire to remain silent, as well as of a desire to remain silent until an attorney has been consulted." Wainwright v. Greenfield, 474

> U.S. 284, 294 n. 13, 106 S.Ct. 634, 88 L.Ed.2d 623 (1985).
>
> . . . The entirety of Bushyhead's statement was an invocation of his right to silence and is therefore protected by the Fifth Amendment privilege against self-incrimination. The district court thus erred in admitting the testimony of agent Olsen about Bushyhead's statement and in allowing the prosecutor to comment on this statement.

Bushyhead, 270 F.3d at 912-913.

Just as Bushyhead's statement "I have nothing to say, I'm going to get the death penalty anyway" constituted an unambiguous invocation of his right to silence, Wiebe's statement "I, I have nothing to say" constituted an unambiguous invocation of his right to silence. Because the detectives did not scrupulously honor Wiebe's invocation by immediately ceasing questioning, Wiebe's Fifth Amendment privilege against self-incrimination was violated. The court erred in admitting Wiebe's statements.

In response, the state may argue that because Wiebe initially answered several questions and concurred the officers were recording with his permission, that his subsequent assertion he had nothing to say was somehow ambiguous. Any such argument should be rejected, however.

First, the questions Wiebe answered were innocuous and routine, having to do with his name, its pronunciation and his date

of birth. Although he concurred the detectives were recording with his permission, they had not asked any substantive questions at that point. Significantly, as soon as any question of substance was asked, Wiebe paused silently for a period of time and then stated, "I, I have nothing to say." This was in response to the first question either detective asked that could potentially elicit an incriminating response. These circumstances are not indicative of an ambiguous invocation such as was the case in State v. Piatnitsky, for instance.

Following Piatnitsky's arrest for shooting two people at a party, detectives Keller and Allen interviewed Piatnitsky about the shooting. Piatnitsky, 180 Wn.2d at 409. After about an hour of questioning during which Piatnitsky indicated he was willing to give a taped confession, the detectives turned on the tape recorder. The relevant portion of the taped interview went as follows:

> DET: Okay, and earlier you were advised of your Miranda rights. Do you remember that, your Constitutional rights by the officer, do you remember that?
>
> SUS: Yeah; I have a right ...
>
> DET: Did you understand those?
>
> SUS: I have a right to remain silent.
>
> DET: Right. I'm gonna go ahead and ...

> SUS: That's the, that's the only one I remember.
>
> DET: Okay. I'm gonna read 'em for you again.
>
> SUS: That's the one I, I should be doing right now.
>
> DET: Well, you know, like we told you, you don't have to talk to us. Okay. You've already admitted to this thing. We want to go on tape, and because it's an important part of this, and we talked about that, and that's the part when you go back to get the shotgun. Before we do any of that, I want to read you ...
>
> SUS: What are you guys talking about, man?
>
> DET: I want to read you your rights, okay. Do you understand that you have the right to remain silent?
>
> DET2: You gotta answer out loud, SAM.
>
> SUS: I'm not ready to do this, man.
>
> DET2: You just told us that you wanted to get it in your own words on tape. You asked us to turn the tape on; remember?
>
> SUS: I just write it down, man. I can't do this. I, I, I just write, man. I don't, I don't want ...
>
> DET: Okay.
>
> SUS: I don't want to talk right now, man.

Piatnitsky, 180 Wn.2d at 409-10 (citation to record omitted).

The detectives Mirandize Piatnitsky again, and he signed a waiver form. During the recording, the detectives clarified their understanding of the situation:

DET2: Are you sure you don't want to do it on tape like you said you did; you want to get in your own words?

SUS: Yes, sir.

DET2: Okay.

DET: So you'd rather take a written statement, do a written one.

SUS: Yes. I don't know (unintelligible)[.]

DET: Okay, it's too hard to talk about; you'd rather write it.

Piatnitsky, at 410 (citation to the record omitted).

