

No. 41904-1-II
COURT OF APPEALS, DIVISION TWO,
OF THE STATE OF WASHINGTON

STATE OF WASHINGTON,

Respondent,

vs.

THOMAS STEPHENS,

Appellant.

BRIEF OF RESPONDENT

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TABLE OF CONTENTS

TABLE OF CONTENTS..... i

TABLE OF AUTHORITIES..... ii

COUNTER STATEMENT OF ISSUES..... 1

STATEMENT OF FACTS.....2

ARGUMENT.....7

ISSUE ONE- Did the trial court err because it did not give a
unanimity instruction about which knife was the assault
weapon when only one of the four knives was in evidence?.....7

ISSUE TWO- Did the trial court err when it removed the
public from the courtroom while replaying a 911 tape
for the jury during jury deliberations?.....8

ISSUE THREE- Did the trial court err when it permitted
the jury to see an exhibit without conducting an open
hearing at which the defendant was present?.....16

CONCLUSION.....17

CERTIFICATE OF DELIVERY.....18

TABLE OF AUTHORITIES

FEDERAL CASE LAW

| | |
|--|----|
| <i>Waller v. Georgia</i> , 467 U.S. 39, 47, 104 S.Ct. 2210, 81 L.Ed.2d 31 (1984)..... | 10 |
|--|----|

FEDERAL CONSTITUTION

| | |
|--------------------|---|
| Six Amendment..... | 8 |
|--------------------|---|

WASHINGTON STATE CASE LAW

| | |
|--|----------------|
| <i>Allied Daily Newspapers of Washington v. Eikenberry</i> , 121 Wn.2d 205, 848 P.2d 1258 (1993)..... | 10 |
| <i>Federated Publications, Inc. v. Kurtz</i> , 94 Wn.2d 51, 615 P.2d 440 (1980)..... | 10 |
| <i>In re Detention of D.F.F.</i> , 172 Wn.2d 37, 256 p.3d 357 (2011)..... | 10 |
| <i>In re Orange</i> , 152 Wn.2d 795, 100 P.3d 291 (2004)..... | 10 |
| <i>Seattle Times v. Ishikawa</i> , 97 Wn.2d 30, 640 P.2d 716 (1982)..... | 10 |
| <i>State v. Bone-Club</i> , 128 Wn.2d 254, 906 P.2d 325(1995)..... | 9,12,15,16 |
| <i>State v. Brightman</i> , 155 Wn.2d 506, 122 P.3d 150 (2005)..... | 10 |
| <i>State v. Easterling</i> , 157 Wn.2d 167, 137 P.3d 825 (2006)..... | 10 |
| <i>State v. Koss</i> , 158 Wn.App. 8, 241 P.2d 415 (2010)..... | 8,13 |
| <i>State v. Lormor</i> , 172 Wn.2d 85, 257 P.3d 624 (2011)..... | 10, 11, 12, 13 |
| <i>State v. Momah</i> , 167 Wn.3d 140, 217 P.3d 321 (2009)..... | 10,11,12,13,16 |
| <i>State v. Paumier</i> , 155 Wn.App. 673, 230 P.3d 212 (2010)..... | 11 |
| <i>State v. Rivera</i> , 108 Wn.App 645, 32 P.3d 292 (2001)..... | 13 |
| <i>State v. Stockwell</i> , 160 Wn.App. 172, 248 P.3d 576 (2011)..... | 11 |
| <i>State v. Sadler</i> , 147 Wn.App. 97, 193 P.3d 1108 (2008)..... | 13,15 |

State v. Strode, 167 Wn.2d 222, 217 P.3d 310 (2009).....10

State v. Ticeson, 159 Wn.App. 374, 246 P.3d 550 (2011)..... 13

WASHINGTON CONSTITUTION

Article I, section 10..... 8,9

Article I, section 22..... 8,9

OTHER AUTHORITIES

CrR 6.15 (e)..... 16

COUNTER STATEMENT OF ISSUES

ISSUE ONE

Did the trial court err because it did not give a unanimity instruction about which knife was the assault weapon when only one of the four knives was in evidence?

