

No. 40530-0-II

COURT OF APPEALS, DIVISION TWO
OF THE STATE OF WASHINGTON

STATE OF WASHINGTON,

Respondent,

v.

ROLAND DOUGLAS,

Appellant.

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STATE OF WASHINGTON
BY _____
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FILED
COURT OF APPEALS
DIVISION II

APPEAL FROM THE SUPERIOR COURT OF THE
STATE OF WASHINGTON FOR MASON COUNTY

The Honorable Toni A. Sheldon, Trial Court Judge
Cause No. 09-1-00177-4

BRIEF OF RESPONDENT

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A. ASSIGNMENTS OF ERROR

1. Appellant received ineffective assistance of counsel.
2. The State introduced evidence that violated the confrontation clauses of Washington Constitution article IV, section 22 and the Sixth Amendment.
3. The evidence was insufficient to prove the essential elements of third degree rape of a child, RCW 9A.44.079.
4. The trial court induced the defense to stipulate to damaging evidence on the erroneous grounds.
5. The court erroneously admitted prior bad acts evidence under RCW 10.58.090.
6. The court allowed the prosecutor to call a witness for the sole purpose of impeachment, and to coach the witness with an inadmissible recording before he took the stand.
7. Appellant was denied a record of sufficient completeness.
8. Appellant was denied a public trial as required by the Amendment and art. 1 § 22.
9. The prosecutor committed reversible misconduct in closing argument.
10. Cumulative errors denied Appellant a fair trial under the Fifth Amendment and Const. art. 1, § 22.

B. ISSUES PERTAINING TO ASSIGNMENTS OF ERROR

1. Did Appellant receive effective assistance of counsel when no errors occurred?
2. Did err occur when the State asked general question regarding an out of court statement that was subject to a motion in limine, that limited questions about specifics of the statement?
3. Was *Crawford* violated when the statements at issue were not testimonial in nature?
4. Did the State prove the age difference required by rape of child in the third degree when the victim testified to her age and the detective testified to what Douglas's age was?
5. Did the trial court err and improperly admit evidence under RCW 10.58.090 that Douglas committed a prior sex offense when it methodically addressed each element of that statute?

6. Was it improper for A.J.S. to refresh her memory from a transcribed statement?
7. Did error occur when Detective Heldreth testified about general issues involved in a forensic child interview?
8. Was it proper to impeach Pippins when he testified inconsistently with prior statements?
9. Was it improper to allow Pippins to review his previous statement prior to testifying?
10. Was a cautionary instruction needed when Pippins was impeached for being inconsistent?
11. Was Douglas denied an appellate record of sufficient completeness when no prejudice has been shown and there was no attempt to supplement the record by way of affidavit?
12. Was Douglas denied a public trial when a sidebar between court and counsel was based on legal matters/
13. Did the State commit prosecutorial misconduct when its arguments were proper and did not prejudice Douglas's right to a fair trial?
14. Did cumulative errors deny Douglas a fair trial, when errors did not occur?

C. ENCE RELIED UPON

The official Report of Proceedings will be referred to as "RP." The Clerk's Papers shall be referred to as "CP."

D. STATEMENT OF THE CASE

1 & 2. Procedural History & Statement of Facts. Pursuant to RAP 10.3(b), the State accepts Douglas' recitation of the procedural history and facts.

E. ARGUMENT

1. Error did not occur when Douglas was represented by effective counsel.

To establish ineffective assistance of counsel, a defendant must show that: (1) his counsel's performance was deficient; and (2) the deficient performance resulted in prejudice. *State v. Walker*, 143 Wash.App. 880, 890, 181 P.3d 31 (2008); see *Strickland v. Washington*, 466 U.S. 668, 687, 104 S.Ct. 2052, 80 L.Ed.2d 674 (1984).

We start with the strong presumption that counsel's representation was effective. *State v. Studd*, 137 Wash.2d 533, 551, 973 P.2d 1049 (1999). This requires the defendant to demonstrate the absence of legitimate strategic or tactical reasons for the challenged conduct. *State v. McFarland*, 127 Wash.2d 322, 336, 899 P.2d 1251 (1995).

