

No. 62459-8-I

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

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STATE OF WASHINGTON,

Respondent,

v.

TONY SMITH,

Appellant.

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

The Honorable George Mattson

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REPLY BRIEF OF APPELLANT

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COURT OF APPEALS  
STATE OF WASHINGTON

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A. ARGUMENT

1. THE COURT'S DISMISSAL OF JUROR 8  
VIOLATED MR. SMITH'S RIGHT TO FAIR,  
IMPARTIAL AND UNANIMOUS JURY

Mr. Smith contended in the Brief of Appellant the trial court violated his right to right to a fair, impartial, and unanimous jury when it questioned Juror 8 individually instead of first, as suggested by the defense at trial, asking Juror 8 in the presence of the other jurors, if the jury continued to deliberate whether there was a reasonable possibility of reaching a verdict as required by the framework outlined in *State v. Elmore*, 155 Wn.2d 758, 123 P.3d 72 (2009). In its response brief, the State contends Mr. Smith is incorrect in claiming the requirements of *Elmore* are mandatory, contends Mr. Smith failed to show Juror 8 was a holdout juror, and submits the actions of the trial court were proper.

Although the factors in *Elmore* are certainly not requirements, *Elmore* was careful to stress that:

Where a juror asks to be dismissed, the court must be equally careful that the request does not stem from the juror's wish to avoid the unenviable position of holdout juror, even though the juror has doubts as to the sufficiency of the evidence.

*Elmore*, 155 Wn.2d at 772 n.5. Thus, *Elmore* strongly suggests its factors be closely followed when addressing the delicate situation as present here where Juror 8 was asking to be dismissed.

Contrary to the State's contention, Mr. Smith noted in the opening brief that Juror 8's note strongly suggested the conclusion that she was a hold-out juror whose motivation for seeking dismissal was a disagreement over the sufficiency of the evidence. This conclusion was based on the fact the jury deliberated with Juror 8 for two days without reaching a verdict, yet when Juror 8 was replaced by the alternate juror, the jury required only hours to return a guilty verdict.

Further, *Elmore* does not require a showing that Juror 8 was in fact a hold-out juror, rather, the *Elmore* factors, such as first reinstructing the jury, apply whenever a court is faced with the prospect of a juror who refuses to deliberate or refuses to follow the court's instructions as was the case here. Instead, of jumping to an inquiry of the juror without the other jurors present, the trial court here should have taken a more measured response as noted by *Elmore*; reinstruct the jury panel as a whole, or ask the foreman if the jury could there was a reasonable possibility of the jury reaching a verdict. The trial court's failure to take the measured

response as noted by the *Elmore* court resulted in a violation of Mr. Smith's right to a fair, impartial, and unanimous jury.

2. THE COURT CLEARLY AND  
UNEQUIVOCALLY CLOSED THE  
COURTROOM VIOLATING THE PUBLIC'S  
RIGHT TO AN OPEN COURTROOM

a. Mr. Smith did not invite the error. The State contends Mr. Smith not only assented to the closing of the courtroom, he invited it. Respondent's brief at 45. The State is simply wrong.

A lengthy colloquy occurred between the court, the prosecutor and Mr. Smith's attorney during the regarding defense expert Kay Sweeney's notes and whether they had been provided to the State. 5/12/08RP 117-33. The court grew increasingly frustrated with its inquiry until it ordered the courtroom cleared so it could question Mr. Sweeney *in camera*. 5/12/09RP 132-33. At no time prior to the court's courtroom closure order did the court make any mention of an *in camera* proceeding or did Mr. Smith's attorney request one. Contrary to the State's argument, the page of the record cited to by the State does not contain a request by defense counsel for an *in camera* hearing or for a courtroom closure. 5/12/09RP 126. In fact, the issue is not discussed at all.

The State is simply wrong; Mr. Smith never requested an *in camera* hearing and never requested a courtroom closure. Mr. Smith did not invite the error. Further, the lack of an objection did not waive the right to a public trial or the public's right to an open courtroom. *State v. Strode*, 167 Wn.2d 222, 230, 217 P.3d 310 (2009).

b. The court ordered the courtroom closed to the public. Mr. Smith submitted that the trial court closed the courtroom and ordered everyone out of the courtroom except for defense counsel and the defense expert witness, Kay Sweeney, when the court conducted its "*in camera*" review of Mr. Sweeney's billing statements. Specifically, Mr. Smith noted the court's clear statements:

Here is what I want to do. *I want to clear this courtroom and make this an incamera courtroom* and I want him to read his notes, so I can make sure I understand what he is saying. It is not the most legible. *That means the defendant has to go, everybody else has to go.* If it is as I think, I don't think there is anything to redact, but I just want to make sure I am not missing the point because I don't understand the name of the certain person he's talking to because he is kind of illegible.