Both detectives testified that the unintelligible portion of the recording was Piatnitsky stating once again that he did not want to make an audio recorded confession. The detectives complied with that request and stopped recording. Instead, one of the detectives wrote down Piatnitsky's version of the events, which Piatnitsky edited. At some point, Piatnitsky did not like where the questioning was going and he told detectives he was finished and cut off the interview. The detectives stopped asking questions and finished the statement. Piatnitsky then reviewed everything, requested some changes, and signed the corrected statement. Piatnitsky, at 410-411.

On appeal, Piatnitsky argued his statement was admitted in violation of his Fifth Amendment privilege. Piatnitsky, at 411. Significantly, the court noted the statement "I don't want to talk right now, man" could be an unequivocal invocation of the right to silence. Piatnitsky, at 411. Based on the circumstances, however, it was not in Piatnitsky's case:

> Looking at the context, the detectives interrogating Piatnitsky could reasonably conclude that he never actually invoked his right to silence. In response to a question about whether he understood his Miranda rights, Piatnitsky said, "I have a right to remain silent.... That's the, That's the only one I remember.... That's the one I, I should be doing right now." Pretrial Ex 3, at 2. Piatnitsky himself admits that he should have been exercising his right to silence, which, when properly understood, means that he was not actually doing so. Immediately after this interaction, one of the detectives explained that he wanted to get a recording of Piatnitsky's confession but that he first wanted to go through Miranda once again. To this, Piatnitsky responded, "I'm not ready to do this, man." Id. The detective asked for a clarification because earlier Piatnitsky had indicated willingness to confess on audio recording. Piatnitsky obliged, saying, "I just write it down, man. I can't do this. I, I, I just write, man. I don't, I don't want ... I don't want to talk right now, man." Id. The detective agreed and told Piatnitsky, "Okay, but let's go over the rights on tape, and then you can write it down, okay." Id. Piatnitsky confirmed the detective's understanding of the statement by saying, "All right, man." Id. Thus, when Piatnitsky said, "I don't want to talk right now, man," his invocation of Miranda was equivocal at best. Id. The detective reasonably concluded that

> Piatnitsky was expressing a preference for the means of communication.

Piatnitsky, at 414 (footnote omitted).

Piatnitsky's statement "I don't want to talk right now, man" is somewhat similar to Wiebe's statement, "I, I have nothing to say," although Wiebe asserts his own statement is even more unequivocal because there is no time limitation to it, such as I don't want to talk "right now." Regardless, if "I don't want to talk right now" can constitute an unequivocal invocation, so too, can "I, I have nothing to say."

But whereas the court found Piatnitsky's statement ambiguous due to its context, this Court should find no ambiguity here. First, Wiebe did not speak substantively about the accusations for any period of time beforehand, let alone for an hour before the invocation. Rather, the invocation was made in response to the first question that could potentially elicit an incriminating response. Second, Wiebe never agreed to make a taped confession. Third, he never said he *should* exercise his right to silence, indicating he was not doing so. On the contrary, he said he had nothing to say. As the court in Bushyhead found, this is an invocation of the right to silence itself. Fourth, there was no

indication Wiebe was willing to make a statement via some other means of communication. Under the specific circumstances of this case, this Court should find "I have nothing to say" means just that. See State v. I.B., __ Wn. App. __, __ P.3d __, 2015 WL 1944974 (shaking head in the negative after being asked if he was willing to talk constituted unequivocal assertion of his right to silence).

The violation of Wiebe's constitutional right to remain silent requires reversal. This Court presumes that constitutional error caused prejudice and reverses and remands for a new trial unless the state proves it was harmless beyond a reasonable doubt. State v. Coristine, 177 Wn.2d 370, 380, 300 P.3d 400 (2013). The state cannot carry that burden here.

During deliberations, the jury asked to hear again Wiebe's tape-recorded interview. CP 37; RP 1082. As defense counsel asserted at sentencing, the jury convicted Wiebe based on his admission "to being the lookout:

> But the jury certainly found that because – and I might add, this is important: he was found that because he was admitted to being the lookout; that's why the jury found him guilty. And I say that, Your Honor, because I believe in the paper I read the comment by one of the jurors sitting on the panel that was interviewed. And they were quoted as saying well, You know, he said he was the lookout, and so

> he didn't do anything else about it and so, therefore, we found him guilty.