Deficient performance is performance below an objective standard of reasonableness based on consideration of all the circumstances. *State v. Rodriguez*, 121 Wash.App. 180, 184, 87 P.3d 1201 (2004). Prejudice means that there is a reasonable probability that, except for counsel's unprofessional errors, the result of the proceeding would have been different. *State v. McFarland*, 127 Wash.2d 322, 334-335, 899 P.2d 1251 (1995). Effective assistance of counsel does not mean successful

assistance of counsel. *State v. White*, 81 Wn.2d 223, 225, 500 P.2d 1242 (1972). Competency of counsel will be determined upon the entire record. *State v. Gilmore*, 76 Wn.2d 293, 297, 456 P.2d 344 (1969).

This analysis applies to many of the arguments set out by Douglas. At no time was Douglas represented by ineffective counsel.

2. No error occurred because the State did not violate the motion in limine.

The court granted a motion in limine “to exclude testimony from the alleged victim’s mother or anyone else with regard to the specifics of a telephone call that were said to have alerted her that her daughter was having sex with a sex offender.” RP Vol VII 73. The State asked Ms. Kessel general question regarding this telephone call:

Q: And did that person provide you with information that was concerning to you?

A: Yes

Q: What was the general nature of your concern after getting that phone call?

A: That my daughter was having sexual activities with someone besides her boyfriend.

Q: And who was the person that she was supposedly having sexual relations with?

A: Roland. RP Vol VII 90.

Defense counsel made no objection to this line of questioning.

The issue here is whether the State violated the order in limine, and if so, what remedy is called for. The State did not inquire into specifics of the anonymous phone call, per the court's motion in limine. The questions asked by the State were general in nature and specific testimony regarding the phone call was never requested. The State asked Ms. Kessel general questions about the "nature" of her concern regarding the phone call and she names Douglas as part of that concern. Counsel for Douglas did not object at the introduction of this evidence because the motion had not been violated.

On the other hand, if the court deems that a violation of the motion in limine did occur, the trial court has no duty to remedy a violation *sua sponte*. *State v. Sullivan*, 69 Wash.App. 167, 847 P.2d 953 (1993). Unless the trial court indicates that further objections are required when making its ruling, its decision is final, and the party losing the motion in limine has a standing objection. *State v. Kelly*, 102 Wn.2d 188, 685 P.2d 564 (1984). In the present case, the State was the party that lost the motion, and the State maintained a standing objection.

The court in *Sullivan* held that, "in the absence of any unusual circumstances that makes it impossible to avoid the prejudicial impact of

evidence that had previously been ruled inadmissible, the complaining party at the time must make a proper objection in order to preserve the issue for appeal.” Defendant’s failure to object, waives review of the trial court’s action or lack thereof on the violation of the order in limine.

Sullivan, 69 Wash.App. 167, 847 P.2d 953. The court in that case states:

“It is appropriate then that, where the evidence has been admitted notwithstanding the trial court’s prior exclusionary ruling, the complaining party be required to object in order to give the trial court the opportunity of curing any potential prejudice. Otherwise, we would have a situation fraught with a potential for serious abuse. A party so situated could simply lie back, not allowing the trial court to avoid the potential prejudice, gamble on the verdict, and then seek a new trial on appeal.” *Id* at 172.

In the present case, if a violation did occur, then Douglas should have objected at the time the evidence was introduced. However, no such violation occurred. Therefore, there was no need for counsel to object to this evidence and Douglas received effective counsel. (see discussion in section 1)

3. Statements made by anonymous caller were not testimonial in nature.

The right to confront and cross-examine adverse witnesses is guaranteed by both the federal and state constitutions. U.S. Const. amend 6; Wash. Const. art. I, § 22. Out-of-court statements by witnesses that are testimonial are barred, under the Confrontation Clause, unless witnesses are unavailable and defendants had prior opportunity to cross-examine witnesses, regardless of whether such statements are deemed reliable by court. *Crawford v. Washington*, 541 U.S. 36, 124 S.Ct. 1354, 158 L.Ed. 2d 177 (2004) The test for determining whether declarant's out-of-court statement is testimonial, and thus implicates defendant's confrontation right, is whether reasonable person in declarant's position would anticipate his or her statement being used against the accused in investigating and prosecuting the alleged crime. *Id.* The court in *Crawford*, went on to say that casual remarks made to family, friends, and nongovernment agents are generally not testimonial statements because they were not made in contemplation of bearing formal witness against the accused. *Id.* at 51

Testimony regarding the anonymous telephone call in the present case did not violate the confrontation clause because any statements made by the anonymous caller were not testimonial in nature. It is a stretch of the imagination that the anonymous caller was contemplating that what he was saying to Ms. Kessel would be used against Douglas in a trial. These statements were not made to law enforcement and it is reasonable to

assume that these statements would not be used against Douglas in a prosecution. In fact, because the specific statements made by the anonymous caller were excluded and not examined, Douglas had no reason to confront the caller.