ISSUE TWO

Did the trial court err when it removed the public from the courtroom while replaying a 911 tape for the jury during jury deliberations?

ISSUE THREE

Did the trial court err when it permitted the jury to see an exhibit without conducting an open hearing at which the defendant was present?

STATEMENT OF FACTS

On January 10, 2011, Thomas Ray Stephens was charged in a second amended information with Assault in the Second Degree-Domestic Violence, Tampering with a Witness, and Violation of No Contact Order (gross misdemeanor) (CP 17-19). The State also sought a deadly weapon enhancement to the charge of Second Degree Assault (CP 17).

After pretrial motions and jury selection were completed, trial began January 11, 2011 (RP 1/11/2011-8). The State provided substantial evidence from which a jury could conclude that Mr. Stephens attacked his wife with a knife. During the State's case-in-chief, it called Deputy Kempf (RP 1/11/2011- 79) to introduce photos taken inside Ms. Stephens' residence. On January 12, 2011 (RP 1/12/2011- 3), Deputy Kempf testified that exhibit 22 showed the knife he located on the bathroom counter (RP 1/12/2011-6). Defense counsel showed him something not identified correctly in the record that reminded Deputy Kempf he collected the knife and placed it in evidence (RP 1/12/2011- 8).

Deputy Kempf then identified "exhibit two"¹ as the knife in his photo and that he placed in evidence (RP 1/12/2011- 9).

Trooper Sanders testified (RP 1/12/2011- 18) he located Mr. Stephens' vehicle and placed Mr. Stephens under arrest (RP 1/12/2011- 20). Trooper Sanders testified Mr. Stephens was advised of his constitutional rights and waived his right to remain silent (RP 1/12/2011- 21). Mr. Stephens then told Trooper Sanders he had noticed that his wife looked like she had been using methamphetamine and described the physical signs to the trooper (RP 1/12/2011- 21). Mr. Stephens said he was concerned about her pregnancy and her alleged use of drugs, so he confronted her (RP 1/12/2011- 21). She allegedly admitted to using methamphetamine and to having an affair with his friend (RP 1/12/2011- 22). He admitted slapping her but denied using a knife or any other weapon (RP 1/12/2011- 22). He then went on to explain a hallucination in which he thought either his friend or a presence in his mind that he called the "crew" was messing with him (RP 1/12/2011- 22) so he began searching the house for the noises he thought he heard (RP 1/12/2011- 22).

¹ Not a correct exhibit number.

Trooper Sanders obtained and executed a search warrant to search Mr. Stephens' vehicle (RP 1/12/2011- 25). He found a knife in the glove box (RP 1/12/2011- 25). Exhibit 42 is the knife that he found in the glove compartment (RP 1/12/2011- 27).

Trooper Sanders testified he asked Mr. Stephens about the knife (RP 1/12/2011- 27). Mr. Stephens did not recognize the knife and began to insinuate that a friend had set him up by putting the knife there (RP 1/12/2011- 27).

Deputy Millet testified he obtained two knives from Ms. Stephens in early August and placed them into evidence (RP 1/12/2011-80). The two knives he took from the Stephens' residence on August 14, 2010 included a "triangular shape butcher knife," about 8 inches in length and a "long serrated knife about 9 inches in length (RP 1/12/2011- 82). The State did not present the two knives for admission at that time (RP 1/12/2011- 82).

On rebuttal, the State sought to enter the two knives found by Deputy Millet on August 14, 2010 (RP 1/13/2011-43). The Court refused to admit one knife because presentation of the knife was improper rebuttal (RP 1/13/2011-43). The second knife was withdrawn by the State ((RP 1/13/2011-105; CP 25, exhibit 43

withdrawn).