RP 1082.

The court agreed the statement "sank him:"

> I don't think he fully got the implications — where he said in the interrogation "I was just looking out" and, you know, that – right there, I think sank him to such a large extent on the accomplice theory.

RP 1069. The circumstances show the jury relied on Wiebe's statement to convict. Accordingly, the state cannot show harmlessness and this Court should reverse Wiebe's convictions and remand for a new trial.

2. THE COURT VIOLATED WIEBE'S DUE PROCESS RIGHTS BY ASSIGNING TO HIM A BURDEN TO PROVE HE WAS NOT AN ACCOMPLICE AS A DEFENSE TO THE CHARGES.

In keeping with the state's theory, the court instructed the jury a person is an accomplice in the commission of a crime if, with knowledge that it will promote or facilitate the commission of the crime, he aids or agrees to aid in the commission of the crime. CP 46. Over defense counsel's objection, the court also instructed the jury a person is not an accomplice in a crime committed by another person if he terminates his complicity before the commission of the

crime and either gives timely warning to police or otherwise makes a good faith effort to prevent the commission of the crime. CP 48.

As defense counsel noted, the second instruction likely caused jurors to think Wiebe had to terminate complicity and either contact law enforcement or make a good faith effort to prevent the commission of the crimes in order to not be an accomplice. However, it was the state's burden to prove accomplice liability, not Wiebe's burden to prove the absence of it. As a result, the instruction improperly shifted the burden of proof and violated Wiebe's due process right to require the state to prove all the elements of the charged offenses.

Significantly, the jury may not have otherwise found Wiebe to be an accomplice to some, or all, of the charged offenses, based on lack of knowledge. For instance, the jury may have believed he had knowledge he was aiding a burglary, but not the other offenses, such as robbery or extortion, which occurred while he was undeniably outside the residence. Because Wiebe did not so something to prevent these crimes as required by the instruction, however, the jury may have felt obligated to convict.

The due process clause of the Fourteenth Amendment guarantees "No state shall ... deprive any person of life, liberty, or

property, without due process of law." U.S. CONST. amend. XIV, § 1. The United States Supreme Court has interpreted the due process guaranty as requiring the state to prove "beyond a reasonable doubt ... every fact necessary to constitute the crime with which [a defendant] is charged. In re Winship, 397 U.S. 358, 364, 90 S. Ct. 1068, 25 L. Ed. 2d 368 (1970). A corollary rule is that the state cannot require the defendant to disprove any fact that constitutes the crime charged. State v. W.R., Jr., 181 Wn.2d 757, 336 P.3d 1134 (2014).

Due process does not require the state to disprove every possible fact that would mitigate or excuse the defendant's culpability. Smith v. United States, __ U.S. __, 133 S. Ct. 714, 184 L. Ed. 2d 570 (2013). The legislature does not violate a defendant's due process rights when it allocates to the defendant the burden of proving an affirmative defense when the defense merely "'excuse[s] conduct that would otherwise be punishable.'" Smith, 133 S. Ct. at 719 (quoting Dixon v. United States, 548 U.S. 1, 6, 126 S. Ct. 2437, 165 L. Ed. 2d 299 (2006)). But when a defense necessarily negates an element of an offense, it is not a true affirmative defense, and the legislature may not allocate to the defendant the burden of proving the defense. State v. Fry, 168

Wn.2d 1, 7, 228 P.3d 1 (2010); Mullaney v. Wilbur, 421 U.S. 684, 699, 704, 95 S. Ct. 1881, 44 L. Ed. 2d 508 (1975). In such a case, the legislature can only require the defendant to present sufficient evidence to create a reasonable doubt as to his or her guilt. State v. Riker, 123 Wn.2d 351, 367-68, 869 P.2d 43 (1994).