4. There was sufficient evidence to prove the required age difference between Douglas and A.J.S.

Evidence is sufficient if, viewed in the light most favorable to the State, it permits any rational trier of fact to find all of the essential elements of the crime beyond a reasonable doubt. *State v. Salinas*, 119 Wn.2d 192, 201, 829 P.2d 1068 (1992). In a criminal case, the State must prove each element of the alleged offense beyond a reasonable doubt. *State v. Alvarez*, 128 Wash.2d 1, 13, 904 P.2d 754 (1995).

A claim of insufficiency admits the truth of the State's evidence and requires that all reasonable inferences be drawn in favor of the State and interpreted most strongly against the defendant. *Salinas*, 119 Wn.2d at 201. Direct evidence is not required to uphold a jury's verdict; circumstantial evidence can be sufficient. *State v. O'Neal*, 159 Wash.2d 500, 506, 150 P.3d 1121 (2007).

Douglas alleges that the State failed to prove Douglas's age. Douglas further alleges that the only evidence relating to the defendants age was A.J.S's testimony that Douglas told her he was 21 and that the

State told the jury that Douglas was 21. However, detective Heldreth testified that after he contacted Douglas he ascertained that his birthday was November 8, 1987. RP Vol VII 153. Therefore, the State proved this element of the crime beyond a reasonable doubt.

5. Evidence that Douglas committed a prior sex offense was properly admitted under RCW 10.58.090. RCW 10.58.090 is constitutional.

Constitutional challenges to legislation are questions of law that are reviewed de novo. *State v. Gresham*, 153 Wash.App. at 659,663, 223 P.3d 1194 (2009). Statutes are presumed constitutional, and the party challenging the legislation bears the burden of proving the legislation is unconstitutional beyond a reasonable doubt. *Id.* at 664.

The doctrine of separation of powers is implicit in our constitution, derived from the distribution of power into three coequal branches of government. *Id.* at 643. However, the three branches are not hermetically sealed and some overlap must exist. *City of Fircrest v. Jensen*, 158 Wash.2d 384, 393, 143 P.3d 776 (2006). The inquiry that must be made is not whether two branches of government engage in coinciding activities, but rather whether the activity of one branch threatens the independence or integrity or invades the prerogatives of another. *Id.* at 393.

The authority to enact evidence rules is shared by the Supreme Court and the legislature. *Id.* at 394. The Supreme Court is vested with

judicial power from article IV of our constitution and from the legislature under RCW 2.04.190. The court's authority to govern court procedure flows from these dual sources of authority. The legislature's authority to enact rules of evidence has long been recognized by the Supreme Court. *State v. Pavelich*, 153 Wash. 379, 381, 279 P. 1102 (1929). The adoption of the rules of evidence is a legislatively delegated power of the judiciary. *Id.* at 381. Therefore, rules of evidence may be promulgated by both the legislative and judicial branches. *Fircrest*, 158 Wash.2d at 394.

When rules and statutes cannot be harmonized, the nature of the right at issue determines which one controls. *State v. Gresham*, 153 Wash.App. at 667 223 P.3d. 1194 (2009). Whenever there is an irreconcilable conflict between a court rule and a statute concerning a matter related to the court's inherent power, the court rule will prevail. *Id.* at 667.

The Court in *Gresham* has succinctly addressed Douglas's separation of powers argument by holding that RCW 10.58.090, while permissive in allowing 404(b) evidence, also preserves the trial court's authority to exclude evidence of past sex offenses under ER 403. *Gresham*, 153 Wash.App. at 669. As the Court in *Gresham* correctly reasoned:

RCW 10.58.090(1) states, “In a criminal action in which the defendant is accused of a sex offense, evidence of the defendant’s commission of another sex offense or sex offenses is admissible notwithstanding Evidence Rule 404(b), if the evidence is not inadmissible pursuant to Evidence Rule 403. *Gresham*, 153 Wash.App. at 669-670.

