

NO. 39077-9

**COURT OF APPEALS, DIVISION II
STATE OF WASHINGTON**

STATE OF WASHINGTON, RESPONDENT

v.

TYREEK SMITH and DARRELL JACKSON
APPELLANTS

FILED
COURT OF APPEALS
JAN 17 PM 5:39
STATE OF WASHINGTON
BY *gjb*
CLERK

Appeal from the Superior Court of Pierce County
The Honorable Bryan Chushcoff, Judge

No. 08-1-00298-7 and 08-1-00299-5

BRIEF OF RESPONDENT

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

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B. STATEMENT OF THE CASE.

1. Procedure

The State charged defendants, Tyreek Smith and Darrell Jackson, on January 16, 2008, with two counts each of aggravated murder in the first degree and one count each of robbery in the first degree and burglary in the first degree. SCP 1-3, JCP 117-119.¹

On June 18, 2008, the case was pre-assigned to the Honorable Judge Bryan Chushcoff. 6/18/08RP 6.² A third co-defendant, Pierre Spencer, was also present and all three trials were pre-assigned together. 6/18/08 RP 3.

A CrR 3.5 motion was held on November 17, 2008. 11/17/08 RP 4. A separate CrR 3.5 hearing was held for each defendant. 11/17/08 RP 5. The court found the statements of all three defendant's admissible. 11/17/08 RP 98, 151, 11/18/08 RP 16, JCP 129-132, 158-161, SCP 22-25.

Defendant Spencer eventually entered into a plea agreement with the State. 12/3/08 RP 4. Smith filed a severance motion and Jackson followed with a severance motion of his own. 12/3/08 RP 6.

¹ The State will refer to the clerk's papers for defendant Jackson as JCP and the clerk's papers for defendant Smith as SCP.

² The State will refer to the verbatim report of proceedings as follows: for the proceedings that are sequentially paginated, the State will refer to them as: 6/18/08 RP, 11/17/08 RP, 11/18/08 RP, 12/3/08 RP, 12/30/08 RP, 1/15/09 RP, 1/28/09 RP and 3/27/09 RP; for the 16 volumes that are sequentially paginated, the State will refer to those as RP.

On December 3, 2008, the State filed amended informations for both Smith and Jackson. JCP 124-128, SCP 17-21. The amended informations added two counts of Felony Murder for each defendant, and added a firearm enhancement to all of the charges. 12/3/08 RP 23.

On December 30, 2008, the court heard argument on the motion to sever. 12/30/08 RP 2, 4-27. The court made a preliminary determination that separate trials were disfavored and further work was to be done on the redaction of the statements at issue. 12/30/08 RP 27-32. On January 15, 2009, further argument was held on the redactions. 1/15/09 RP 4. While both defendants still wanted severance, both admitted that the redactions were much more acceptable. 1/15/09 RP 6-7, 9.

Trial commenced on February 2, 2009. RP 4. Smith's attorney renewed his motion to sever. RP 6. The dispute came down to one statement made by Ms. Sabin-Lee. RP 497-98.

The parties agreed to the questionnaires which included language that the questionnaires would be sealed. SCP 295-307. The State asked the court if the questionnaires would be sealed. RP 69. The court then went through the court's normal procedures of sealing the jury questionnaires so as to protect the juror's privacy. RP 69-70. Jackson's attorney was asked if he was satisfied with the procedure and he indicated that he was. RP 70. The parties signed an agreed stipulation sealing the jury questionnaires. CP 295-96.

Defendant Spencer did testify at trial. RP 1350-1600. His plea agreement and statement of defendant on plea of guilty were both admitted without objection from either defendant. RP1352, 1358.

On February 23, 2010, the State again moved to amend the charges based on the evidence that has been adduced at trial. RP 1814-15, JCP 201-5, SCP 71-5. The court accepted the amended information. RP 1818.

At the conclusion of the State's case, Smith's attorney renewed his motion to sever the cases and renewed his motion for mistrial on behalf of Smith. RP 1819-20. The court ruled that the redactions that had been made complied with *Bruton* and that the jury had been properly instructed as to the statements from Smith and Jackson. RP 1824.

On February 26, 2009, the jury found both defendants guilty as charged of all six counts. RP 2016-18, JCP 249-254, SCP 76-81. The jury returned a yes verdict on all the special verdict forms as related to the aggravating factors and the weapons enhancements. RP 2018-2027, JCP 255-264, SCP 82-88.

Sentencing was held on March 27, 2009. 3/27/09 RP 4. The court found that the counts 3 and 4 for each defendant merged with counts 1 and 2. 3/27/09 RP 12. The court followed the State's recommendation and sentenced each defendant to life in prison without the possibility of parole on counts 1 and 2, and to the high end of the standard range on counts 5 and 6. 3/27/09 RP 22-25, 29, JCP 269-271, SCP 98-110.

Defendants both filed these timely appeals. JCP 282-292, SCP 111.

2. Facts

Ruben Doria was 23. RP 593. He had a health problem that allowed him to have a medical marijuana license. RP 593, 753, 840. The license was hung on the wall of his apartment. RP 661-62. Mr. Doria had been injured in the military when a jet wing clipped him and he was in chronic pain and disabled because of it. RP 592-3. Mr. Doria lived with his friend Abraham Warren Abrazado. RP 593, 598, 678, 751. Mr. Abrazado had a kidney problem and was on dialysis. RP 597.

On September 23, 2007, around 9pm, officers were called to the apartment that Mr. Doria and Mr. Abrazado shared. RP 599-600, 615, 637-8. About 10 people were standing outside the building crying. RP 639. The first officers responding found the door to the apartment slightly ajar. RP 606, 617, 643. A trail of dirt led up the stairs to the apartment. RP 618, 640. After officers announced themselves and entered the apartment, they found a friend of the victim's in the apartment who was very upset. RP 607. They next discovered two deceased males in the apartment. RP 600. The deceased were identified as Mr. Doria and Mr. Abrazado. RP 609.

Mr. Doria kept a tidy apartment. RP 683, 809. His friends came by to smoke marijuana with him. RP 679. He had his grow operation for marijuana spread out over different rooms. RP 683-85, 716, 809, 842,

871. There were different stages of plants in each room. RP 684. People came to Mr. Doria's to purchase marijuana from him. RP 717, 841,867. He only sold it to people he trusted. RP 868. Mr. Doria always has some marijuana out and he talked about it a lot. RP 810, 841. Mr. Doria carried cash and baggies of marijuana with him in a small Nike bag and usually didn't try to conceal it. RP 719, 736, 845. He also had a case safe that he kept money, marijuana and pills in. RP 844, 845. It was a known fact that Mr. Doria had money coming in. RP 755, 810. Many of his friends were concerned for his safety. RP 870.

Mr. Doria did not like people showing up unannounced and even his friends called first before coming over. RP 680. Mr. Doria usually answered his phone. RP 716-17.

On September 21, 2007, Erik Soderquist was at Mr. Doria's hanging out and smoking weed. RP 687. Their friends, Dave Alston and Roger Roten, were also there. RP 688, 811. At 1am, defendant Darrell Jackson called Mr. Doria and then came over. RP 691. Jackson got a \$40 bag of marijuana from Mr. Doria and then left. RP 691. Jackson stayed in the door area of the apartment. RP 691. He was only there about ten minutes. RP 722-23, 813. Mr. Doria fronted the marijuana to Jackson. RP 692.

Jackson was reported as being a person who often picked up marijuana from Mr. Doria. RP 693, 824. There was testimony that Jackson owed Mr. Doria money. RP 694, 824. Mr. Soderquist has gone

with Mr. Doria to Jackson's apartment about month or two prior to the murders. RP 694. Defendant Tyreek Smith had been at Jackson's apartment and sold Mr. Doria some Swisher Sweets which they used to smoke marijuana. RP 694, 698, 699-701.

Smith was reported to live with Jackson. RP 747, 1122. They lived at the Sage Terrace Apartments. RP 1121, 1615, 1658, 1684-85. Smith sold Swisher Sweets out of the apartment. RP 1122. Jackson was known as "D." RP 750, 1120, 1370, 1613. Smith and Pierre Spencer were in the army together. RP 1287.

On September 22, 2007, Mr. Roten tried calling Mr. Doria at about 1:30pm but there was no answer. RP 725-26. He tried calling several more times. RP 726. When Mr. Doria hadn't called back, he stopped by his apartment at around 2:30 but Mr. Doria's car wasn't there. RP 726. When Mr. Doria still hadn't called the next day, he went to his apartment again and his car was still not there. RP 728.

Alex Robinson was also a friend of Mr. Doria's and tried to MySpace him on September 22nd. RP 758. It was unusual for him not to hear from Mr. Doria. RP 759.

