

No. 39858-3-II
THE COURT OF APPEALS FOR THE STATE OF WASHINGTON
DIVISION II

STATE OF WASHINGTON,

Respondent,

vs.

DANIEL A. WARD

Appellant.

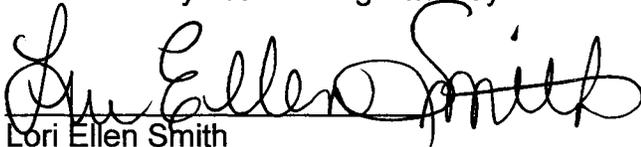
Appeal from the Superior Court of Washington for Lewis County

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RESPONSE BRIEF

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STATEMENT OF THE CASE

On February 13, 2009, A.M., the victim in this case, A.M., went to a party at site in a rural area of Lewis County, Washington. RP 61,63. A.M. went to the party with Johnny and Lindsey. RP 63. A.M. had just met Lindsey the night of the party. RP 61,64. The teens went to the party in Johnny Singletary's truck. RP 64,65. When they got to the location of the party, there were a lot of vehicles there. RP 66. It was very dark at the party. RP 66. There was a bonfire at the party. RP 67. Singletary parked far enough away from the fire that it did not cast any light on the area where they parked the truck. RP 67. A.M. had only been at the party about ten minutes when they were ready to leave, because the others they were waiting for had not shown up. RP 69. As A.M. was getting into the truck to leave, Daniel Ward approached him and asked him about Lindsey. RP 69. A.M. replied that he had just met Lindsay that night. RP 70. Ward then said, "Hey, nigger, what are you doing with Lindsey? What's your relationship with Lindsey?" RP 70. A.M. told Ward that he did not have any relationship with Lindsey and that he was just coming to the party with Reina, and Matt. RP 70. Ward then started slapping his own head and getting mad. RP 71. A.M. got out of the vehicle and ran

around it, trying to get away from Ward. RP 74. Daniel Ward ran after A.M., calling A.M. "nigger." RP 80. A.M. is African American. RP 85. A.M. jumped into the bed of the truck and back out, and then into the truck from the passenger side. RP 75. A.M. locked the driver's side door and closed the passenger side door. RP 75. At this point, Daniel Ward was at the driver's side door. RP 75. But before A.M. could lock the passenger side door, Daniel Ward's brother Dustin opened the passenger side door and started hitting A.M. RP 76. Dustin continued hitting A.M. but A.M. did not hit Dustin back, A.M. just "covered up." RP 101. As Dustin was hitting A.M., Daniel Ward was hitting the driver's side window and trying to open the door. RP 101,102.

At some point, Dustin unlocked the driver's side door and then Daniel Ward pulled A.M. out of the truck and began to hit A.M. RP 77, 102. Daniel Ward had A.M. on the ground. RP 77. A.M. got up, but Daniel Ward tacked him and started hitting him again. RP 78. A.M. thought that Daniel Ward's brother was holding A.M. down while Daniel Ward hit A.M. RP 78. A.M. was on the ground with Daniel Ward on top of him, hitting A.M.. RP 79. Daniel was hitting A.M. with a closed fist. RP 79. Daniel Ward kept hitting A.M. until A.M. was able to pull out his pocket knife and stab Daniel

with it. RP 81. Daniel Ward was still on top of A.M. hitting A.M. when A.M. was able to reach around and stab Daniel in the back or side with the pocket knife. RP 82. After being stabbed, Daniel Ward stopped hitting A.M. RP 82. Someone then told A.M. that A.M.'s head was bleeding. RP 82. At some point, A.M. heard someone say "no rocks" but A.M. did not remember being hit with a rock. RP 82,112. A.M. wrapped his shirt around his head to stop the bleeding and he left the party with Matt and Reina, and they went back to Matt's house. RP 83. A.M. then called his uncle and his uncle picked up A.M. and took him to the hospital. RP 83. A.M. received two stitches to his head wound. RP 84.