Advancing this rationale a step further, the *Gresham* Court reasoned that with this language, the legislature recognized the trial court’s ultimate authority to determine what evidence will be considered by the finder of fact in each case. *Gresham*, 153 Wash.App. at 670. Because the statute is permissive and not mandatory, the trial court’s admission of evidence involving prior sex offenses does not “circumscribe a core function of the courts.”

The reasoning in *Gresham* is also quite similar to the 10th Circuit’s opinion in *U.S. v. Benally*, 500 F.3d 1085, 74 Fed R. Evid. Serv. 361 (C.A. 10 2007), which examined Federal Evidence Rules (FER) 413 and 414 in addressing propensity evidence in the context of sexual assault and child molestation. The difference in *Benally* is that while “congressional intent” instead of the Washington State Legislature or Washington Supreme Court was involved, the underlying goal remains unchanged: an intent regarding the admission of evidence tending to show a defendant’s propensity to commit sexual assault or child molestation. *Benally*, 500 F.3d at 1090.

Defendant, under the protections of RCW 10.58.090, will have: (a) the trial court judge serving as gatekeeper in applying the multipart test to determine whether the evidence will be admitted; and (b) an ER 403 balancing test to protect him/her from unfair prejudice. RCW 10.58.090 does not violate the separation of powers doctrine, just as FER 413 and 414 do not offend federal law.

Douglas argues that his prior conviction was entirely irrelevant and the court did not engage in any balancing whatsoever. However, the trial court thoughtfully and methodically parsed RCW 10.58.090 and correctly concluded that because its elements were satisfied, evidence of Douglas's prior sex crime conviction should be admitted. RP Vol VI 38-45 In evaluating whether evidence of a defendant's prior sex offense should be admitted, RCW 10.58.090(6) directs the trial court to consider the following factors:

- (a) The similarity of the prior acts to the acts charged;
- (b) The closeness in time of the prior acts to the acts charged;
- (c) The frequency of the prior acts;
- (d) The presence or lack of intervening circumstances;
- (e) The necessity of the evidence beyond the testimonies already offered at trial;
- (f) Whether the prior act was a criminal conviction;

- (g) Whether the probative value is substantially outweighed by the danger of unfair prejudice, confusion of the issues, or misleading the jury, or by considerations of undue delay, waste of time, or needless presentation of cumulative evidence; and
- (h) Other facts and circumstances.

The court found that the present crime and the prior act were similar in a couple of regards. The court stated “the prior act is said to have been sexual intercourse with a 15 year old while Mr. Douglas was more than 24 months older than that individual. And is essentially the same conduct that is alleged in this information.” RP Vol. VI 42-43. Subsection (6)(b) was likewise met under *U.S. v. Benally*, 500 F.3d 1085, 74 Fed R. Evid Serv. 361 (C.A. 10 2007). In *Benally*, because there, evidence of the defendant’s prior sex crimes that occurred some forty years earlier was deemed admissible. *Benally*, 500 F.3d at 1088, 1091-1092. In Douglas’s case, just approximately two years separated his prior conviction and date of his current offense in 2009. RP Vol. VI 43. The court found that a two year period is close in time. The court found that in regard to (6)(c), that the prior acts occurred over a two-week period and just one act is alleged in this particular case. RP Vol. VI 43.

In addressing prong (6)(d), the court found no intervening factors. The Court in *Benally*, stated that treatment, intoxication or drug use, given

certain facts might be considered an intervening circumstance. *Id* at 1093. In the present case, there are no such intervening factors. The court stated that with regard to prong (6)(e) that the state intended to call the alleged victim to testify and one witness to testify regarding an alleged conversation with the defendant in which he allegedly admitted the currently charged activity. The court went on to say “that’s not a significant number of witnesses or overpowering amount of witnesses; that the court would find that it would be within the State’s discretion to call this particular evidence a necessity.’ RP Vol VI 43-44. In regards to prong (6)(f), the prior act was a criminal conviction.

The trial court found when examining prong (6)(g), that the probative value is not substantially outweighed by a danger of unfair prejudice, confusion of the issues, or misleading the jury, undue delay, waste of time or needless presentation of cumulative evidence in that the evidence that would be coming in would be as to a conviction rather than an event in time that’s being explained. RP Vol. VI 44. The court goes on to say this is less of a danger of unfair prejudice than explaining to the jury what specific behaviors were going on. RP Vol. VI 44. This dovetails into Douglas’s argument regarding *Old Chief v. U.S.*, 519 U.S. 172, 117 S.Ct 644 (1997) That case allows defendant’s to stipulate to the existence of a prior conviction to keep the State from discussing the details. *Id.* Counsel

agreed to the form of the stipulation to avoid the obvious prejudice that would result from the lack of stipulation. Counsel maintained objections to the introduction of this evidence; the stipulation was simply to the form. This was proper and there was no prejudice to the Douglas and the court agreed.