During closing argument, the State referred to the knife found by Trooper Sanders as the weapon used by the defendant (RP 1/13/2011-75). Defense counsel stated during closing argument “[t]here’s absolutely nothing whatsoever to show that this knife was used in any way as alleged by the State.” (RP 1/13/2011-85). The State again referred to the knife found in the Defendant’s glove box in rebuttal (RP 1/13/2011-98).

After the jury was sent out to deliberate, the Court and the parties sorted the admitted evidence from evidence not admitted (RP 1/13/11-104). Mr. Stephens’ counsel pointed out that the jury would probably want to hear the CD’s again, and stated it “seems to me we’re going to have to be careful they only hear the portions of the [911] CD that were admitted.” (RP 1/13/2011-107). The Court replied:

That’s going to be very tricky. I’m not sure we can do that because I don’t think there’s any way – unless we bring them back in the courtroom which is the only way I would be willing to do it.

(RP 1/13/2011-107-8). The State agreed to bring its computer back to the courtroom if the jury asked to hear the CD again (RP

1/13/2011-108).

On January 13, 2011, at 4:20 p.m., the Jury asked to "look at the blade of the knife?" (CP 35). The Court answered "yes" at 4:25 p.m. There is no transcript about this request.

On January 14, 2011, the jury asked the Court to replay exhibit 2, the 911 call. The Court stated the following in open court:

State v. Stephens. I think probably since this is a sort of substitute for having the jury hear this in the jury room we do it in the courtroom to have a little more control of it, but I think I should ask counsel who are not involved in the case to leave and we'll clear the courtroom.

(RP 1/14/2011-2).

The Court went on to provide the reason:

I think, counsel, there would be circumstances under which we would set this up in the jury room and simply have the bailiff start it. But since we have to stop at a very precise point, I think he [sic] we better err on the side of caution.

(RP 1/14/2011-2-3).

The Court asked everyone except court staff and the parties to leave the courtroom (RP 1/14/2011-2). After the jury had re-entered the Courtroom, the Court stated:

Good morning, ladies and gentlemen. The last question we got was a request to hear the 911 tape again. We really

don't have the ability to do that in the jury room so we need to do it in the courtroom. I have closed the courtroom to try to facilitate doing this as closely as you would in your jury deliberations room.

(RP 1/14/2011-3).

The jury found Mr. Stephens guilty on all three charges (C 30, 31, 33). It decided Mr. Stephens was armed with a deadly weapon (CP 28). Sentencing followed on March 16, 2011 (CP 5-16). An appeal was filed on March 16, 2011 (CP 4).

ARGUMENT

ISSUE ONE

Did the trial court err because it did not give a unanimity instruction about which knife was the assault weapon when only one of the four knives was in evidence?

Appellant contends the Court erred in failing to give a unanimity instruction about the knife used in the attack. There was no error because there was only one knife admitted. The knife referred to as "exhibit two" was not admitted by either party. The trial court refused to admit the third knife. The State withdrew the fourth knife.

Appellant accurately points out that Deputy Kempf testified he had placed a knife in property. The knife was not placed into

evidence. The only knife placed into evidence was the knife located by Trooper Sanders. The State's closing arguments show the State was alleging that the knife found by Trooper Sanders, exhibit 42, was the knife used by Mr. Stephens. There was no basis for a unanimity instruction.²

ISSUE TWO

Did the trial court err when it removed the public from the courtroom while replaying a 911 tape for the jury during jury deliberations?

The Court did not err when it removed the public from the courtroom while replaying a 911 tape for the jury because jury deliberations are not open to the public, because no evidence was taken and no discretionary decisions were made. There was no structural error because jury deliberations are closed. There is no need to remand the case for determination of why the trial court closed the courtroom because the trial court very clearly explained why it closed the courtroom.