Mr. Alston tried to call Mr. Doria multiple times on September 23rd. RP 815. Lisa Brown also tried to call on Mr. Doria on September 22nd but he never called back. RP 858.

Patrick Baska, another friend of Mr. Doria, stopped by his apartment on September 22nd in the afternoon. RP 875. He heard music on inside the apartment. RP 875. He knocked on the door and heard a commotion inside. RP 876. It sounded like people were shushing each other. RP 876. He called Mr. Doria's cell and heard it ring inside. RP 877. As he was driving away, he saw Mr. Abrazado return to the complex in Mr. Doria's vehicle. RP 880.

Nicholas Vaughey managed the complex where Mr. Doria lived. RP 915. On September 22, 2007, he dropped off an envelope for Mr. Doria at about 2:00pm. RP 916-17. Despite the fact that Mr. Doria knew he was coming, there was no answer when he knocked. RP 918. He heard loud music inside. RP 918. The envelope did not have blood on it when he put it down in front of the door. RP 923.

On September 23, 2007, around 6pm, Mr. Roten went and picked up Mr. Alston and Mr. Robinson and took them to Mr. Doria's. RP 729. They could hear music coming from the apartment. RP 761. Mr. Alston hoisted Mr. Robinson up to the balcony. RP 730, 817. Mr. Robinson came running down the steps, very upset. RP 730. He said to call 911 because Mr. Doria and Mr. Abrazado were tied up. RP 817, 828. Mr. Alston called the police. RP 832. When they went upstairs they saw that

the apartment had been tossed. RP 731, 820. The computer and the Xbox 360 were missing. RP 732, 762. Marijuana plants were also missing. RP 732, 740, 762. Mr. Alston turned the stereo down. RP 763, 819.

Mr. Doria and Mr. Abrazado were in the living room. RP 731. Mr. Abrazado was face up with his throat cut while Mr. Doria was tied up; face down in a pool of blood. RP 762, 818. The TV was static "snow". RP 762. All of Mr. Doria's medication was on the coffee table where it didn't belong. RP 820. Some marijuana plants were also in the living room out of place. RP 821.

Officers found a yellow envelope was propped against the front door with the name "Ruben" written across the front and blood on the outside. RP 619-20, 640. Loud music was playing in the apartment. RP 624, 643, 650. The TV was on but with "snow" only. RP 627, 644. White plastic garbage bags were strewn across the kitchen. RP 625. One of the victim's was lying between the couch and the coffee table and had wounds to the upper chest area. RP 628. His throat had been cut as well. RP 628. The other victim was lying face down and had duct tape around his feet and neck with his arms underneath his body. RP 628, 632. There was a pool of blood. RP 633.

Blood was also found on the floor, in the sink and in the bathroom. RP 644-46, 957, 1131. The potting soil on the landing looked like the same soil as the grow-op. RP 959.

There was evidence of an obvious grow-op of marijuana in the apartment. RP 626, 646. A crib notebook was found. RP 659. Some packaged marijuana was also found. RP 666. There was spilled dirt in the rooms that contained the marijuana plants which looked like plants were missing from the room. RP 664.

A computer was missing from the apartment. RP 648. Mr. Doria's car was missing from the parking lot. RP 610, 822. Mr. Doria drove a red Isuzu Trooper. RP 720. He always parked it in the same spot. RP 752, 827.

The vehicle was found in the Emerald Queen Casino parking lot on September 24, 2007. RP 899, 901. The driver's window was down and the keys were inside. RP 902. Potting soil was found in the car that looked like the potting soil on the landing. RP 1145.

Mr. Robinson was with Jackson the day after the discovery of the bodies. RP 780. Jackson did not look shocked upon hearing of the murders. RP 781. He just looked down and didn't say anything. RP 781. He didn't ask for any details and didn't say that he already had already heard about it. RP 802.

In September 2007, Smith asked Jackson's sister if he could store some marijuana in her apartment because business was soon going to be booming. RP 1123.

Smith asked Jackson's grandmother's boyfriend, Bobby Simmons, to use his van to move some plants around summer time of 2007. RP 1205, 1208, 1210. Mr. Simmons also observed some marijuana plants in Jackson's apartment. RP 1211.

Smith told his girlfriend, Natausha Sabin-Lee that he "hit a lick." RP 1281, 1306. This was in September of 2007. RP 1278. Smith said he had a whole lot of marijuana plants but that he got it from the University of Washington. RP 1282. Ms. Sabin-Lee asked Smith if the plants had to do with murders of the victims and he said no, the plants came from the University of Washington. RP 1289.

The University of Washington does not grow marijuana and does not prescribe it either. RP 1300-01.

Smith moved to Georgia soon after September 22, 2007. RP 1304-5. He flew to Georgia on September 28, 2007, after his uncle bought him a ticket. RP 1693.

A safe, like the one Mr. Doria had, was found in an empty apartment at the Sage Terrace Apartments sometime after mid-November 2007. RP 908, 910, 911. The safe was locked open about two inches and had Swisher Sweet wrappers inside. RP 912. The tobacco that had been in the Swisher Sweets was also in the safe. RP 912. Jackson had moved out of the Sage Terrace in December 2007. RP 1660.

Spencer testified that he was in the army with Smith. RP 1362. He sold his .357 to Smith. RP 1363. Spencer was taking care of a sick friend, Ramsey Larbi, and had latex gloves in his car. RP 1365-66. Spencer said he gave Larbi's phone to Smith. RP 1367. Smith called him and asked him to "do a lick." RP 1367. A "lick" is a robbery. RP 1367, 1516, 1695, 1783. Spencer went to Jackson's house to get more details. RP 1367. When he got there, Jackson's cousin was also there. RP 1369. They planned to rob a guy who sold marijuana and had a grow-op in his apartment. RP 1372. The plan was to get a bunch of plants and \$7,000-\$8,000. RP 1373. They went to 7-11 to get Larbi's phone activated. RP 1375. They took the .357, got in Spencer's car, a Blazer, and drove to Mr. Doria's. RP 1367, 1375, 1376, 1381. Jackson called Mr. Doria first. RP 1380. They arrived between midnight and 1:00pm. RP 1381. There were too many people at the apartment so they decided to try again the next night. RP 1384.

Spencer went with Smith the next morning to pick up another gun. RP 1388. Smith came back with a SKS rifle. RP 1415. Smith said it was just in case there were more people in the house. RP 1416. Jackson had the .357. RP 1418. Smith also had a knife. RP 1419. Jackson called the

victim to tell him they were coming. RP 1422. When they arrived, Mr. Doria's roommate was driving Mr. Doria's car out of the parking lot. RP 1422-23. Once inside the apartment they put on gloves. RP 1425-26.

Mr. Doria was alone and let them in. RP 1426. Jackson pulled the .357 and Mr. Doria ran to the balcony. RP 1428, 1439. They rushed him and sat him down on the couch. RP 1428, 1530. Jackson told Spencer to tie Mr. Doria's hands with duct tape and later told him to tie his legs and mouth too. RP 1440, 1442. Smith turned up the volume on the stereo. RP 1440. Smith pointed the SKS at Mr. Doria. RP 1442. Spencer and Smith went and got marijuana plants, brought them to the front door and put them in black garbage bags. RP 1443, 1445, 1447, 1449. Jackson had said that Mr. Doria had done him wrong in a deal. RP 1446. Jackson told Spencer to look for the safe. RP 1446-47. Smith started hitting Mr. Doria with the .357 on the head causing him to bleed. RP 1449, 1537. Smith said they had to get rid of him since he knew where Jackson lived and could ID him. RP 1450. At that point, someone knocked on the door. RP 1451. They made Mr. Doria jump to the door to see who it was. RP 1451, 1538. Mr. Doria was then made to hop back as his phone started to ring. RP 1451-52.

Spencer went and got more plants and when he came out Mr. Doria was on his side and Smith was stabbing him. RP 1455. Jackson

then stabbed him. RP 1457. Mr. Doria was making gurgling noises. RP 1458. Spencer stabbed him next. RP 1458. Smith checked to see if he was still alive and then stabbed him in the throat. RP 1459-60. The knife and the back of the .357 were then cleaned. RP 1461-62.

They then heard keys in the door. RP 1464. Mr. Abrazado came in and said, "Oh my God, please don't kill me." RP 1464. Jackson and Smith grabbed him and kicked the door shut. RP 1465, 1540. Mr. Abrazado was forced into a kneeling position and Jackson slit his throat. RP 1465, 1541, 1542, 1576.