Based on a thorough evaluation and careful balancing of all the sections in RCW 10.58.090, the trial court reached its decision to admit evidence of Douglas's 2008. The court also gave a limiting instruction at the time the evidence was introduced (RP Vol. VII 151-152) and included one in the final packet of jury instructions. RP Vol. VII 163. Error did not occur.

6. Witness may refresh memory with a writing.

ER 612 governs the procedure for using a writing to refresh a witness's memory. A witness may use a writing to refresh his or her memory for the purpose of testifying if the adverse party has an opportunity to review the writing. The opposing party is entitled to cross-examine the witness from the writing and to introduce portions of it into evidence. ER 612. The criteria for the use of notes or other memoranda to refresh a witness's recollection are (1) that the witness's memory needs refreshing, (2) that opposing counsel have the right to examine the writing, and (3) that the trial court be satisfied that the witness is not

being coached-that the witness is using the notes to aid, and not to supplant, his/her own memory. *State v. Little*, 57 Wash.2d 516, 521, 358 P.2d 120 (1961). A witness is allowed to read from a writing when it refreshes the memory, the defendant had an opportunity to review the writing and perform cross-examination based on the writing, and there was no indication that they were coached. *State v. Williams*, 137 Wash.App. 736, 154 P.3d 322 (2007).

Like *Williams*, allowing A.J.S. to read from the transcribed statement was not error. The State asked A.J.S. a number of questions that she did not remember the answers. The State asked if reading a copy of her transcribed prior statement would refresh her memory. A.J.S. read the transcript and told the State that her memory was refreshed. RP Vol. VII 105. There is no indication that counsel did not have access to the transcription and was able to cross-examine A.J.S. regarding it. Therefore, the trial court did not error in allowing A.J.S. to refresh her memory and read a portion of her prior statement.

7. Detective Heldreth did not testify regarding hearsay statements.

ER 802 states: Hearsay is not admissible except as provided by these rules, by other court rules, or by statute. ER 801(c) states: "Hearsay" is a statement, other than one made by the declarant while testifying at the trial or hearing, offered in evidence to prove the truth of the matter asserted.

The State at no time elicited hearsay testimony from Detective Heldreth. Detective Heldreth testified about generalities regarding the interview process of A.J.S. RP. Vol. VII 132-134. At no time did Detective Heldreth repeat what A.J.S. said to him in the interview. Douglas argues in his brief that Heldreth testified about what A.J.S. allegedly told him, specifically, “what happened between her and Roland.” The actual testimony from Detective Heldreth was: “But during that two hours I was gaining information from her and building that rapport so she’d feel comfortable enough to tell me what happened between her and Roland.” RP Vol. VII 134. Detective Heldreth did not testify about what A.J.S. told him had happened between her and Roland.

Detective Heldreth explained his experience relevant to a law enforcement officer which included, among the general law enforcement training: interviewed multiple children ranging from three to adulthood; attended child interview courses, attended three separate interview interrogation courses put on by the FBI (each were one week long). RP Vol. VII 131. Detective Heldreth was not giving his opinion regarding the interview based on his training or experience, simply explaining the interview process with A.J.S. Counsel did not object to Detective Heldreth’s testimony because it was not objectionable.

8. The State properly impeached witness Pippins.

Although State may impeach its own witness, it may not call witness for primary purpose of soliciting testimony in order to impeach witness with testimony that would be otherwise inadmissible. *State v. Lavaris*, 106 Wash.2d 340, 721 P.2d 515 (1986). There is nothing in the record that would support Douglas's assertion that the State simply called Pippin's for impeachment purposes. In fact, the record supports the exact opposite and reflects the following: "It's a fairly short statement, and we'll end up having to mark the CD as evidence, depending on what his testimony is and whether or not it's consistent or inconsistent with the statement that he gave to the detective." RP Vol. VII 83. It is clear from the record that the State was not sure how Mr. Pippins would testify. Ultimately Pippins testimony was inconsistent with prior statements and the State had every right to inquire. Nothing improper transpired when the State asked Pippin about his prior statements.