The Court's decision in W.R., Jr. is instructive. Following a bench trial, the court found W.R. guilty of second degree rape for reportedly forcing J.F. to have sex with him. W.R. admitted he had sex with J.F., but defended it as consensual. The court explained the state had proved rape in the second degree beyond a reasonable doubt and that W.R. had failed to prove the defense of consent by a preponderance of the evidence. W.R., Jr., 181 Wn.2d at 761.

On appeal, W.R. argued the court violated his due process rights when it allocated to him the burden of proving consent, which he maintained negated the element of forcible compulsion. W.R., Jr., at 762. As a general rule, the Court held that when a defense necessarily negates an element of the crime, it violates due process to place the burden of proof on the defendant. "The key to whether a defense necessarily negates an element is whether the

completed crime and the defense can coexist." W.R., Jr., 181 Wn.2d at 765.

Applying the "negates" analysis, the court held the crime of rape by forcible compulsion cannot coexist with the defense of consent, because there is no resistance to overcome when there is consent:

> The statute defines "forcible compulsion" as "physical force which *overcomes resistance*, or a threat ... *that places a person in fear of death or physical injury* to herself or himself or another person, or in fear that she or he or another person will be kidnapped." RCW 9A.44.010(6) (emphasis added). As defined, forcible compulsion contemplates force that overcomes actual resistance or threats that place a person in actual fear. There can be no forcible compulsion when the victim consents, as there is no resistance to overcome. Nor is there actual fear of death, physical injury, or kidnapping when the victim consents.

W.R., Jr., 181 Wn.2d at 765. As a result, the court held a defendant cannot be burdened with proving consent by a preponderance of the evidence, as the burden must remain on the state to prove forcible compulsion beyond a reasonable doubt. W.R., Jr., at 766.

Similarly here, accomplice liability and the "not an accomplice" defense cannot coexist. As indicated above, accomplice liability hinges on whether the person – with knowledge

he is promoting or facilitating the crime – agrees to aid or aids in its commission. But if a person terminates complicity and summons law enforcement or attempts to prevent the commission of the crime, he clearly is not acting with knowledge he is promoting or facilitating a crime. Nor is he aiding or agreeing to aid. In fact, he is doing the exact opposite. In other words, the "not an accomplice" defense codified in RCW 9A.08.020(5)(b) negates the mens rea and actus reus of accomplice liability. As such, Wiebe could not be burdened with proving the defense to the jury.

But as defense counsel argued, the instruction – although it did not explicitly state Wiebe had a burden of proof – likely caused jurors to believe Wiebe was an accomplice unless he showed he was not, by virtue of having done the enumerated acts required by the defense.

Indeed, the prosecutor made this argument in closing:

> Now, Instruction 8 defines for you or tells you when a person is not an accomplice to a crime: If he or she terminates his or her complicity prior – before the commission of a crime, okay, and either gives timely warning to law enforcement or somehow makes a good-faith effort to prevent the commission of the crime. Did this happen in this – in the case? Is there any evidence of that happening in this case?
>
> Okay. Remember Detective Stevens testified yesterday. I asked him, Did the defendant have a cell phone? Yes. Did you take it from him? Yes. Did

> you search it? Yes. Did you look for when phone calls were made or text messages and things like that surrounding this time period? Yes. Any phone calls, text messages, whatnot to 911 or police? No.
>
> So if the defendant didn't do any of that – and there's no evidence that he did any of that to either prevent the crimes from happening or give law enforcement notice or head up that, Hey, something is about to go down. Okay. I've got a bad feeling about this. I'm calling to let you know. I don't want to be any part of this. That's what it – that's what it means to not be an accomplice. That clearly did not happen in this case.

RP 1000.

Placing the burden on Wiebe to prove he terminated complicity and attempted to contact law enforcement or prevent the commission of the crime improperly shifted the burden of proof to disprove accomplice liability and violated Wiebe's right to due process. Under the circumstances, the state cannot prove the error was harmless beyond a reasonable doubt. See State v. Guloy, 104 Wn.2d 412, 425, 705 P.2d 1182 (1985). This Court should reverse Wiebe's convictions.