Ashley Pearson, sixteen years old, attends the same school as A.M., and was also at the party on February 13, 2009. RP 123. Ashley got to the part around ten or eleven o'clock. RP 124. Ashley said it was dark except for the fire. RP 126. Ashley pointed out Daniel Ward and said that she knew him from school, and that Daniel and Dustin Ward were at the party that night. RP 127, 128. After being down by the fire at the party for around twenty minutes, Ashley went back up to where the vehicles were parked. RP 129. Ashley said that A.M. was "up there" with Lindsey, and Daniel Ward got mad when he saw that. RP 131. Ashley saw Daniel when he

"started pounding his head and screaming and. . . he started chasing A.M., telling him he wanted to beat him up" RP 131. She said A.M. was running and saying that he did not want to fight. RP 131. Ashley said at some point A.M. said he had a knife and was going to use it because he didn't want to fight. RP 131. Ashley saw A.M. jump through the back of the truck to get away from Daniel Ward. RP 133. Ashley saw A.M. get into the truck and lock the driver's side door. RP 133. She saw Dustin get into the truck and unlock the driver's side door, so Daniel Ward could get in and then both Daniel and Dustin started hitting A.M. RP 133. Eventually, Ashley said the fight "turned into just Daniel and Arthur in the ditch." RP 137. Ashley saw Daniel on top of A.M., straddling him, and Daniel then picked up a rock and "smashed" A.M. in the head with it. RP 138. Ashley said it was a softball-sized rock, and that it was a "violent hit" with the rock. RP 139. Ashley heard Lindsey yell for Daniel to stop hitting A.M. RP 140. After Daniel hit A.M. with the rock, Ashley noticed blood trickling down the side of A.M.'s face. RP 140. Ashley said Kyle was one of the persons who helped A.M. get back up to the vehicles. RP 141. Ashley did not at any point see A.M. hit Daniel Ward. RP 142. Ashley said the fight

ended after A.M. got hit with the rock. RP 143. Ashley was driving that evening, and she had not been drinking. RP 145.

Kristen Olson went to the party with Ashley Pierson, Ryan Carter, and Samantha Johnson. RP 168. Kristen knows Daniel Ward and A.M. RP 171. Kristen saw Johnny Singletary and A.M. and Lindsey come to the party in Singletary's truck. RP 172, 173. Kristen noticed Daniel Ward walk up and pull Lindsey aside to talk to her. RP 173. Kristen saw that Daniel seemed to get mad about something and then Daniel started chasing A.M. around the car. RP 173, 176. Kristen heard Daniel say to A.M., "[g]et back here nigger." RP 176. She said A.M. was trying to get away from Daniel. RP 176. Kristen saw A.M. get into Singletary's truck and saw Dustin and Daniel punching A.M. RP 173. Kristen then saw Daniel pull A.M. out of the truck and they wound up in the ditch. RP 173. Kristen said Daniel was straddling A.M. and punching A.M.'s face. RP 178. Kristen did not see Daniel hit A.M. with the rock, nor did she see A.M. stab Daniel. RP 180. Afterwards, Kristen saw a "whole bunch of blood" coming from A.M.'s head. RP 181.

Kyle Tullis said that he was friends with A.M. and that he knew of Daniel and Dustin Ward. RP 193, 194, 196. Kyle was at the party on February 13th. RP 194. Kyle saw Daniel get mad

and start hitting himself in the head and then start yelling at A.M. RP 200, 201. Then he saw Daniel trying to "catch" A.M. RP 200, 201. Kyle saw Daniel chase A.M. around the truck to get away from Daniel. RP 201. Kyle saw A.M. jump into the cab of the truck and saw Dustin Wade go in after him and saw Dustin unlock the driver's side door so Daniel could get in. RP 203. Kyle said Daniel was yelling to Dustin, "get him Dustin." RP 203. While Daniel and Dustin were hitting A.M., Kyle said A.M. just had his arms up over his head, trying to cover it up. RP 205. Kyle saw Daniel pull A.M. out of the truck and take A.M. into the ditch. RP 206. Kyle said Daniel kept hitting A.M., and A.M. got up once but Daniel just put him back on the ground. RP 207. Kyle then saw Daniel pick up a rock and hit A.M. in the head with it. RP 207. Kyle did not see that Daniel had been stabbed until after the fight ended. RP 209. Kyle did not see A.M. stab Daniel. RP 209.