They then took the plants to Mr. Doria's car. RP 1466-67. The plants were unloaded at Jackson's apartment. They also took the X-box, computer and safe. RP 1472. Spencer and Jackson dumped the victim's car at the Emerald Queen Casino. RP 1474-75. They realized they forgot the bag with the gloves and drove back to Mr. Doria's. RP 1478. Smith came out with the bag of gloves and a bag of marijuana. RP 1479. Spencer received two plants and the laptop for his role. RP 1481. He also got the SKS. RP 1483. Spencer said he didn't know either victim and was only included because he has a car. RP 1484, 1485, 1526. Spencer claimed he didn't know it would turn violent. RP 1517, 1518. 1526.

Smith told police that he had been rolling around in a Blazer on September 1, 2007, when they talked about doing a lick. RP 1695, 1713. The plan was to go the apartment to buy marijuana but then bust in and rob them all. RP 1696. They said someone might have to get hit with a gun to make it look believable. RP 1696. Smith claimed he wanted out at that point. RP 1696. Smith said he left and when he came back there were 4-5 marijuana plants in white plastic bags in his apartment. RP 1697. Smith said no one was supposed to die. RP 1706. They did the lick because they needed rent money. RP 1712. They came back the first day because there were too many people in the apartment. RP 1714.

Jackson told police that he bought marijuana from Mr. Doria. RP 1760, 1782. He said he heard from Mr. Robinson that Mr. Doria and his roommate had been robbed and found dead in their apartment. RP 1760. Jackson claimed he had never been in Mr. Doria's apartment. RP 1761. Jackson then said they went there to do a lick. RP 1762. Jackson said he wasn't part of the planning process but was supposed to be their way in. RP 1762. Jackson then admitted the planning meeting had been at his apartment. RP 1784. The day before the murder they went to get a bag of marijuana and Jackson was supposed to tell them if too many people were in the apartment. RP 1785. Jackson just bought the marijuana and left on that day. RP 1786-87. Jackson then said he didn't go to Mr. Doria's on

the day of the murders but then admitted he had been there. RP 1763-64. The plan was to rob Mr. Doria. RP 1788. Mr. Doria said he would meet him in the parking lot. RP 1791. He called Mr. Doria and when Mr. Doria opened the door, the others pushed him back into the apartment. RP 1764. Jackson then said they rushed him up the stairs with guns. RP 1793. The weapons were a .357 and a SKS rifle. RP 1765. Jackson said he was just the grunt and did what he was told. RP 1765. He left the apartment and came back and when he came back, Mr. Doria was tied with duct tape. RP 1767, 1794. Jackson said someone was hitting Mr. Doria on the back of the head and saying, "I am God." RP 1796. Jackson claimed someone else stabbed Mr. Doria and slit his throat. RP 1767, 1797. Mr. Doria was screaming through the duct tape. RP 1797. Jackson said someone else hit Mr. Abrazado with a gun and then killed him. RP 1767, 1768, 1769, 1801, 1802, 1803. Mr. Abrazado kept saying, "Please stop." RP 1769. Jackson claimed he never touched either victim. RP 1770. Jackson said he left and took the bus home. RP 1767. The reason for the lick was that one of them was having money troubles. RP 1773. Jackson claimed he did not have a weapon. RP 1811.

Phone records for the day prior to the murders and the day of the murders showed many calls between Larbi's phone to Ms. Sabin-Lee and DEMO where Sabin-Lee worked. RP 1648, 1651, 1663, 1664. There

were also several calls to and from Spencer. RP 1648, 1651, 1655-56. There was also a call from Jackson to the phone. RP 1649. In addition, there were calls to Smith's family in Georgia made on the Larbi phone. RP 1650, 1657. Ms. Sabin-Lee did not socialize with Jackson or Spencer and did not send them texts. RP 1290. The phone records also showed the Larbi phone calling Mr. Doria and the phone calls between Mr. Doria and Mr. Abrazado. RP 1651, 1652, 1654. It also showed people trying to call Mr. Doria on the day he died. 1652, 1654, 1655. Smith claimed the calls to Sabin-Lee and DEMO must have been them looking for him. RP 1699. Then said he used the phone right after they came back. RP 1705.

The medical examiner was very comfortable determining the cause of death for both victims. RP 1019. He testified that Mr. Abrazado had no defensive wounds. RP 1039. He did have a dialysis shunt and an enlarged heart. RP 1039-40. His health problems would have made him more susceptible to dying from blood loss. RP 1041, 1054. Mr. Abrazado had four stab wounds to his back. RP 1042, 1046. In addition, his jugular was cut and he had a collapsed lung. RP 1044-45, 1048, 1052. Mr. Doria has duct tape around his ankles and mouth. RP 1057. The tape was wrapped tightly around his neck and head and may have caused him trouble breathing. RP 1063, 1114-15. He also had blood on his calf, blood splatter on this legs and feet and blood on the bottom of one of his

shoes. RP 1058. There was blood under and on top of the duct tape meaning he bled before the duct tape was put on him. RP 1059, 1115-16. There were blunt force injuries to his scalp. RP 1064. There were two large cutting wounds on Mr. Doria's neck- one that cut the larynx and his jugular. RP 1066. He also had multiple stab wounds, including one that went all the way from the front to the back. RP 1071, 1074, 1086, 1088, 1089. One wound cut his aorta. RP 1089, 1102. He was stabbed from above and behind. RP 1099. Both victims would have bled out within minutes from their injuries. RP 1101. Bleeding to death was the mechanism for death for both. RP 1102.

C. ARGUMENT.

1. THE TRIAL COURT DID NOT ERROR IN SEALING THE JURY QUESTIONNAIRES AS DEFENDANT JACKSON INVITED THE ERROR AND HIS RIGHT TO A PUBLIC TRIAL WAS NOT VIOLATED. SHOULD THIS COURT DISAGREE, THE PROPER REMEDY IS REMAND FOR A RECONSIDERATION OF THE COURT'S SEALING ORDER.

Criminal defendants have a right to a public trial. The Sixth Amendment to the United States Constitution, and article I, section 22 of the Washington Constitution, both protect a defendant's right to a public trial. *State v. Brightman*, 155 Wn.2d 506, 514, 122 P.3d 150 (2005); *In re Orange*, 152 Wn.2d 795, 804, 100 P.3d 291 (2004); *Waller v. Georgia*,

467 U.S. 39, 44-45, 104 S. Ct. 2210, 81 L. Ed. 2d 31 (1984); *State v. Bone-Club*, 128 Wn.2d 254, 257, 906 P.2d 325 (1995). The right to a public trial applies not only to the evidentiary phase of a criminal trial, but also to other proceedings such as jury voir dire. *Gannett Co. v. DePasquale*, 443 U.S. 368, 379, 99 S. Ct. 2898, 61 L. Ed. 2d 608 (1999); *Press-Enterprise v. Superior Court of California*, 464 U.S. 501, 509-10, 104 S. Ct. 819, 78 L. Ed. 2d 629 (1984) (“*Press-Enterprise I*”); *Federated Publications, Inc. v. Kurtz*, 94 Wn.2d 51, 59-60, 615 P.2d 440 (1980).

A court errs in closing the courtroom to the public without weighing the five factors listed in *State v. Bone-Club*, *supra*. The *Bone-Club* factors are:

1. The proponent of closure . . . must make some showing [of a compelling interest], and where that need is based on a right other than an accused’s right to a fair trial, the proponent must show a ‘serious and imminent threat’ to that right.
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.
5. The order must be no broader in its application or duration than necessary to serve its purpose.

128 Wn.2d at 258-59. While many cases dealt with closures of the courtroom to the general public during trial proceedings, the Washington

Supreme Court first applied the *Bone-Club* analysis to jury selection in *In re Orange, supra*. There, the defendant was charged with several violent felonies including murder in the first degree, attempted murder in the first degree, and assault in the first degree. The trial court tried to balance or resolve space limitations for the venire panel with the interests of both the defendant's and victim's families to attend the trial. The court was also faced with trying to keep the families separated to avoid potential conflict. The court ruled that no family members or spectators would be allowed in the courtroom during jury selection. 152 Wn.2d at 802. Using the *Bone-Club* analysis, the Supreme Court reversed, holding that the trial court erred by closing the courtroom during jury selection. *Orange*, 152 Wn.2d at 812.

The following year, the Supreme Court addressed a similar issue in *State v. Brightman*. *Brightman* was charged with murder in the second degree. As in *Orange*, the trial court had to deal with a large venire panel and limited space in the courtroom as well as accommodating the wishes of family members or interested parties who wished to attend the proceedings. The court resolved the issue by excluding "the friends, relatives, and acquaintances" during jury selection. *Brightman*, 155 Wn.2d at 511. The Supreme Court reversed the conviction, holding that the trial court was required to do a *Bone-Club* analysis before closing the courtroom during jury selection. *Brightman*, at 509.