Appellant contends the court erred because it closed the courtroom to replay a 911 tape for the jury during deliberations.

² Additionally, a unanimity instruction is not required because the specific knife used is not an element of the crime. *State v. Koss*, 158 Wn.App. 8, 241 P.2d 415 (2010).

Appellant further contends the closure violates both art. 1, section 10³ and art. 1, section 22⁴ of the Washington State Constitution. Appellant cites no cases to support his argument that closure was inappropriate because of art. 1, section 10; that argument is waived.⁵ Appellant relies on cases interpreting the Sixth Amendment to the United States Constitution and art. 1, section 22, of the Washington State Constitution. Even then, Appellant's argument fails to identify whether closing the courtroom during jury deliberations is considered a "closure" under Washington State interpretations of art. 1, section 22. Appellant has cited nothing except general concepts to aid the appellate court to determine whether the trial court errs when closing a courtroom to facilitate a jury request.

The State does not believe closing the courtroom to play a 911 tape for the jury is a "closure" under art. 1, section 22.

State v. Bone-Club, 128 Wn.2d 254, 906 P.2d 325 (1995),

³ Justice in all cases shall be administered openly, and without unnecessary delay.

⁴ In criminal prosecutions the accused shall have the right ... to have a speedy *public* trial by an impartial jury[.]

⁵ Under art. 1, section 10, the issue is whether the court violated a legitimate public interest in a particular phase of a court proceeding. Appellant makes no attempt to explain why the public would legally have an interest in attendance during jury deliberations.

relied on *Waller v. Georgia*, 467 U.S. 39, 47, 104 S.Ct. 2210, 81 L.Ed.2d 31 (1984),⁶ *Federated Publications, Inc. v. Kurtz*, 94 Wn.2d 51, 615 P.2d 440 (1980), *Seattle Times v. Ishikawa*, 97 Wn.2d 30, 640 P.2d 716 (1982), and *Allied Daily Newspapers of Washington v. Eikenberry*, 121 Wn.2d 205, 848 P.2d 1258 (1993) to determine a defendant's right to an open courtroom when a court room closure occurred. The Court decided to employ the five criteria enunciated in *Eikenberry* to identify the art. 1, section 22, rights of a criminal defendant.

Since *Bone-Club*, the Washington State Supreme Court has issued at least seven opinions⁷ addressing courtroom closures. In each case, except two⁸, the Court held the trial court's reason for closing a portion of the trial was inappropriate. *State v. Momah*, 167 Wn.3d 140, 217 P.3d 321 (2009) and *State v. Lormor*, 172

⁶ The *Waller* court looked to First Amendment guidelines to determine whether a closure also implicated the Sixth Amendment.

⁷ *State v. Strode*, 167 Wn.2d 222, 217 P.3d 310 (2009)(plurality opinion); *In re Detention of D.F.F.*, 172 Wn.2d 37, 256 P.3d 357 (2011)(art I, section 10); *State v. Easterling*, 157 Wn.2d 167, 137 P.3d 825 (2006); *State v. Brightman*, 155 Wn.2d 506, 122 P.3d 150 (2005); *In re Orange*, 152 Wn.2d 795, 100 P.3d 291 (2004); *State v. Momah*, 167 Wn.2d 140, 217 P.3d 321 (2009); *State v. Lormor*, 172 Wn.2d 85, 257 P.3d 624 (2011).

⁸ *State v. Momah*, 167 Wn.3d 140, 217 P.3d 321 (2009); *State v. Lormor*, 172 Wn.2d 85, 257 P.3d 624 (2011).

Wn.2d 85, 257 P.3d 624 (2011) decided otherwise. *State v. Momah*, *supra* at page 152, held the trial court correctly analyzed the balance between an open court and the defendant's right to a fair trial. *Momah* stated (1) the trial court followed the *Bone-Club* analysis when it closed a portion of the jury voir dire and (2) the proponent of closure, the defendant's attorney, had requested the closure to ensure his/her client received a fair trial. See *State v. Stockwell*, 160 Wn.App. 172, 248 P.3d 576 (2011); *State v. Paumier*, 155 Wn.App. 673, 230 P.3d 212 (2010) (*Momah* modifies the *Bone Club* analysis to include whether the defendant acquiesced to the closure and participated in it).