Johnny Singletary, Lindsey Hepburn and Samantha Johnson all were at the party and testified consistently with A.M.'s, Kyle's, Kristen's and Ashely's testimony. All of the witnesses said that Daniel Ward started the fight. RP 232--250(Singletary); RP 270-287(Lindsey); RP 296-312 (Samantha)(and as previously cited). Neither the rock or the knife were recovered by deputies. RP 340.

Daniel Ward testified that he "tussled" with A.M. inside the truck and that he pulled A.M. out of the truck and then "he tripped or something. He fell backwards and we went into the ditch and I was on top of him and I ended up hitting him a few times." RP 375. Daniel said, "I meant to hit him a few times." RP 375. Daniel Ward said that A.M. "was just putting his hands over his face" and was not hitting Daniel back at first. RP 376. Daniel said that was why he got off of A.M. "the first time." RP 376. Daniel said he hit A.M. about ten times when A.M. was on the ground. RP 376. Daniel said that he then got off of A.M. and started walking up to the road and A.M. was still in the ditch. RP 376. Daniel said that A.M. then got up and started "getting mad or whatever and he went to swing at me so I ducked him and then I picked him up by his legs and we went into the ditch again." RP 377. Daniel said he ended up hitting A.M. a "few more times" and then he got off of A.M. because he "felt a pain or something." RP 377. Daniel said that after he got off of A.M., "he kept coming at me. So basically what I did was I grabbed a rock when we were coming up together and I had my arm on his back neck and I was holding him down, his face down because he kept--he wasn't backing off or nothing, he was coming with me." RP 378. Then, Daniel said he "had the rock in my hand

and I hit him over the back of the head and that was it." RP 378. After that, Daniel said that some friends were holding A.M. against the truck, and that A.M. was yelling that he "wanted to fight more." RP 378. Daniel admitted that he and his brother Dustin had been drinking that night. RP 381. On cross, Daniel Ward admitted that he had started "arguing" with A.M. and that he had chased A.M. RP 382. Daniel admitted that prior to the "argument," A.M. had never done anything to him. RP 382. Daniel admitted that he told Deputy McGinty that he started pushing A.M. and that A.M. didn't want any part of it. RP 383. Daniel also admitted that he "just kept going at" A.M. RP 383. Daniel admitted that he and his brother were both hitting A.M. when A.M. was still in the truck, and that Daniel pulled A.M. out of the truck and that Daniel was on top of A.M. on the ground, hitting A.M. over and over again. RP 385.

Deputy Zimmerman took pictures of A.M.'s injuries at the hospital on February 14, 2009.. RP 162,163. Deputy Zimmerman said that A.M.'s injuries included a laceration to the back of his head and a "goose egg" on the left side of his forehead. RP 163,164; Ex.1,3,5. Deputy Zimmerman also interviewed A.M. and took a taped statement from him. Deputy Zimmerman said A.M. appeared quite shaken up at the time. RP 165. Deputy

Zimmerman did not recover the knife used by A.M. in the fight. RP 166. Detective Sergeant Dusty Breen saw Daniel Ward at the hospital. RP 345,346. Detective Breen noted that there was mud and dirt on the knees and shin-to-ankle areas of Daniel's pants. RP 346. Detective Breen also noted that Daniel's left and right hands were swollen, with the right hand appearing to be more swollen than the left. RP 346.

Deputy McGinty later talked with Daniel Ward about the fight. RP 360. Daniel said that he was drunk at the party, and that he saw Lindsey and A.M. "walking with their arms linked and it upset him." RP 360. Daniel said he got mad and confronted A.M. RP 360. Daniel told the deputy that he shoved A.M. RP 360. Deputy McGinty said Daniel told him that he chased A.M. into the truck, punched him, pulled A.M. out of the truck, slammed A.M. into the ground and repeatedly hit him. RP 361. Daniel told the deputy that he "just kept hitting" A.M. RP 361. Daniel told Deputy McGinty that when A.M. came at him he hit A.M. on the head with the rock. RP 361. Daniel told the deputy that he did not know that he had been stabbed, but that he felt a pain that felt like being stabbed. RP 362. Daniel did not tell Deputy McGinty that he felt he had acted in self defense.