3. THE PROCEDURES USED AT JURY SELECTION VIOLATED WIEBE'S CONSTITUTIONAL RIGHT TO A PUBLIC TRIAL.[6]

(i) Relevant Facts

Before voir dire, the court explained to the parties that peremptory challenges would be made by passing a clipboard back and forth:

> [After for cause challenges], I've been just doing – sliding right into doing peremptories on the record where we can verbally do it without them being here.
>
> What I've gotten little bit of feedback – well, sometimes especially when you have large panels, people are trying to remember; okay, Juror No. 38, you know, was she – which one – how – you know, if you'd like, I'm open to doing this: Bringing them back in after we do the for-cause challenges, having them seated here, but then we're going to be back, passing the clipboard around.

RP 104. Both parties acquiesced to the court's chosen procedure. RP 104-105; see also RP 401 (prosecutor asking court whether we are "doing the clipboard passing").

After the parties exercised for-cause challenges, the entire panel was brought back into court for the parties to visualize while they exercised peremptory challenges. RP 401-402. Although

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[6] The Washington Supreme Court is considering this issue in State v. Love, 176 Wn. App. 911, 309 P.3d 1209 (2013), review granted, 181 Wn.2d 1029, 340 P.3d 228 (2015). The decision in Love will likely dictate, or at least guide, a decision on this issue.

three jurors in the box had been stricken for cause, the court did not have anyone move into the box. RP 398-401. The parties made note of the jurors' new positions on the jury panel sheet. CP 175.

While the parties passed the clipboard back and forth, the court explained to the jury:

> Okay. All right. We're on that final home stretch. We're done with all of the questions. We are now just doing the final process. Please bear with us, we're going to have pass some paperwork and clipboard around, and we'll announce who our jury panel will be.

RP 402.

The court then explained it was "going to shift people around, and then we're going to excuse you." RP 403. The court then had 7 jurors step down from the box and moved new jurors into their seats. RP 403. It also moved in two new alternates and excused the remainder of the panel. RP 403-404.

At no time did the court identify in open court which jurors had been stricken with peremptory challenges or by which party. RP 403-404. Rather, those jurors were simply dismissed from the courtroom, as a group, with all other potential jurors not selected for service. RP 403-404.

(ii) Law

Under both the Washington and United States Constitutions, a defendant has a constitutional right to a speedy and public trial. Const. art. 1, § 22; U.S. Const. amend. VI. Additionally, article I, section 10 expressly guarantees to the public and press the right to open court proceedings. State v. Easterling, 157 Wn.2d 167, 174, 137 P.3d 825 (2006). The First Amendment implicitly protects the same right. Waller v. Georgia, 467 U.S. 39, 46, 104 S. Ct. 2210, 81 L. Ed. 2d 31 (1984).

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. State v. Wise, 176 Wn.2d 1, 5, 288 P.3d 1113 (2012). The open and public judicial process helps assure fair trials, deters perjury and other misconduct by participants, and tempers biases and undue partiality. Wise, 176 Wn.2d at 6. 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 right to a public trial encompasses jury selection. Presley v. Georgia, 558 U.S. 209, 723-24, 130 S. Ct. 721, 175 L.

Ed. 2d 675 (2010); Wise, 176 Wn.2d at 11. Before a trial judge can close any part of voir dire, it must analyze the five factors identified in State v. Bone-Club, 128 Wn.2d 254, 906 P.2d 325 (1995). Orange, 152 Wn.2d at 806-07, 809; see also State v. Brightman, 155 Wn.2d 506, 515-16, 122 P.3d 150 (2005) (a trial court violates a defendant's right to a public trial if the court orders the courtroom closed during jury selection but fails to engage in the Bone-Club analysis).

Under the Bone-Club test, (1) the proponent of closure must show a compelling interest for closure and, when closure is based on a right other than an 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 258-260; Wise, 176 Wn.2d at 12.