9. The State did not coach witness Pippins when they had him listen to his prior statement.

Prior to any testimony in this case the State, defense counsel, and Pippins listened to a recording of Pippins statement to Detective Heldreth. RP Vol. VII 85. Subsequently Pippins was called to testify by the State.

ER 613(a) states:

In the examination of a witness concerning a prior statement made by witness, whether written or not, the

court may require that the statement be shown or its content disclosed to the witness at that time, and on request the same shall be shown or disclosed to opposing counsel.

In accordance with ER 613, Pippins was given an opportunity to review the statement. This rule is clear that it does not matter what form of media the statement is in. The fact that the statement was recorded and not written is inconsequential. After, the witness Pippins had an opportunity to listen to his statement the State inquired of him.

Pippins testimony was inconsistent with his prior statement. RP Vol. VII 123-124. The statement is admissible if it is inconsistent with the witness's statements on either direct or cross-examination. *State v. Robbins*, 25 Wn.2d 110, 169 P.2d 246 (1946). The State had every right to inquire into Pippins prior statement to Detective Heldreth when his testimony at trial was inconsistent.

The State acted proper when it inquired of Detective Heldreth regarding statements Pippins made to him prior to trial. ER 613 (b) states:

Extrinsic evidence of a prior inconsistent statement by a witness is not admissible unless the witness is afforded an opportunity to explain or deny the same and the opposite party is afforded an opportunity to interrogate the witness thereon, or the interests of justice otherwise require.....

Pippins was afforded an opportunity to explain or deny the inconsistencies and Douglas was likewise afforded an opportunity to interrogate the him. Extrinsic evidence may consist of testimony by another witness or, in the event of a written inconsistent statement, the writing itself. *Webb v. Seattle*, 22 Wn.2d 596, 157 P.2d 312 (1945). The extrinsic evidence in the present case, relating to Pippins inconsistent statements by way of Detective Heldreth's testimony. This was appropriate and contemplated by ER 613.

10. Cautionary instruction was not needed regarding impeachment evidence.

Failure to give cautionary instruction that evidence of prior inconsistent statements made by a witness was not admitted to prove truth or falsity of statements previously made but only for its bearing upon credibility or witness' testimony at trial is not necessarily prejudicial error, and whether it is such error depends on circumstances of each case. *State v. Gilmore*, 42 Wash.2d 624, 257 P.2d 215 (1953). Clearly Pippins was inconsistent and evasive. It is the jury's duty to determine what credibility is given to the witnesses. The court's instructions to the jury included the following:

You are the sole judges of the credibility of the witnesses and of what weight is to be given to the testimony of each. In

considering the testimony of any witness, you may take into account the opportunity and ability of the witness to observe, the witness's memory and manner while testifying, any interest, bias or prejudice the witness may have, the reasonableness of the testimony of the witness considered in light of all the evidence, and any other factors that bear on believability and weight.

RP Vol. VII 161.

The absence of a cautionary instruction was not prejudicial error and the aforementioned jury instruction guides the jury when dealing with credibility issues.

11. Douglas was not denied an appellate record of sufficient completeness when no actual prejudice has been shown and no attempt to supplement the record was made.

A criminal defendant is constitutionally entitled to a record of sufficient completeness to permit effective appellate review of his or her claims. *State v. Thomas*, 70 Wash.App. 296, 852 P.2d 1130 (1993). A sufficiently complete record does not necessarily require a verbatim transcript of every word. *State v. Tilton*, 149 Wn.2d 775, 72 P.3d 735 (2003). The defendant must demonstrate some defect in the record before a new trial is granted. Additionally, the defendant must cure defects in the record with affidavits of the trial court or counsel if possible. *State v. Miller*, 40 Wash.App. 483, 698 P.2d 1123 (1985). The court in *Miller* stated, "the usual remedy for defects in the record should be to supplement the record with appropriate affidavits. The defendant's

appellate counsel has made no attempt to provide this court with affidavits of the trial court or counsel. We hold the defendant waived his right to a complete record by not attempting to obtain affidavits from the trial court and counsel concerning the missing portion of the record. *Id.* at 488. Douglas has failed to demonstrate any actual prejudice and never made an attempt to supplement with the appropriate affidavits.

12. Douglas's right to a public trial was fulfilled.

A criminal defendant has the right to a "speedy and public trial." Art. 1, § 22. The constitution also requires that justice be administered openly. Art. 1, § 10.