After the case went to the jury, the trial court noted in open court that "we have had our instruction conference." RP 402. However, it is not clear where or when that "conference" took place--although it was not done on the record. Id. The trial court did ask the parties whether they had any exceptions or objections or any other issues with the jury instructions on the record in open court. RP 402-403. It does not appear that Ward ultimately requested a self defense instruction, and he only objected to Instruction No. 13. RP 402. That instruction was corrected to the satisfaction of Mr. Ward, and there were no other objections to the instructions. RP 402,403. Ward was found guilty of assault in the second degree with a deadly weapon enhancement. RP 474, 475. The jury found Ward not guilty of malicious harassment. RP 474. Ward filed a timely notice of appeal and the State submits this brief in response to Ward's opening brief on appeal.

ARGUMENT

A. BECAUSE THERE IS NO EVIDENCE TO SUPPORT A SELF DEFENSE INSTRUCTION AND BECAUSE A SELF DEFENSE INSTRUCTION WAS NOT REQUESTED, WARD WAS NOT "DENIED HIS RIGHT TO HAVE THE JURY INSTRUCTED ON" SUCH A THEORY.

Ward claims he was denied the right to have the jury instructed on his theory of the case when the jury was not instructed on self defense. There is no merit to this argument.

First of all, Ward did not request a self-defense instruction at trial as required by CrR 6.15(a). Generally, a party claiming that the trial court's instructions were erroneous must have objected on the same ground below or the party has waived the right to raise the issue on appeal. CrR 6.15(c); State v. Scott, 110 Wash.2d 682, 685-86, 757 P.2d 492 (1988). "No error can be predicated on the failure of the trial court to give an instruction when no request for such an instruction was ever made." State v. Kroll, 87 Wash.2d 829, 843, 558 P.2d 173 (1976). Accordingly, this issue is not properly before this Court. However, even if Ward can raise this issue now, his argument still fails because there is no credible evidence to support a self defense instruction in this case.

"Jury instructions are sufficient if they are supported by substantial evidence, allow the parties to argue their theories of the

case, and when read as a whole properly inform the jury of the applicable law." State v. Clausing, 147 Wn.2d 620, 626, 56 P.3d 550 (2002). However, "[i]t is prejudicial error to submit an issue to the jury that is *not warranted by the evidence*." Clausing, 147 Wn.2d at 627(emphasis added). "A trial court determines whether there is sufficient evidence to instruct the jury on self-defense by reviewing the entire record in the light most favorable to the defendant with particular attention to those events immediately preceding and including the alleged criminal act." State v. Callahan, 87 Wn.App. 925, 933, 943 P.2d 676 (1997). But, "[a] defendant is entitled to a self-defense instruction only if he has raised some credible evidence, from whatever source, that he feared death or great personal injury at the hands of the victim." State v. Ra, 142 Wn.App. 868, 706, 175 P.3d 609, 617 (2008)(emphasis added), citing RCW 9A.16.050 and State v. Read, 147 Wn.2d 238, 242, 53 P.3d 26 (2002); State v. Haydel 122 Wash.App. 365, 370, 95 P.3d 760(2004)(a claim of self-defense, however, is available only if the defendant first offers "credible" evidence tending to prove that theory or defense.)

However, a trial court does not err when it declines to instruct the jury on theories that are unsupported by the evidence.

See State v. Graeber, 46 Wn.2d 602, 605-06, 283 P.2d 974 (1955), *cert. denied*, 350 U.S. 938, 351 U.S. 970 (1956) (holding that it is unnecessary for trial court to give instructions where there is insufficient evidence to establish the defense theory, counsel fails to request the instruction, and counsel fails to object to the instructions the court gave); see also State v. Lathrop, 112 Wash. 560, 562, 192 P. 950 (1920) (holding that a trial court does not err in failing to give self-defense instruction where no evidence supports self-defense and where counsel failed to request the instruction).

Furthermore, "the right of self-defense cannot be successfully invoked by an aggressor, or one who provokes an altercation, *unless* he or she in good faith first withdraws from the combat at a time and in a manner to let the other person know that he or she is withdrawing or intends to withdraw from further aggressive action. State v. Craig, 82 Wash.2d 777, 783, 514 P.2d 151 (1973)." State v. Riley 137 Wash.2d 904, 909-914, 976 P.2d 624 (1999)(emphasis added). However, the defendant may exercise no greater force than was reasonably necessary, State v. Hendrickson, 81 Wn.App. 397, 400, 914 P.2d 1194 (1996).