5/12/08RP 133 (emphasis added).

From this clear unequivocal statement, the State concludes Mr. Smith has “misread the trial record,” and the court never ordered the courtroom closed. Respondent’s brief at 33-42. The State contends that this was merely an *in camera* proceeding which traditionally are closed. Respondent’s brief at 43-44. The State cites this Court’s decision in *State v. White*, 152, 173, 215 P.3d 251 (2009).

The *White* decision does hold that *in camera* proceedings held in open courtroom do not violate the defendant’s right to a public trial. *Id.* at 182. But the *White* decision does not address the public’s right to an open courtroom, a right different from the defendant’s right to a public trial but coextensive with the defendant’s right. Closing the courtroom excludes the public without any record of why the courtroom was required to be closed or without allowing the public an opportunity to object.

Further, the State contends that everybody but Mr. Smith’s attorney, Mr. Smith, and Mr. Sweeney were excluded from the courtroom. Respondent’s brief at 42. Although the State is correct that Mr. Sweeney was present, Mr. Smith and his attorney were specifically excluded from the courtroom.

Judge: So the defendant has got to go, just like everybody else, if it is an *in camera* proceeding, right?

Connick: Right. We're leaving.

5/12/08RP 134. See also 5/12/08RP 133, *supra*.

As stated recently by Division Two of this Court in *State v. Paumier*, the federal constitution “resolves any question about what a trial court must do before excluding *the public* from trial proceedings, including *voir dire*.” 155 Wn.App. 673, 230 P.3d 212, 219 (2010) (emphasis added), *citing Presley v. Georgia*, \_\_\_ U.S. \_\_\_, 130 S.Ct. 721, \_\_\_ L.Ed.3d \_\_\_ (2010).

By shutting out the public without first considering alternatives to closure and making appropriate findings explaining why closure was necessary, the trial court violated Paumier’s and the public’s right to an open proceeding.

*Id.*

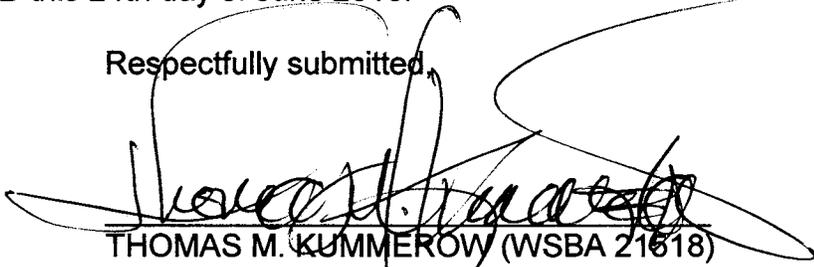
Here, there was a ready alternative to closing the courtroom, thus excluding the public: the court could have retired to chambers and conducted the *in camera* hearing there. But the court chose to close the courtroom, thus violating the public’s right to an open courtroom.

B. CONCLUSION

For the reasons stated, Mr. Smith submits this Court must reverse his convictions and remand for a new trial.

DATED this 24th day of June 2010.

Respectfully submitted,



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	)	
Appellant.	)	

**DECLARATION OF DOCUMENT FILING AND SERVICE**

I, MARIA ARRANZA RILEY, STATE THAT ON THE 24<sup>TH</sup> DAY OF JUNE, 2010, I CAUSED THE ORIGINAL **REPLY 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:

<input checked="" type="checkbox"/> RANDI AUSTELL, DPA KING COUNTY PROSECUTOR'S OFFICE APPELLATE UNIT 516 THIRD AVENUE, W-554 SEATTLE, WA 98104	(X) ( ) ( )	U.S. MAIL HAND DELIVERY _____
<input checked="" type="checkbox"/> TONY SMITH 814207 CLALLAM BAY CORRECTIONS CENTER 1830 EAGLE CREST WAY CLALLAM BAY, WA 98326	(X) ( ) ( )	U.S. MAIL HAND DELIVERY _____

**SIGNED** IN SEATTLE, WASHINGTON THIS 24<sup>TH</sup> DAY OF JUNE, 2010.

X \_\_\_\_\_ 

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