The Washington Supreme Court has held that where a courtroom is closed during significant portions of trial, these constitutional rights are violated. In *State v. Marsh*, 126 Wash. 142, 145, 217 P. 705 (1923), the superior court tried an adult as if he were a juvenile, closing the entire proceeding and failing to provide counsel. In *State v. Bone-Club*, 128 Wn.2d 254, 256-57, 906 P.2d 325 (1995), the trial court summarily granted the State's request to clear the courtroom for the pretrial testimony of an undercover detective. In *State v. Brightman*, 155 Wn.2d 506, 511, 122 P.3d 150 (2005) the trial court ordered -- sua sponte -- that the courtroom be closed for the entire 2 ½ days of voir dire, excluding the defendant's family and friends. In *In re Pers. Restraint of Orange*, 152

Wn.2d 795, 100 P.3d 291 (2004), the trial court summarily ordered the defendant's family and friends excluded from *all* voir dire proceedings. And, in *State v. Easterling*, 157 Wn.2d 167, 172-73, 137 P.3d 825 (2006), the trial court ordered the defendant and his attorney excluded from pretrial motions regarding the co-defendant. Most recently, in *State v. Strode*, 167 Wn.2d 222, 217 P.3d 310 (2009), the court held that private questioning of a subset of jurors violated the right to a public trial where the court failed to balance the *Bone-Club* factors before holding voir dire in chambers. In *State v. Momah*, 167 Wn.2d 140, 217 P.3d 321 (2009), the court held that, even if there was error, Momah had invited the error by his conduct, so he was not entitled to a new trial.

In each of the cases above, however, a courtroom closure was either directly ordered or indirectly effectuated by the trial court's action. In this case, the courtroom was never closed at all. If the courtroom was never closed at all, the cases cited by Douglas are simply not controlling.

In similar contexts, the Washington Supreme Court has recognized that sidebars and the like are not truly trial proceedings to which the defendant or the public must be granted access. For example, in *In re Personal Restraint of Lord*, 123 Wn.2d 296, 306, 868 P.2d 835 (1994), the supreme court considered an argument that the defendant had a right to be present at numerous conferences between the lawyers and the judge,

including a pretrial hearing in which the court deferred ruling on an ER 609 motion, granted a motion for funds to get Lord a haircut and clothing for trial, settled on the wording of the jury questionnaires and the pretrial instructions, and set a time limit on the testing of certain evidence. *Lord*, 123 Wn.2d at 306. It also considered whether Lord had the right to be present during a proceeding where the court announced its rulings on evidentiary matters which had previously been argued, ruled that the jurors could take notes, and directed the State to provide the defense with summaries of its witnesses' testimony. *Id.* The court held that Lord had a right to be present at none of these purely legal discussions between the court and counsel.

The core of the constitutional right to be present is the right to be present when evidence is being presented. *United States v. Gagnon*, 470 U.S. 522, 526, 105 S.Ct. 1482, 84 L.Ed.2d 486 (1985) (per curiam). Beyond that, the defendant has a “right to be present at a proceeding ‘whenever his presence has a relation, reasonably substantial, to the fulness of his opportunity to defend against the charge....’ ” *Gagnon*, 470 U.S. at 526 (quoting *Snyder v. Massachusetts*, 291 U.S. 97, 54 S.Ct. 330, 78 L.Ed. 674, 90 A.L.R. 575 (1934)). The defendant therefore does not have a right to be present during in-chambers or bench conferences between the court and counsel on legal matters, *United States v. Williams*, 455 F.2d 361 (9th Cir.), cert. denied, 409 U.S. 857 (1972), at least where those matters do not require a resolution of disputed facts. *People v. Dokes*, 79 N.Y.2d 656, 584 N.Y.S.2d 761, 595 N.E.2d 836 (1992) (right to be present during hearing on admissibility of prior conviction).

Id.

Similarly, in *In re Personal Restraint of Pirtle*, 136 Wn.2d 467, 484, 965 P.2d 593 (1998), the court held that the defendant need not be present for discussions about the wording of jury instructions, ministerial matters, and whether the jury should be sequestered. In *Pirtle* the court held that, although the defendant should have been present for a hearing where juror misconduct was discussed, his absence was immaterial where the motion was later argued and decided in his presence. *Pirtle*, 136 Wn.2d at 484.