According to the Ra case, "[t]he test [for self defense] has a subjective component: whether the defendant actually feared death or great personal injury; and an objective component: whether the defendant's fear of great harm was reasonable under the circumstances." Id., citing Read, supra (citing State v. Walker, 136 Wn.2d 767, 772, 966 P.2d 883 (1998)). Finally, to instruct the jury on self-defense, there must be evidence that: "(1)the defendant subjectively feared that he was in imminent danger of death or great bodily harm; (2) this belief was objectively reasonable; (3) the defendant exercised no greater force than was reasonably necessary; and (4) the defendant was not the aggressor." Callahan, 87 Wn.App. at 929(citations omitted). Here, Daniel Ward not only used unreasonable force (he was not "attacked" or provoked in the first place) but Ward was also clearly the initial, and only aggressor.

In the first place, a self defense instruction would have been denied because Ward was unquestionably the first aggressor--and there is no credible evidence that he had "withdrawn" from the altercation that he had started. Every eye witness (and the victim) to this assault said that Ward started the altercation. RP 74-76(A.M.); RP 131-133(Ashley); RP 173,176(Kristen); RP

200,201(Kyle); RP 241-242(J. Singletary); RP 275(Lindsey); RP 302,202 (Samantha). There was consistent testimony by eye witnesses and A.M. who said that Daniel Ward started beating on A.M. when he cornered A.M. inside the truck and then Daniel pulled A.M. out of the truck and to the ground, where Daniel straddled A.M. and continued to pummel A.M. with his fists. RP 77-79; 133, 137, 173, 178, 205,206.

When Daniel and A.M. were down in the ditch, most of the witnesses saw Daniel hit A.M. with the rock. RP 138, 207, 246, 208, 284,307. Daniel himself admitted on cross examination that he was the aggressor, and that A.M. did not want to fight, and that Daniel still kept going at A.M. RP 382,383, 385. The testimony was consistent that A.M. tried to avoid the fight from the beginning and that A.M. simply tried to cover his head and face with his arms while Daniel pummeled him. RP 101, 131, 142, 176, 200, 205, 376.

Daniel Ward's self serving testimony that they wound up in the ditch because A.M. "tripped or something" and that Daniel picked up the rock because A.M. "kept coming at" him, is simply not supported by the eye witnesses to the crime, as previously cited.

Nor does the evidence support Daniel's argument on appeal that he "in good faith first withdr[ew] from the combat *at a time and in a manner to let . . . [A.M.] know that he . . . [was] withdrawing or intend[ed] to withdraw from further aggressive action.*"

Craig(emphasis added). RP 78,79,137,138, 139, 178, 207. Nor did Daniel mention anything to Deputy McGinty about "self defense." RP 360-362. Furthermore, the dirt marks on the knees, shins and lower leg areas of Ward's pants support all of the eye witness accounts that Daniel Ward was on top of A.M., straddling him--in such a position, Daniel's pant legs would be dirty at the knees and lower legs, as seen by Detective Breen. RP 346. And Daniel's swollen hands showed the ferocity of Daniel Ward's attack on A.M. RP 346.

The bottom line here is that the evidence does not support a self defense theory, or instruction. This conclusion is further supported by the fact that Daniel Wade's trial counsel did not request a self defense instruction after hearing all of the evidence: he knew that doing so would be futile. For all of the previously-stated reasons, Wade's self defense argument is without merit, and this Court should agree.

1. Wade's Trial Counsel Was Not Ineffective for Failing to Request an Instruction on Self Defense.

Wade also argues that his counsel was ineffective for failing to request an instruction on self defense. This argument also fails.