A violation of the public trial right is structural error, presumed prejudicial, and not subject to harmless error analysis. Wise, 176 Wn.2d at 13-15; State v. Strode, 167 Wn.2d 222, 231, 217 P.3d 310 (2009); Easterling, 157 Wn.2d at 181; Orange, 152 Wn.2d at 814. Moreover, the error can be raised for the first time on appeal. Wise, 176 Wn.2d at 13 n.6; Strode, 167 Wn.2d at 229; Orange, 152 Wn.2d at 801-02; Brightman, 155 Wn.2d at 517-518.

At Wiebe's trial, the court conducted peremptory challenges in the privacy of silently passing a sheet of paper back and forth without ever considering or even articulating the Bone-Club factors. While members of the public could subsequently look at the jury panel sheet to determine which party challenged which prospective juror, the mere opportunity to find out, sometime after the process, which side eliminated which jurors was not sufficient. The challenged jurors were never identified in open court. Thus, even if members of the public scrutinized the minutes, there was no way to associate a juror's name with a particular individual. It was therefore impossible, for example, to determine whether any particular racial group has been purposefully excluded. See Batson v. Kentucky, 476 U.S. 79, 88-89, 106 S. Ct. 1712, 90 L. Ed. 2d 69 (1986) (prohibiting such exclusions); State v. Burch, 65 Wn. App.

828, 833-834, 830 P.2d 357 (1992); see also State v. Saintcalle, 178 Wn.2d 34, 309 P.3d 326 (2013) (lead opinion, concurrence, and dissent underscore harm resulting from improper race-based exercises of peremptory challenges and difficulty of prevention), cert. denied, 134 S. Ct. 831, 187 L. Ed. 2d 691 (2013).

Because the trial court failed to consider the Bone-Club factors before conducting peremptory challenges in a private manner, it violated Wiebe's right to public trial. Reversal is the only proper course.

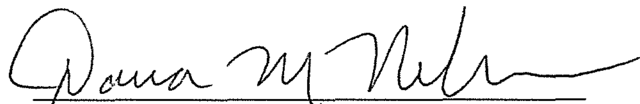
D. CONCLUSION

The court's admission of Wiebe's statements violated his Fifth Amendment privilege against self-incrimination. The court also violated Wiebe's due process rights by instructing the jury on an affirmative defense that negated the state's burden to prove accomplice liability. Finally, the manner in which the court took peremptory challenges violated Wiebe's right to a public trial. For all these reasons, this Court should reverse his convictions and remand for a new trial.

Dated this 24th day of June, 2015

Respectfully submitted

NIELSEN, BROMAN & KOCH



DANA M. NELSON, WSBA 28239
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Attorneys for Appellant

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

STATE OF WASHINGTON	)	
	)	
Respondent,	)	
	)	
v.	)	COA NO. 47057-8-II
	)	
JARROD WIEBE,	)	
	)	
Appellant.	)	

DECLARATION OF SERVICE

I, PATRICK MAYOVSKY, DECLARE UNDER PENALTY OF PERJURY UNDER THE LAWS OF THE STATE OF WASHINGTON THAT THE FOLLOWING IS TRUE AND CORRECT:

THAT ON THE 24TH DAY OF JUNE 2015, I CAUSED A TRUE AND CORRECT COPY OF THE **BRIEF OF APPELLANT** TO BE SERVED ON THE PARTY / PARTIES DESIGNATED BELOW BY DEPOSITING SAID DOCUMENT IN THE UNITED STATES MAIL.

[X] JARROD WIEBE
DOC NO. 379320
COYOTE RIDGE CORRECTIONS CENTER
P.O. BOX 769
CONNELL, WA 99326

SIGNED IN SEATTLE WASHINGTON, THIS 24TH DAY OF JUNE 2015.

X Patrick Mayovsky

NIELSEN, BROMAN & KOCH, PLLC

June 24, 2015 - 2:45 PM

Transmittal Letter

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Court of Appeals Case Number: 47057-8

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