The individual questioning of a juror in an open courtroom outside the presence of the rest of the venire panel does not raise a situation where the court must weigh the *Bone-Club* factors. *State v. Vega*, 144 Wn. App. 914, 917, 184 P.3d 677 (2008).

Defendant Jackson contends that the trial court erred in “closing” part of the voir dire by sealing the juror questionnaires. This claim must be rejected because defendant invited any error and he fails to show any violation of his rights to open or public trials.

- a. Should this Court find error, defendant Jackson invited the error.

Even assuming this Court were to follow Division I and decide that jury questionnaires should be deemed to be presumptively open to the public, defendant may not seek relief on that account, because he invited the purported error. A defendant who invites error -- even constitutional error -- may not claim on appeal that he is entitled to a new trial on account of the error. *State v. Studd*, 137 Wn.2d 533, 546, 973 P.2d 1049 (1999); *State v. Aho*, 137 Wn.2d 736, 744-45, 975 P.2d 512 (1999); *State v. Smith*, 122 Wn. App. 294, 299, 93 P.3d 206 (2004). The doctrine of invited error applies regardless of whether counsel intentionally or inadvertently encouraged the error. *Seattle v. Patu*, 147 Wn.2d 717, 720, 58 P.3d 273 (2002). The invited error rule recognizes that “[t]o hold otherwise [i.e. to entertain an error that was invited] would put a premium

on defendants misleading trial courts.” *State v. Henderson*, 114 Wn.2d 867, 868, 792 P.2d 514 (1990).

A defendant who is merely silent in face of manifest constitutional error does not “invite” the error. *State v. Stein*, 144 Wn.2d 236, 241, 27 P.3d 184 (2001). But, a defendant who “affirmatively assents” to error may invite it. For example, it has been suggested that, for purposes of applying the doctrine of invited error, there is a distinction between “whether defense counsel merely failed to object to the giving of the instruction, or whether he affirmatively assented to the instruction or proposed one with similar language.” *State v. LeFaber*, 128 Wn.2d 896, 904, 913 P.2d 369 (1996)(Alexander, J. dissenting); see *People v. Thompson*, 50 Cal. 3d 134, 785 P.2d 857 (1990)(failure to object to private voir dire not reviewable where procedure was for defendant’s benefit and the defendant participated without objection). A defendant need not expressly waive constitutional rights; a waiver can be inferred from conduct. *State v. Thomas*, 128 Wn.2d 553, 559, 910 P.2d 475 (1996)(court inferred waiver of right to testify by defendant’s failure to take the witness stand at trial); *State v. Momah*, 167 Wn.2d 140, 155-56, 217 P.3d 321 (2009) (Momah’s participation in and affirmative agreement with the closure of the courtroom caused any error to not be structural, and to not warrant reversal).

Here, the parties agreed to the questionnaire that contained language that the questionnaires would be sealed. SCP 295-307, page 1. In addition, the court order sealing the jury questionnaires indicates that it has “come on regularly by stipulation/motion of the parties to seal jury questionnaires.” SCP 308-9. Further, the court inquired of Jackson’s counsel as to his satisfaction with the sealing process and Jackson’s attorney indicated that he was satisfied. RP 70.

As the record indicates, defendant affirmatively asked the court to seal the juror questionnaires and agreed to the language on the questionnaire that informed the jury of such. He cannot now claim it as a basis for error. He is precluded from raising this claim under the doctrine of invited error.

- b. Defendant’s right to a public trial was not violated.

However, should the court review the merits of the claim, the State believes that the trial court did not error. The State does not dispute that voir dire proceedings are included within the open trial right. *Press-Enterprise Co. v. Superior Court*, 464 U.S. 501, 104 S. Ct. 819, 78 L. Ed. 2d 629 (1984)(“*Press –Enterprise I*”). In that case, the Court explained why voir dire proceedings should be included within the open-trial right:

The value of openness lies in the fact that people not actually attending trials can have confidence that standards of fairness are being observed; the sure knowledge that anyone is free to attend gives assurance that established procedures are being followed and that deviations will become known. Openness thus enhances both the basic fairness of the criminal trial and the appearance of fairness so essential to public confidence in the system. *Richmond Newspapers, Inc. v. Virginia*, 448 U.S., at 569-571.

Press-Enterprise I, 464 U.S. at 508. Subsequently, in *Press-Enterprise Co. v. Superior Court*, 478 U.S. 1, 12-13, 106 S. Ct. 2735, 92 L. Ed. 2d 1 (1986) (“*Press-Enterprise II*”), the Court set forth a framework for determining what is - and what is not - within the scope of the public-trial right. In that case, the Court applied an “experience and logic” test that had been first announced by Justice Brennan in his concurring opinion in *Globe Newspaper Co. v. Superior Court*, 457 U.S. 596, 102 S. Ct. 2613, 73 L. Ed. 2d 248 (1982). *Press-Enterprise II*, 478 U.S. at 8-9. This test looks to whether such a right is consistent with “experience and logic.” *Press-Enterprise II*, 478 U.S. at 9.

The “experience” inquiry considers whether there has been a “tradition of accessibility.” *Press-Enterprise II*, 478 U.S. at 8. In other words, a court looks to “whether the place and process have historically been open to the press and general public.” *Id.* A “tradition of accessibility implies the favorable judgment of experiences.” *Id.*

The “logic” inquiry focuses on “whether public access plays a significant positive role in the functioning of the particular process in question.” *Id.* In conducting this inquiry, a court should consider whether the process enhances the fairness of the criminal trial as well as “the appearance of fairness so essential to public confidence in the system.” *Press-Enterprise II*, 478 U.S. at 9.

These two considerations are related as they “shape the functioning of governmental processes.” *Id.* If the right asserted is grounded in both experience and logic, then a right of access to the proceedings in question exists under the constitution.

There is a presumption under Washington’s court rules that juror questionnaires are not public documents and this fact is conveyed to prospective jurors. For example, GR 31(j) provides that “individual juror information, other than name, is presumed to be private.” The policy and purpose statement for this rule reflects that it is designed to balance competing constitutional interests:

It is the policy of the courts to facilitate access to court records as provided by article I, section 10 of the Washington State Constitution. Access to court records is not absolute and shall be consistent with reasonable expectations of personal privacy as provided by article 1, section 7 of the Washington State Constitution.

GR 31(a). The juror handbook prepared by judges' associations (and appearing on the Washington Courts website) clearly anticipates that questioning may occur in private:

After you're sworn in, the judge and the lawyers will question you and other members of the panel to find out if you have any knowledge about the case, any personal interest in it, or any feelings that might make it hard for you to be impartial. This questioning process is called voir dire, which means "to speak the truth." ... Though some of the questions may seem personal, you should answer them completely and honestly. ... If you are uncomfortable answering them, tell the judge and he/she may ask them privately.

http://www.courts.wa.gov/newsinfo/resources/?fa=newsinfo_jury.jury_gui

de#A3; See also *State v. Strode*, 167 Wn.2d 222, 239-40, 217 P.3d 310

(2009)(C. Johnson, J., dissenting). In July 2000, the Washington State

Jury Commission issued its Report to the Board for Judicial

Administration and recommended that jurors be given an opportunity to

discuss sensitive matters in private:

Recommendation 20 ... The court should try to protect jurors from unreasonable and unnecessary intrusions into their privacy during jury selection. In appropriate cases, the trial court should submit written questionnaires to potential jurors regarding information that they may be embarrassed to disclose before other jurors.

http://www.courts.wa.gov/committee/?fa=committee.display&item_id=27

7&committee_id=101. As one justice recently noted:

When jurors respond to the questions, they should reasonably expect courts to be truthful and maintain the confidentiality of extremely sensitive, personal, and perhaps traumatic experiences.

Through the above methods, as well as other means, courts routinely assure jurors that their private information will remain private. The courts' assurances serve at least two purposes: to respect individuals' privacy interests and to guarantee an impartial jury.

State v. Strode, 167 Wn.2d at 240 (C. Johnson, J., dissenting). Thus, keeping juror information obtained by use of questionnaires out of the public document realm protects the jurors' constitutional right to personal privacy under article 1, section 7 as well as the defendant's right to an impartial jury by promoting disclosure of juror information that might be embarrassing to the juror and detrimental to his or her ability to be fair and impartial. The right to an open trial is satisfied by having the questioning of the jurors occur in an open courtroom.