To prove ineffective assistance of counsel an appellant must show that (1) trial counsel's performance was deficient and (2) the deficient performance prejudiced him. Strickland v. Washington, 466 U.S. 668, 687-289, 104 S.Ct. 2052, 80 L.Ed.2d 674 (1984); State v. Hendrickson, 129 Wn.2d 61, 77-78, 917 P.2d 563 (1996). Prejudice occurs when, but for the deficient performance by counsel, there is a reasonable probability that the outcome would have been different. In the Matter of the Pers. Restraint of Pirtle, 136 Wn.2d 467, 487, 965 P.2d 593 (1998). The defendant bears the burden of establishing both prongs before a reviewing court will deem trial counsel's performance ineffective. Strickland at 687, 104 S.Ct. at 2064. Mere differences of opinion regarding trial strategy or tactics cannot support an ineffective assistance of counsel claim. Hendrickson, 129 Wn.2d at 66-78. An attorney has no duty to argue frivolous or groundless matters before the court. State v. Stockman, 70 Wn.2d 941, 946, 425 P.2d. 898 (1967). Exceptional deference must be given when evaluating counsel's strategic

decisions. State v. McNeal, 145 Wn.2d 352, 362, 37 P.3d 280 (2002).

Here, Wade has not met his burden to show his trial counsel was ineffective because, as set out with cites to the record in the previous section, the evidence did not support a theory of self defense. Accordingly, whether to request a self defense instruction was not only a strategic decision, but requesting such an instruction would have been futile in this case. Decisions regarding trial strategy or tactics cannot be a basis for an ineffective assistance claim. Hendrickson, supra. And, trial counsel has no duty to pursue groundless issues. Stockman, supra. Because Ward cannot show that the trial court would have granted a request to instruct on self defense--even if his trial counsel had requested it--Ward's ineffective assistance claim fails. In other words, Ward cannot show that the outcome of the trial would have been different had his counsel requested a self defense instruction, so he cannot meet the prejudice prong of Strickland. In re Pirtle, supra. And, contrary to inferences made by Ward, it certainly is reasonable that Ward's trial counsel--after seeing how all of the evidence "shook out" at trial--would have abandoned any initial thoughts of pursuing a self defense theory. After all of the evidence was presented,

Ward's trial counsel reasonably would see that there simply was no basis for requesting a self defense instruction. Consequently, Ward has not met the very high bar for showing his trial counsel was ineffective. His arguments to the contrary fail.

B. THERE WAS NO VIOLATION OF WARD'S RIGHT TO A PUBLIC TRIAL BECAUSE OBJECTIONS OR EXCEPTIONS TO THE JURY INSTRUCTIONS WERE HELD ON THE RECORD IN OPEN COURT.

Ward also argues that his right to a public trial was violated because the attorneys and the court apparently had some sort of preliminary, off-the-record discussion about jury instructions (Ward claims this was done "in chambers"--however, it is not clear this is what occurred). The trial court then asked the parties whether they had objections or exceptions to the jury instructions on the record in open court. This procedure did not violate Ward's right to a public trial, and Ward's argument to the contrary is without merit.

An appellate court reviews de novo "[w]hether a defendant's right to a public trial has been violated . . ." State v. Brightman, 155 Wn.2d 506, 514, 122 P.3d 150 (2005). A criminal defendant has a right to a public trial under both the State and Federal Constitutions. Wash. Const. art. I, § 22; U.S. Const. amend VI; Brightman, 155 Wn. 2d at 514; see also, State v. Strode, 167 Wash.2d 222, 217

P.3d 310 (2009), and State v. Momah, 167 Wash.2d 140, 217 P.3d 321 (2009).

The seminal case on courtroom closure is State v. Bone-Club, 128 Wn.2d 254, 906 P.2d 325 (1995). In Bone-Club, the trial court closed the courtroom by stating, "all those sitting in the back, would you please excuse yourselves at this time." Id. at 256. Similarly, in In re Personal Restraint of Orange, 152 Wn.2d 795, 100 P.3d 291 (2004), the trial court ordered closure by stating, "*I am ruling* no family members, no spectators will be permitted in this courtroom during the selection of the jury because of the limitation of space, security, etcetera [sic]. *That's my ruling.*" Id. at 802 (emphasis in original). In Brightman, the trial court told the attorneys in a pre-trial proceeding to: "tell the friends, relatives, and acquaintances of the victim and the defendant that the first two or three days for selecting the jury the courtroom is packed with jurors, they can't observe that." Brightman, 155 Wn.2d at 511.

When determining whether a courtroom has been "closed," the reviewing court looks at the "plain language of [the trial court's] ruling" to determine whether the trial court has fully closed the courtroom, which triggers the Bone-Club analysis. Orange, 152 Wn.2d at 808. Likewise, the Brightman Court noted that, "once the

plain language of the trial court's ruling imposes a closure, the burden is on the State to overcome the strong presumption that the courtroom was closed." Brightman, 155 Wn.2d at 516.