Further, *Momah* defined errors which require reversal, calling them "structural errors" that "necessarily renders a criminal trial fundamentally unfair or an unreliable vehicle for determining guilt or innocence." *Momah*, 167 Wn.2d 140. Rather than define "non-structural errors," the Court simply stated there was no structural error in the case so reversal was unnecessary.

The Washington Supreme Court's most recent decision defines "closure." *State v. Lormor*, 172 Wn.2d 85, 257 P.3d 624 (2011) held that removing one person is not "closure." The decision

then defined "closure":

[Closure] does not apply to every proceeding that transpires within a courtroom but certainly applies during trial, and extends to those proceedings that cannot be easily distinguished from the trial itself. This included pre- and posttrial matters such as voir dire, evidentiary hearings, and sentencing proceedings."

Lormar, 172 Wn.2d 93.

The Supreme Court decision in *Lormar* is important because *State v. Lormar*, 154 Wn.App. 386, 224 P.3d 857 (2010) followed federal decisions to determine whether exclusion of defendant's family was reversible error. Based on federal precedent, the Court concluded the exclusion of the defendant's daughter was "trivial." *Lormar*, 154 Wn.App. 392.

The Supreme Court took a different course on review. The Court defined "closure" as "when the courtroom is completely and purposefully closed to spectators". *Lormar*, 172 Wn.2d 93. The Court also emphasized the authority of a trial court to control courtroom operations, where the trial judge possesses broad discretion. *Lormar*, 172 Wn.2d 93. The test, therefore, is not whether a person was excluded but whether the trial court abused its discretion when it excluded an individual or when the closure

creates a structural error.

Momah and *Lormar* provide guidance about which appellate decisions have appropriately analyzed the “closure” issue. *Momah* defined “structural errors.” *Lormar* defined (1) “closure” and (2) when a proceeding must be conducted in open court unless a *Bone-Club* analysis is conducted. Many decisions from the Washington courts of appeal have therefore correctly addressed the issue. See, e.g., *State v. Koss*, 158 Wn.App. 8, 241 P.3d 415 (2010) (defendant’s constitutional right to an public trial requires the court be open during “adversary proceedings” including evidentiary phases of the trial, suppression hearings, voir dire, and jury selection); *State v. Ticeson*, 159 Wn.App. 374, 246 P.3d 550 (2011) (trial court did not err when it dealt with ministerial issues in chambers); *State v. Sadler*, 147 Wn.App. 97, 193 P.3d 1108 (2008) (defendant has a right to be present (in open court) whenever evidence is taken but does not have a right to a public hearing on purely ministerial or legal issues that do not require the resolution of disputed facts); *State v. Rivera*, 108 Wn.App 645, 32 P.3d 292 (2001) (discussion about juror’s personal hygiene was ministerial; the trial court did not err when it conducted a hearing in closed court).

In the present case, there is no question the courtroom was closed to the public. Everyone except the parties, court personnel and the jury was excluded while the 911 tape was played for the jury. The question then becomes whether the closed courtroom created a structural error. It did not. The "structure" of a jury trial does not include open jury deliberations. Further, no evidentiary hearings or issues were discussed or decided. No evidence was taken. No motions were heard. The jury was already impaneled. The only difference in the case was the trial court brought the jury into the courtroom rather than play the 911 tape in the jury deliberation room.