Decisions from the Court of Appeals are similar. In a recent case, the court observed:

The public trial right applies to the evidentiary phases of the trial, and to other adversary proceedings. . . . The right to public trial is linked to the defendant's constitutional right to be present during the critical phases of trial; thus, a defendant has a right to an open court whenever evidence is taken, during a suppression hearing, ... during voir dire, and during the jury selection process. . . . A defendant does not, however, have a right to a public hearing on purely ministerial or legal issues that do not require the resolution of disputed facts.

State v. Sadler, 147 Wn. App. 97, 114, 193 P.3d 1108 (2008) (citations and internal quotations omitted). In *State v. Rivera*, 108 Wn. App. 645, 32 P.3d 292 (2001), the court held that the defendant had no right to be present at a chambers conference where jurors complained about the

hygiene of another juror, because the matter was purely ministerial. In *State v. Bremer*, 98 Wn. App. 832, 835, 991 P.2d 118 (2000), the court held that a defendant had no right to be present at a chambers conference between the court and counsel regarding proposed jury instructions because the inquiry was legal and did not involve resolution of questions of fact. In *State v. Walker*, 13 Wn. App. 545, 536 P.2d 657 (1975), the court held that *Walker* had a right to be present at a post-trial motion to determine his competency because factual matters were determined. However, the court also noted that the defendant “need not be present during deliberations between court and counsel or during arguments on questions of law.” *Walker*, 13 Wn. App. at 557 (*cited with approval in Lord*, 123 Wn.2d at 306 n.3).

In the present case, counsel was cross-examining Detective Heldreth and drew an objection from the State. The basis of the objection was hearsay. The court invited the parties to approach. A brief sidebar occurred. RP Vol. VII 148. Based on the record, the sidebar regarded the hearsay objection, a question of law. Therefore, sidebars and the like are not truly trial proceedings to which the defendant or the public must be granted access.

13. The State did not commit Prosecutorial Misconduct.

In order to establish prosecutorial misconduct, the appellant must show that the prosecutor's conduct was improper and prejudiced his right to a fair trial. *State v. Dhaliwal*, 150 Wash.2d 559, 578, 79 P.3d 432 (2003). Prejudice is established where there is a substantial likelihood the instances of misconduct affected the jury's verdict. *Id* at 578. A defendant who fails to object to an improper remark waives the right to assert prosecutorial misconduct unless the remark was so "flagrant and ill intentioned" that it causes enduring and resulting prejudice that a curative instruction could not have remedied. *State v. Russell*, 125 Wash.2d 24, 882 P.2d 747 (1994).

At no time did the State argue that the jury must convict unless they believed those witness were lying. (Appellants brief p.41). During closing argument the State simply stated "If Brandon Pippins and A.J.S. are not lying, what's the opposite of that, ladies and gentlemen." RP Vol. VII 175. Simply stated they are either telling the truth or not. Subsequently, the court gave the instruction relating to the jury's duty as the sole judges of credibility. RP Vol. VII 161. The argument made by the State was not improper and certainly was not 'flagrant and ill-intentioned.'" No error occurred.

14. Cumulative Errors did not occur.

14. Cumulative Errors did not occur.

For the reasons stated throughout, there were no errors committed.

F. CONCLUSION

The State respectfully requests the Court to affirm the judgment and sentence.

Dated this 15 day of October, 2010

Respectfully submitted by:


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Deputy Prosecuting Attorney for Respondent
Gary P. Burlison, Prosecuting Attorney
Mason County, WA

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

STATE OF WASHINGTON,)
)
Respondent,)
)
vs.)
)
ROLAND DOUGLAS,)
)
Appellant,)
_____)

No. 40530-0-II

DECLARATION OF
FILING/MAILING
PROOF OF SERVICE

FILED
COURT OF APPEALS
DIVISION II
10 OCT 18 AM 9:33
STATE OF WASHINGTON
DEPUTY

I, MARGIE OLINGER, declare and state as follows:

On FRIDAY OCTOBER 15, 2010, I deposited in the U.S. Mail,
postage properly prepaid, the documents related to the above cause number
and to which this declaration is attached, BRIEF OF RESPONDENT, to:

Jordan McCabe
P.O. Box 7212
Bellevue, WA 98008-1212

I, MARGIE OLINGER, declare under penalty of perjury of the laws
of the State of Washington that the foregoing information is true and correct.

Dated this 15TH day of October, 2010, at Shelton, Washington.



MARGIE OLINGER