Nor is Washington alone in this conclusion. Indeed, most of states that have addressed the issue by statute or rule have concluded that juror questionnaires should not be available to the general public. *See* Ala. R. Ct. 18.2(b) ("If a juror questionnaire containing personal information is obtained from a prospective juror in any case appealed to the Court of Criminal Appeals, that questionnaire shall not be included in the clerk's

portion of the record on appeal. ... Any such questionnaires supplemented into the appellate record shall be available for inspection only by the court and the parties to the appeal.”) Alaska R. Admin 15(j)(2)-(3) (“Trial questionnaires and trial panel lists are confidential. ... The parties, their attorneys, and agents of their attorneys shall not disclose ... the trial questionnaires...”); Ariz. S. Ct. R. 123(e)(9) (“information obtained by special screening questionnaires or in voir dire proceedings that personally identifies jurors summoned for service, except the names of jurors on the master jury list, are confidential, unless disclosed in open court or otherwise opened by order of the court.”); Colo. Rev. Stat. §13-71-115(2) (“With the exception of the names of qualified jurors and disclosures made during jury selection, information on the questionnaires shall be held in confidence by the court, the parties, trial counsel, and their agents. ... The original completed questionnaires for all prospective jurors shall be sealed in an envelope and retained in the court’s file but shall not constitute a public record.”); Conn. Gen Stat. 51-232(c) (questionnaires may be viewed only by court and parties and are not public records); Idaho R. Civ. P. 47(d) (“In order to provide for open, complete and candid responses to juror questionnaires and to protect juror privacy, information derived from or answers to juror questionnaires shall be confidential and shall not be disclosed to anyone except pursuant to court order.”); Idaho

Crim. R. 23(1) (same language); Idaho Admin R 32(g)(7) (providing for confidentiality); Kan. Dist. Ct. R. 167 (suggested form informs jurors that “[t]he juror questionnaire is not a public record and is only made available to court personnel and the attorneys and parties to the case being tried.”); 14 Maine Rev. Stat. § 1254-A(7)-(9) (questionnaires “may at the discretion of the court be made available to the attorneys and their agents and investigators and the pro se parties at the courthouse for use in the conduct of voir dire examination” and such information may not be further disclosed without court authorization); Mass. Gen. Laws, ch. 234A, § 22 (“A notice of the confidentiality of the completed questionnaire shall appear prominently on the face of the questionnaire.”); Mass. Gen. Laws, ch. 234A, § 22 (information in questionnaires not to be disclosed except to court and parties and is not a public record); Mich. Ct. R. 2.510(C)(1) (questionnaires available only to parties and court absent court order); Mich. Ct. R. 6.412(A) (applying R. 2.510 to criminal cases); Mo. S. Ct. R. 27.09(b) (“Jury questionnaires maintained by the court in criminal cases shall not be accessible except to the court and the parties. Upon conclusion of the trial, the questionnaires shall be retained under seal by the court except as required to create the record on appeal or for post-conviction litigation. Information so collected is confidential and shall not be disclosed except on application to the trial court and a showing of good

cause.”); N.H. Super. Ct. R. 61-A (attorneys entitled to a copy of the questionnaire, but “shall not exhibit such questionnaire to anyone other than his client and other lawyers and staff employed by his or her firm.”); N.J. R. Gen. Applic. 1:38(c) (questionnaires are confidential and not public records); N.M. Stat. § 38-5-11(C) (“questionnaires obtained from jurors shall be made available for inspection and copying by a party to a pending proceeding or their attorney or to any person having good cause for access”); Pa. R. Crim. Pro. 632(B) (“The information provided by the jurors on the questionnaires shall be confidential and limited to use for the purpose of jury selection only. Except for disclosures made during voir dire, or unless the trial judge otherwise orders pursuant to paragraph (F), this information shall only be made available to the trial judge, the defendant(s) and the attorney(s) for the defendant(s), and the attorney for the Commonwealth.”); Vt. R. Civ. P. 47(a)(2) (questionnaires may be made available to public only after names and addresses have been redacted); Vt. R. Crim. P. 24(a)(2) (same); Tex. Gov’t Code § 62.0132(f)-(g) (questionnaires are confidential and may be disclosed only to court and parties); cf., Ark. Code § 16-32-111(b) (questionnaires may be sealed on showing of good cause); La. Code Crim. Pro. art. 416.1(C) (jury questionnaire “may” be made a part of the record); Minn. R. Crim. P. Form 50 (advising jurors that answers are part of the public record).

The common practice in this country, as documented by court rule and law, is that jury questionnaires are not matters of public record. The experience prong of *Enterprise Press II* thus militates against petitioner's claim.

The logic prong does not support defendant, either. In *Richmond Newspapers v. Virginia*, 448 U.S. 555, 569-72, 100 S. Ct. 2814, 2834, 65 L. Ed. 2d 973 (1980) the Court identified the following purposes served by openness in criminal proceedings: (1) ensuring that proceedings are conducted fairly, (2) discouraging perjury, misconduct of participants, and unbiased decisions, (3) providing a controlled outlet for community hostility and emotion, (4) securing public confidence in a trial's results through the appearance of fairness, and (5) inspiring confidence in judicial proceedings through education on the methods of government and judicial remedies.

A procedure like that used in petitioner's case will protect juror privacy and encourage candid responses. As noted above, this is the general approach that has been recommended and followed in Washington. The American Bar Association likewise recommends private inquiry into sensitive matters. See American Bar Association, *ABA Principles for Juries and Jury Trials (and Commentary)*, at 42-43, http://www.abanet.org/jury/pdf/final%20commentary_july_1205.pdf.

Studies have shown that jurors will respond more frankly if sensitive questions are asked privately:

A number of empirical studies have found that prospective jurors often fail to disclose sensitive information when directed to do so in open court as part of the jury selection process. A 1991 study of juror honesty during voir found that 25% of jurors questioned during voir dire failed to disclose prior criminal victimization by themselves or their family members. In a more recent study of the effectiveness of individual voir dire, Judge Gregory Mize (D.C. Superior Court) found that 28% of prospective jurors failed to disclose requested information during questioning directed to the entire jury panel. ... Thus, failure to protect juror privacy can actually undermine the primary objective of voir dire – namely, to elicit sufficient information about prospective jurors to determine if they can serve fairly and impartially.

Paula L. Hannaford, *Making the Case for Juror Privacy: A New Framework for Court Policies and Procedures* (State Justice Institute, 2001) (footnotes omitted).

A juror should not be forced to disclose intensely private information to the general public simply because he or she received a jury summons and was called upon to sit on this case. Response rates to juror summons are notoriously low. If jurors are not offered the modicum of privacy granted by this in camera screening process, that rate is not likely to improve, and it could drop further. This threatens the functionality of the entire justice system.

These concerns exist whenever a juror is called to serve and must answer questions in a room full of strangers. The concerns are even more acute, however, when the juror is called to answer such questions in public in a small community. In small communities, a juror who is required to answer private questions will necessarily expose sensitive information to neighbors, friends, acquaintances, co-workers, and fellow parishioners. Although this risk of public exposure of personal information cannot be completely eliminated – i.e. the court can exclude the rest of the venire for individualized questioning but not close the court room- it can be greatly minimized. Consequently, the right to a public trial may be protected without requiring such a high price be paid by jurors performing their civic duty.

Additionally, court records are becoming increasingly available over the internet. Unsealed juror questionnaires could be read by persons seeking information about jurors for reasons that have nothing to do with their potential jury service and who could do nothing about attending a public trials or court proceeding. Such information would be available for years, long after a defendant's trial has been concluded. This poses a huge threat to the personal privacy of jurors with no corresponding benefit to

the right to a public trial. This provides a critical reason why sealing juror questionnaires should be treated differently than open courtrooms.

In view of the foregoing, both the experience and logic prongs of the *Press-Enterprise II* test support the conclusion that jury questionnaires are not within the scope of the right to a public trial. Because defendant fails to demonstrate that his right to a public trial was abridged, this claim should be rejected.

Defendant relies on two cases out of Division I of the Court of Appeals. Defendant cites to *State v. Waldon*, 148 Wn. App. 952, 202 P.3d 325 (2009), and *State v. Coleman*, 151 Wn. App. 614, 214 P.3d 158 (2009).³ However, as stated above, the State disagrees with Division I's analysis as it pertains to juror questionnaires and the open courtroom analysis. In addition, this Court can affirm on any basis that is supported by the law and the record. See *State v. Bradley*, 105 Wn. App. 30, 38, 18 P.3d 602 (2001). In reviewing the *Bone-Club* factors, it is clear that the

³ *Waldon* was decided the day before closing arguments in the instant case, and *Coleman* was decided after the instant trial had been completed. The trial court in this case did not have the benefit of either of these decisions before making its ruling as to the sealing of the questionnaires.

compelling interest was the privacy of the jurors, no one made any objections to the process, the least restrictive means was to seal the questionnaires but to maintain an appellate record by filing them so that Court of Appeals and the attorneys of record could still have access to them, the court did weigh the need for them to be part of the record with the need to respect the jurors privacy, and the order was no broader in its duration that necessary to serves its purpose. *See* RP 69-70, SCP 308-9. While not articulated as such, the court did go through an analysis that is consistent with the aims of ***Bone-Club*** and so defendant's rights were not violated. The trial court did not error in sealing the juror questionnaires.