The record establishes both defense counsel and the trial court were concerned that more of the 911 tape would be played than the trial court had admitted. The trial court did not want to endanger Mr. Stephens' right to a fair trial. Rather than permit the bailiff to play the tape, the trial court presided over the tape's playing to ensure that only the admitted portion was played. Because the tape was being played off a disc in the deputy prosecutor's computer, the trial court had two choices: It could meet with counsel and Mr. Stephens in the jury deliberation room while the

deputy prosecutor replayed the exhibit. Or, it could close the courtroom to bring the jury out of the deliberation room to play the tape. There is no question that holding a portion of jury deliberation in the courtroom was better than adding a judge, clerk, bailiff, police officer, the defendant, defense counsel and the prosecuting attorney to the already crowded jury room. The Court chose the correct method to deal with the situation.

Appellant has cited no cases and the State has found none in which a court has decided the public has a right to hear any portion of a jury deliberation. "Jury rooms are not ordinarily accessible to the public; in fact, it is well known that juries are often taken into the jury room to be insulated from events occurring in the courtroom." *Sadler*, 147 Wn.App. 112. Appellant has cited nothing to show the decision to play the tape in a closed courtroom is a structural error requiring retrial. Nothing occurred that rendered the trial fundamentally unfair or raises an issue about determining guilt or innocence. The State believes, rather, that the trial court exercised its broad discretion about where to play the tape and about who would be allowed to listen. There is no error.

Appellant next contends the only remedy in this case is to

remand the case for a new trial because the trial court did not engage in a *Bone-Club* analysis before closing the courtroom. Appellant is incorrect for two reasons.

First, no *Bone-Club* analysis was necessary because the trial court did not close the courtroom for a portion of the proceedings that were open to the public. Jury deliberations are not open to the public.

Second, the purpose for the *Bone-Club* analysis is to supply a record for appellate review. *Momah* did not require reversal absent a *Bone-Club* analysis because it could find the reasons for the closure on the record. The trial court's reasoning is very clear in this record.

ISSUE THREE

Did the trial court err when it permitted the jury to see an exhibit without conducting an open hearing at which the defendant was present?

Appellant contends the trial court erred when it decided in chambers to permit the jury to see the knife in evidence. The request to see an article already admitted into evidence, however, does not require either the defendant's or his attorney's presence. CrR 6.15 (e) states "[t]he jury shall take with it the instructions

CrR 6.15 (e) states "[t]he jury shall take with it the instructions given, all exhibits received in evidence and a verdict form or forms." The knife had been admitted as exhibit 42. Because it is a deadly weapon, the trial court was keeping it in a safe place. When the jury asked to see it, the trial court had an obligation to provide it to them. Neither the defendant nor his attorney could object at that point because the knife was in evidence.

CONCLUSION

There was no error in Mr. Stephens' trial. Only one knife was admitted or referred to by the State. The courtroom was closed for the jury but there was no closure as defined by recent Washington State Supreme Court decisions. Playing the 911 tape for the jury in the courtroom created no structural error or issues. Providing the knife to the jury, an admitted exhibit, without a conference, was appropriate. Mr. Stephens' conviction should be affirmed.

Respectfully submitted this 1st day of February, 2012.

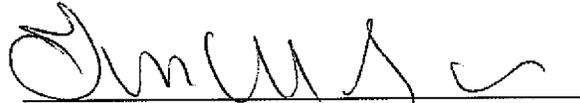


Lewis M. Schrawyer, #12202
Clallam County Deputy Prosecutor

CERTIFICATE OF DELIVERY

LEWIS M. SCHRAWYER, under penalty of perjury under the laws of the State of Washington, does swear or affirm that a copy of this document was sent to Jodi R. Backlund and Manek R. Mistry, by electronic copy at backlundmistry@gmail.com on February 1, 2012.

Signed at Port Angeles, Washington on February 1, 2012.

A handwritten signature in black ink, appearing to read 'Lewis M. Schrawyer', written over a horizontal line.

Lewis M. Schrawyer, #12202

CLALLAM COUNTY PROSECUTOR

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