In the present case, Ward claims the courtroom was "closed" when the parties and the judge apparently had a preliminary discussion about jury instructions off the record. RP 401. Frankly, the record is not clear as to when or where any so-called "instruction conference" was held. Id. However, it is clear that the trial court gave all parties a full opportunity to state their objections to, or questions about, the jury instructions in on the record in open court. RP 401 -403. And Ward did take exception to one of the instructions and that instruction was changed to suit Mr. Ward. RP 402. After correcting the instruction, the trial court said to Ward's counsel, "does that correction take care of your objection?" and trial counsel said, "yes, your honor." The trial court then said, "Do you have any other objections or exceptions [to instructions]?" And Ward's counsel responded, "[n]o your Honor." RP 402, 403. Under these facts, the State does not believe that Ward was denied his right to a public trial.

First of all, Ward cites no case that finds a Bone-Club violation where the trial court and the attorneys for both sides have

a preliminary discussion about jury instructions, either in chambers or otherwise off the record--when the defendant is given a full opportunity to "discuss" the instructions on the record in the open-to-the-public courtroom. Brief of Appellant 11-14. And the State has found no Washington case addressing courtroom closure in terms of off-the-record discussions of jury instructions. The cases cited by Ward--like most of the cases on courtroom closure thus far (except for Bone-Club itself)--address courtroom closure in the context of jury voir dire. State v. Erickson, 146 Wn.App. 200, 189 P.3d 245 (2008); Strode, supra; Momah, supra; In re Orange, supra. Because Ward does not cite any on-point authority, nor has the State found any, this Court need not consider Ward's argument on this issue. State v. Johnson, 119 Wn.2d 167, 171, 829 P.2d 1082 (1992)(the reviewing court need not review an issue unsupported by authority or persuasive argument).

Secondly, the trial court in the present case did not order the courtroom closed. RP 401. However, the State acknowledges that our appellate Courts are not in agreement about what constitutes a courtroom "closure." For example, in Momah, Division One held that conducting voir dire outside the courtroom does not amount to a courtroom closure if there is no explicit closure order. Momah,

supra. In State v. Wise, a panel of Division Two followed the reasoning in Momah and held that private questioning of a juror in chambers did not constitute a courtroom closure. State v. Wise, 148 Wash.App. 425, 436, 200 P.3d 266 (2009). However, other panels of Division Two and Division Three have held that conducting voir dire of one member of the venire privately outside of the courtroom (e.g., in chambers or the jury room) constitutes a courtroom closure for purposes of Bone-Club, even in the absence of an explicit court order. See e.g., State v. Heath, 150 Wash.App. 121, 206 P.3d 712 (2009) (Div.II); Erikson, 146 Wash.App. 200 (2008) (Div.II); State v. Duckett, 141 Wash.App. 797, 173 P.3d 948 (2007) (Div.III); State v. Frawley, 140 Wash.App. 713, 167 P.3d 593 (2007).

In sum, the State has found no Washington authority that states that preliminary, off-the-record discussions of jury instructions between all counsel and the trial court, as apparently occurred here, violates the public's or the defendant's right to a public trial. And Ward cites no authority on point. Accordingly, this Court should agree that, under the circumstances presented here, there was no violation Ward's (or the public's) right to a public trial.

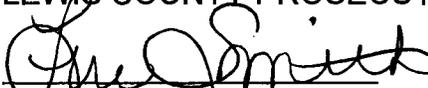
CONCLUSION

For all of the foregoing reasons, Ward's conviction and sentence should be affirmed in all respects.

RESPECTFULLY SUBMITTED this 1st day of June, 2010.

L. MICHAEL GOLDEN
LEWIS COUNTY PROSECUTING ATTORNEY

by:


LORI SMITH, WSBA 27961
Deputy Prosecuting Attorney

Declaration of Service

The undersigned certifies that on this date a copy of the document to which this certificate is attached was served upon the Appellant by U.S. mail, addressed to Appellant's Attorney as follows: Dana M. Lind, Attorney at Law, 1908 E. Madison St., Seattle, WA 98122-2842.

Dated this 1st day of June, 2010, at Chehalis, Washington.



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