- c. Should this Court decide that the sealing order is in error, the proper remedy is to remand for reconsideration of the sealing order.

Should this Court decide to follow Division I and find that the court should have conducted a ***Bone-Club*** analysis, the State would then agree with Jackson that the appropriate remedy is to remand for a reconsideration of the order to sealing the questionnaires. *See Coleman*, 151 Wn. App. at 162-63.

2. DEFENDANT WAS NOT DENIED THE RIGHT TO A FAIR TRIAL AS THE STATEMENTS MADE BY THE PROSECUTOR DID NOT VOUCH FOR SPENCER AND DID NOT CONSTITUTE PROSECUTORIAL MISCONDUCT.

“Trial court rulings based on allegations of prosecutorial misconduct are reviewed under an abuse of discretion standard.” *State v. Stenson*, 132 Wn.2d 668, 718, 940 P.2d 1239 (1997). To prove that a prosecutor’s actions constitute misconduct, the defendant must show that the prosecutor did not act in good faith and the prosecutor’s actions were improper. *State v. Manthie*, 39 Wn. App. 815, 820, 696 P.2d 33 (1985) (citing *State v. Weekly*, 41 Wn.2d 727, 252 P.2d 246 (1952)). The defendant has the burden of establishing that the alleged misconduct is both improper and prejudicial. *Stenson*, 132 Wn.2d at 718. Even if the defendant proves that the conduct of the prosecutor was improper, the misconduct does not constitute prejudice unless the appellate court determines there is a substantial likelihood the misconduct affected the jury’s verdict. *Id.* at 718-19.

A defendant claiming prosecutorial misconduct bears the burden of demonstrating that the remarks or conduct was improper and that it prejudiced the defense. *State v. Gentry*, 125 Wn.2d 570, 640, 888 P.2d 570 (1995) citing *State v. Hoffman*, 116 Wn.2d 51, 93, 804 P.2d 577 (1991). If a curative instruction could have cured the error and the defense

failed to request one, then reversal is not required. *State v. Binkin*, 79 Wn. App. 284, 293-294, 902 P.2d 673 (1995), *overruled on other grounds* by *State v. Kilgore*, 147 Wn.2d 288, 53 P.3d 974 (2002). Failure by the defendant to object to an improper remark constitutes a waiver of that error unless the remark is deemed so “flagrant and ill-intentioned that it evinces an enduring and resulting prejudice that could not have been neutralized by an admonition to the jury.” *Stenson*, 132 Wn.2d at 719, *citing Gentry*, 125 Wn.2d at 593-594.

A prosecutor’s allegedly improper questioning is reviewed in “the context of the total argument, the issues in the case, the evidence addressed in the argument, and the instructions given to the jury.” *State v. Brown*, 132 Wn.2d 529, 561, 940 P.2d 546 (1997). A prosecutor enjoys reasonable latitude in arguing inferences from the evidence, including inferences as to witness credibility. *State v. Gregory*, 158 Wn.2d 759, 810, 147 P.3d 1201 (2006). A prosecutor is allowed to argue that the evidence doesn’t support a defense theory. *State v. Russell*, 125 Wn.2d 24, 87, 882 P.2d 747 (1994).

Defendant Jackson contends the State erred in giving a preview of the State’s case by telling the jury they would hear about the plea agreement of Pierre Spencer, asking Spencer about the terms of the plea agreement, which had been deemed admissible and explored at length by both parties, and arguing about the plea agreement and Spencer’s credibility in closing. Trial counsel did not object to the statements in the

State's opening, to the admission of the plea agreement or statement of defendant on plea of guilty, to the majority of the State's questions or to any arguments concerning the plea agreement in closing. As such, defendant has the burden to prove that the agreement and testimony which he used to his tactical advantage were flagrant and ill-intentioned and resulted in prejudice.

Defendant challenges several parts of the State's case concerning the testimony of Pierre Spencer. Defendant first points to the State's opening where the State, after previewing Jackson and Smith's statements, told the jury:

The third villain who was responsible will also be here in court. His name is Pierre Spencer. He will come here and tell you how Warren Abrazado and Ruben Doria died and why. He was a codefendant with the two defendants here before you. He has agreed with the State of Washington to tell you the truth about what happened in exchange for a fairly modest leniency. He has stepped up. He has pled guilty to the charges against him. You will learn that he is looking at approximately 30 years of hard time in prison. I don't mean 30 years' sentence, serve five years, and get out on patrol. The evidence will show you that he is looking at three decades in prison as punishment for his role, and that is after providing truthful testimony to you.

RP 516-17. Neither defendant objected to this statement.

Opening statement is a preview of what the State expects the testimony and evidence to show. This is an accurate statement of what the State expected Spencer to say and what the terms of his plea agreement

contained. Defendant cannot show that this statement is flagrant and ill-intentioned or that it prejudiced him in any way.

In closing, the State also referenced Spencer's plea agreement but emphasized that Spencer's testimony was only a piece of the puzzle. RP 1883. The State then asked the jury to evaluate Spencer's demeanor on the stand and reminded them that they were the sole judges of credibility. RP 1883. The State also indicated that there was corroboration for Spencer's testimony, and that some of the information that Spencer related could not have been gleaned from discovery as the defense claimed. RP 1885-86. The State even told the jury that they may not chose to believe Spencer. RP 1940. Neither defendant objected to these statements in the State's closing.

Smith's counsel then pointed out for the jury the instruction that stated,

Testimony of an accomplice, given on behalf of the State of Washington, should be subjected to careful examination in the light of the other evidence in the case, and should be acted on with great caution. You should not find the defendant guilty upon such testimony alone unless, after carefully considering the testimony, you are satisfied beyond a reasonable doubt of its truth.

JCP 206-248, Instruction 8. In its rebuttal, the State agreed and told the jury it was appropriate to look at Spencer's testimony with caution. RP 1988. The jury was instructed to carefully scrutinize Spencer's testimony. These arguments were not flagrant and ill-intentioned as the State did not

tell the jury that it knew Spencer had told the truth, but went through how the State believed his testimony was corroborated and what the jury should examine. There is no evidence of misconduct.

Defendant also takes issue with the State's direct examination of Spencer. The State introduced the plea agreement it had made with Spencer as well as the statement of defendant on plea of guilty that Spencer completed. RP 1352, 1358. Neither defendant objected to the admission of these documents. RP 1352, 1358. In fact, the fact that Spencer's plea agreement would be introduced was not a surprise. The State had referenced the agreement in its pre-trial motions and neither defense counsel objected to it coming in. RP 38-9. Further, the parties reached an agreement as to what part of the agreement should be redacted before it was placed into evidence. RP 1349. Smith's attorney brought the agreement to the court's attention and indicated that the parties were agreeing to take out the paragraph about polygraphs; Jackson's attorney agreed. RP 1349. Neither defendant objected to the agreement being entered nor requested that any other part of the agreement be redacted.

After admitting the agreement and guilty plea, the State proceeded to ask defendant questions about them. RP 1352-1362. The State went through Spencer's obligation to be truthful, what sentence he was facing if he didn't testify truthfully, and what sentence he would receive even if he did testify truthfully. RP 1352-1362. These provisions were part of the plea agreement and the language was apparently projected so the jury and

the witness could see it at the same time. RP 1352-54. The State did nothing more than go over the provisions in the admitted documents. There was no objection to any of the State's questions about the documents. It is difficult to see how the State's examination could be flagrant and ill-intentioned when the questions were directly related to admitted evidence. The prosecutor did not commit misconduct.

Further, both defense counsel extensively questioned Spencer and highlighted the inconsistencies in his story. *See generally*, RP 1492-1600. For instance, there were questions designed to show that Spencer's story had actually changed three times. RP 1530-34. On redirect, the State asked Spencer, "Is it your understanding that you will be allowed to withdraw your plea and enter a plea to reduced charges of Murder in the First Degree and Manslaughter in the First Degree no matter what you say here today or no matter whether you tell the truth?" RP 1591. Jackson's attorney objected and the court sustained the objection. RP 1591. This was the only statement concerning the plea agreement that was objected to. Jackson's attorney, however, asked on re-cross, "Isn't it true that the person who decides whether or not you are being completely truthful is sitting right here, the prosecutor?" RP 1599. Spencer said he didn't think so. RP 1599. Jackson's attorney went further and said, "These 14 people, here, don't decide, do they?" RP 1599. The State objected and the court sustained the objection. RP 1599.

The instant case is distinguishable from *U.S. v. Roberts*, 618 F.2d 530, (9th. Cir. 1980), *cert. denied*, 452 U.S. 942, 101 S. Ct. 3088, 69 L. Ed. 2d 957 (1981), which defendant relies on. In that case, the prosecutor told the jury that a detective was in the courtroom to make sure the witness did not lie and if the witness did lie, the plea agreement would have been called off. *Id.* at 533. The court found it to be improper when the State referred to evidence outside the record to imply that the witness was testifying truthfully. *Id.* at 533-4.

That is not the case here. In the instant case, the State asked questions about the admissible plea agreement that was part of the record. Also, contrary to *Roberts*, defense counsel did not object. Further, Jackson's own attorney is the one who tried to mischaracterize the agreement by saying that the prosecutor was the judge of credibility and not the jury. *See* RP 1599. If there was any implication that there was an outside mechanism to determine if Spencer was lying, it was Jackson's own attorney that implied it and not the State. There is no evidence of prosecutorial misconduct or that defendant was prejudiced by these questions.

This case is more similar to the recently decided case of *State v. Coleman*, __ Wn. App. __, __ P.3d __ (2010), WL 1839410. In *Coleman*, the testifying accomplice testified about his plea agreement which was admitted without objection. ¶ 6. The plea agreement was admitted on direct examination and testimony about it was elicited on direct. ¶6. The

defense counsel did not object and instead used the plea agreement as a tactical advantage to show how the accomplice had lied. ¶7. The court cited to both *State v. Green*, 119 Wn. App. 15, 79 P.3d 460 (2003), *review denied*, 151 Wn.2d 1035, *cert. denied*, 543 U.S. 1023 (2004), and *State v. Ish*, 150 Wn. App. 775, 208 P.3d 1281, *review granted in part by* 167 Wn.2d 1005 (2009) in affirming defendant's convictions. The defense had not requested that the statements about truthful testimony be redacted from the plea agreement. ¶ 14. Further, the only statements admitted indicated that the accomplice had to testify truthfully at trial. ¶15. The court found no error in the admission of the agreement and found that even if it was error to introduce it before the accomplice's credibility had been attacked, it was harmless. ¶ 16.

In the instant case, defense counsel did not object to the entry of the plea agreement, to any questions about the plea agreement save the one mentioned earlier, and did not request the truthful testimony provision be removed. Further, defense counsel used the plea agreement to his tactical advantage. The provisions that Spencer testify truthfully only served to provide context for the testimony. While the plea agreement was admitted on direct, Spencer's credibility has already become an issue during pre-trial discussion and in opening when Smith's attorney announced that Spencer's testimony would be both incredible and

“uncredible.” RP 86-96, 556, 573. *Coleman* is on point with the instant case and shows how this court’s ruling in *Ish* should be applied to the instant case. There is no evidence of prosecutorial misconduct.

3. THE TRIAL COURT DID NOT ABUSE ITS DISCRETION IN DENYING SMITH’S MOTION FOR SEVERANCE WHERE THE REDACTED STATEMENTS OF THE CO-DEFENDANT COMPILED WITH **BRUTON** AND SMITH DID NOT SHOW HE WAS ENTITLED TO DISCRETIONARY SEVERANCE OR A MISTRIAL.

Defendant Smith argues that the trial court erred in not granting his motion for severance. He argues that severance was mandatory under CrR 4.4(c)(1) and the Confrontation Clause. He also argues that the court abused its discretion in not granting his request for discretionary severance under CrR 4.4(c)(2) and for denying his motion for mistrial. The trial court did not error.

- a. The trial court did not error in admitting the co-defendant’s statements that had been redacted in compliance with **Bruton**.

CrR 4.4(c)(1) provides that a motion for severance will be granted unless the co-defendant's statement is redacted to delete all references of the moving defendant. This court rule "was adopted to avoid the constitutional problem encountered in *United States v. Bruton*, 391 U.S. 123, 20 L.Ed.2d 476, 88 S. Ct. 1620 (1968)." The court reviews de novo

alleged violations of *Bruton*. *State v. Larry*, 108 Wn. App. 894, 901, 34 P.3d 241 (2001).

In *Bruton*, the Court held that a defendant is deprived of his rights under the Confrontation Clause when his nontestifying co-defendant's confession naming him as a participant in the crime is introduced at their joint trial, even if the jury is instructed to consider that confession only against the defendant. *Bruton*, 391 U.S. at 136. The Court reasoned that the co-defendant essentially becomes one of the defendant's accusers, and the defendant's right to confrontation is violated when he is not able to cross-examine the codefendant at trial. *Bruton*, 391 U.S. at 134.

Nineteen years after the issuance of *Bruton*, the U.S. Supreme Court clarified and narrowed the scope of the *Bruton* rule in *Richardson v. Marsh*, 481 U.S. 200, 95 L.Ed.2d 176 107 S. Ct. 1702 (1987). See *State v. Cotton*, 75 Wn. App. 669, 690-91, 879 P.2d 971, review denied, 126 Wn.2d 1004 (1994)(acknowledging that "[t]he *Bruton* rule was narrowed by the Court in *Richardson*").

In *Richardson*, the Court held admissible a codefendant's confession that was redacted to omit all reference to the defendant where the trial court gave an appropriate limiting instruction. *Richardson*, 481 U.S. at 208. The Court reasoned that this redacted confession fell outside *Bruton's* prohibition because the statement was not "incriminating on its face" and became incriminating "only when linked with evidence introduced later at trial." *Richardson*, 481 U.S. at 208. The Court in

Richardson compared its earlier holding in *Bruton* and noted that: "[o]n the precise facts of *Bruton*, involving a facially incriminating confession, we found [a limiting instruction] . . . inadequate. . . . The calculus changes when confessions that do not name the defendant are at issue."

Richardson, 481 U.S. at 211.

The lower court had reversed the defendant's conviction based on its interpretation that *Bruton* required the trial court to assess the confession's inculpatory value by examining not only the face of the confession, but also all of the evidence introduced at trial. *Richardson v. Marsh*, 781 F.2d 1201, 1212 (6th Cir. 1986). The Court reversed the lower court because the redacted confession at issue was not facially incriminating in that it did not refer to the defendant by name, and therefore admission of the statement complied with the Confrontation Clause. *Richardson*, 481 U.S. at 209. The Court in *Richardson* also stated as follows: "We express no opinion on the admissibility of a confession in which the defendant's name has been replaced with a symbol or neutral pronoun." *Richardson*, 481 U.S. at 211, fn. 5.

Eleven years after *Richardson*, the Court addressed this very issue involving symbols or neutral pronouns in *Gray v. Maryland*, 523 U.S. 185, 140 L.Ed.2d 294, 188 S. Ct. 1151 (1998). In *Gray*, the victim was beaten to death by a group of six assailants. One of the defendants gave a confession implicating himself and two other codefendants. In a joint trial, the prosecution redacted the nontestifying codefendant's confession

by replacing the other defendants' names with a blank space or the word "deleted." *Gray*, 523 U.S. at 188. The Court rejected this approach and held that redactions that simply replace a name with an obvious blank space or word such as "deleted" violate *Bruton*. *Gray*, 523 U.S. at 192. When read together, *Bruton*, *Richardson* and *Gray* allow the admission of redacted statements when the statements are: (1) facially neutral, i.e., do not identify by name the codefendant joined for trial (*Bruton* and *Richardson*); (2) free of obvious deletions such as a "blank" or "X" denoting the name of a codefendant (*Gray*); and (3) accompanied by a limiting instruction (*Richardson*). *Larry*, 108 Wn. App. at 905.

In this case, Jackson's statement was redacted to omit all reference to Smith, and Smith's statement was redacted to omit all reference to Jackson. In fact, the names of all three co-defendant's were deleted and substituted with neutral pronouns. The trial court also gave a limiting instruction requiring the jurors not to consider a defendant's statement against the co-defendant. RP 1691, 1758, 1779. The trial court complied with *Bruton* in denying Smith's motion for severance.

Smith nonetheless argues that Jackson's redacted statement prejudiced him even though Smith's name appears nowhere in Jackson's statement. He argues that Jackson made various references to "the others" and "another" doing various things during the incident, and by "implication" this made it clear that Spencer was working with two other people. The statements do no such thing. The redactions comply with

Bruton, *Gray* and *Richardson* in that they are neutral as to number and don't indicate how many individuals were involved. In fact, there was testimony that Jackson's cousin was involved at some point so it is not clear that "the others" could only refer to the two co-defendants. *See* RP 1369-70. The statements were facially neutral, free of obvious deletions and accompanied by a limiting instructions. Jackson's redacted statement complied with the requirements of *Bruton*.

- b. The Court did not abuse its discretion in denying Smith's motion for discretionary severance.

Smith next argues that the trial court erred in denying his motion for discretionary severance. A trial court has the discretion to grant a motion to sever defendants whenever it is "deemed appropriate to promote a fair determination of the guilt or innocence of a defendant." CrR 4.4(c)(2). Under this rule, separate trials are not favored, and the defendant bears the burden of proof that a joint trial is so manifestly prejudicial as to outweigh concerns for judicial economy. *State v. Jones*, 93 Wn. App. 166, 171, 968 P.2d 888 (1998), *review denied*, 138 Wn.2d 1003 (1999). A defendant cannot prevail under this rule unless he demonstrates specific, undue prejudice resulting from a joint trial. *State v. Grisby*, 97 Wn.2d 493, 507, 647 P.2d 6 (1982). The trial court's decision in granting or denying a motion for severance of jointly charged

defendants will not be disturbed on appeal absent a manifest abuse of discretion. *State v. Alsup*, 75 Wn. App. 128, 131, 876 P.2d 935 (1994).

In the instant case, the parties worked together over the course of several days to come up with redactions that satisfied *Burton*. See 12/30/08 RP 2-32, 1/15/09 RP 4-30, RP 362-367, 496-7, 497-507, 1258-1264. Further, the court instructed the jury to not consider a defendant's statements against the co-defendant. RP 1691, 1758, 1779. A jury is presumed to have followed the court's instructions. *State v. Foster*, 135 Wn.2d 441, 472, 957 P.2d 712 (1998). Given that the statement complied with *Bruton* and the court properly instructed the jury, the court did not abuse its discretion in denying Smith's motion to sever.

c. The court did not abuse its discretion in denying Smith's motion for mistrial.

Finally, Smith alleges that the trial court erred in failing to grant his motion for a mistrial. The trial court's denial of a motion for a mistrial is reviewed for an abuse of discretion. See *State v. Rodriguez*, 146 Wn.2d 260, 269, 45 P.3d 541 (2002). "A trial court abuses its discretion only when its decision is manifestly unreasonable or is based on untenable reasons or grounds." *State v. C.J.*, 148 Wn.2d 672, 686, 63 P.3d 765 (2003). A trial court's denial of a motion for mistrial will be overturned only when there is a "substantial likelihood" the error prompting the motion affected the jury's verdict. *Rodriguez*, 146 Wn.2d at 269-70. A trial court should deny a motion for a mistrial unless "the defendant has

been so prejudiced that nothing short of a new trial can insure that the defendant will be tried fairly.” *Id.* at 270 (quoting *State v. Hopson*, 113 Wn.2d 273, 284, 778 P.2d 1014 (1989)).

The trial court is in the best position to determine the prejudice of the statement in context of the entire trial. *State v. Weber*, 99 Wn.2d 158, 166, 659 P.2d 1102 (1983). If an objection was made, the appellate court will still give deference to the trial court’s ruling when examining the conduct for prejudice because “the trial court is in the best position to most effectively determine if prosecutorial misconduct prejudiced a defendant’s right to a fair trial. *State v. Luvene*, 127 Wn.2d 690, 701, 903 P.2d 960 (1995).

A reviewing court should examine the following factors: (1) the seriousness of the irregularity, (2) whether the statement in question was cumulative of other evidence properly admitted, and (3) whether the irregularity could be cured by an instruction to disregard the remark, an instruction which the jury is presumed to follow. See *State v. Crane*, 116 Wn.2d 315, 332-333, 804 P.2d 10 (1991) *superseded on other grounds by statute as stated in In re Pers. Restraint of Andress*, 147 Wn.2d 602, 56 P.3d 981 (2002); *State v. Escalona*, 49 Wn. App. 251, 254, 742 P.2d 190 (1987).

In the instant case, Smith’s attorney asked for a mistrial twice. The first instance came after Jackson’s attorney’s opening statement. Jackson’s attorney stated,

Suffice it to say that Darrell admitted, first of all, that he was involved in planning this robbery. He was involved in it. No doubt about it. He admitted that he took Mr. Spencer and Mr. Jackson over to Ruben's apartment on Friday night with the plan being that there was going to be a robbery. He admitted that he went in, and there was too many people there, so it did not occur. He admitted that he went back — actually, there was four people there that night. He went back the next day with Pierre, or as he was known, Mexico, and Tyreek.

RP 574. At that point, Smith's attorney objected and made a motion for mistrial. RP 574. The court heard argument from all parties. RP 574-79. Jackson's attorney knew he had misspoke and proposed that he tell the jury that and rephrase to say "others." RP 578. The State pointed out that the harm to Smith was minimal because Smith's attorney had just got done telling the jury that he participated in planning this criminal enterprise. RP 578. The court denied the motion for mistrial. RP 579. Given that the mistake was quickly corrected, came at the beginning of a very long trial and there was not a dispute that Smith had participated in the planning, the court did not abuse its discretion in denying the motion.

Smith's attorney renewed the motion for a mistrial at the end of the State's case citing two particular statements that he thought would be attributed to his client despite the fact that Jackson had really attributed them to Spencer. RP 1819-20. However, as the State pointed out, it was Smith's attorney who wanted all mention of Spencer removed from the

statements as well. RP 1821. Under the doctrine of invited error, a party may not set up error at trial and then complain of it on appeal. *In re Pers. Restraint of Breedlove*, 138 Wn.2d 298, 312, 979 P.2d 417 (1999).

Further, the jury was instructed to only use Jackson's statement against Jackson and as noted above, the jury is presumed to follow the court's instructions. RP 1823, 1824. The court found that the redacted statements complied with *Bruton* and that the jury was properly instructed and denied the motion for mistrial. RP 1824. The court did not abuse its discretion in again denying the motion for a mistrial.

4. THE TRIAL COURT DID NOT VIOLATE
DEFENDANT'S RIGHT AGAINST DOUBLE
JEOPARDY BY ENHANCING DEFENDANT'S
SENTENCE WITH DEADLY WEAPON AND FIREARM
ENHANCEMENTS WHEN THE SUPREME COURT
DECIDED THIS ISSUE IN *KELLEY* AND *AGUIRRE*.

The double jeopardy clause bars multiple punishments for the same offense. *In re Borrereo*, 161 Wn.2d 532, 536, 167 P.3d 1106 (2007) (citing U.S. Const. amend. V; Wash. Const. art. I, sec. 9; *State v. Calle*, 125 Wn.2d 769, 776, 888 P.2d 155 (1995)). When a defendant's act supports charges under two statutes, the court must determine whether the legislature intended to authorize multiple punishments for the crimes in question. *Id.* "If the legislature intended that cumulative punishments can

be imposed for the crimes, double jeopardy is not offended.” *Id.* (citing *State v. Freeman*, 153 Wn.2d 765, 771, 108 P.3d 753 (2005)).

Legislative intent is the foremost consideration. “The question of what punishments are constitutionally permissible is no different from the question of what punishments the Legislative Branch intended to be imposed. Where Congress intended, as it did here, to impose multiple punishments, imposition of such sentences does not violate the Constitution.” *Missouri v. Hunter*, 459 U.S. 359, 386, 103 S. Ct. 673, 74 L. Ed. 2d 535 (1983) (emphasis in the original) (citing *Albernaz v. United States*, 450 U.S. 333, 344, 101 S. Ct. 1137, 67 L. Ed. 2d 275 (1981)).

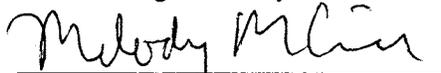
The Supreme Court recently decided this same issue. In *State v. Kelley*, 168 Wn.2d 72, 226 P.3d 773 (2010), the Supreme Court rejected the notion that *Blakely v. Washington*, 542 U.S. 296, 124 S. Ct. 2531, 159 L. Ed. 2d 403 (2004), and *Apprendi v. New Jersey*, 530 U.S. 466, 120 S. Ct. 2348, 147 L. Ed. 2d 435 (2000), require a new analysis of firearm sentencing enhancements in terms of double jeopardy. Citing clear legislative intent, the court found that there was no violation of double jeopardy when a firearm sentencing enhancement is imposed on a crime that has use of a weapon as an element. *Id.* The Supreme Court affirmed this reasoning in *State v. Aguirre*, ___ Wn.2d ___, __ P.3d ___, 2010 WL 727592 (2010) as applied to the addition of a deadly weapon enhancement where the use of a deadly weapon was an element of the crime. As such, defendants’ arguments on this issue fail.

D. CONCLUSION.

For the foregoing reasons, the State respectfully requests this Court affirm defendants' convictions and sentences.

DATED: May 17, 2010

MARK LINDQUIST
Pierce County
Prosecuting Attorney



MELODY M. CRICK
Deputy Prosecuting Attorney
WSB # 35453

Certificate of Service:

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

Bauckey and Nielsen

5.17.10 *Theresa Ka*
Date Signature

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STATE OF WASHINGTON
BY _____
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