

No. 41966-1-II

COURT OF APPEALS, DIVISION II
OF THE STATE OF WASHINGTON

STATE OF WASHINGTON,

Respondent,

vs.

Justin Grover,

Appellant.

Thurston County Superior Court Cause No. 10-1-01707-4

The Honorable Judge Paula Casey

Appellant's Opening Brief

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ASSIGNMENTS OF ERROR

1. The trial court violated Mr. Grover's First, Sixth, and Fourteenth Amendment right to an open and public trial.
2. The trial court violated Mr. Grover's right to an open and public trial under Wash. Const. Article I, Sections 10 and 22.
3. The trial court violated Mr. Grover's right to an open and public trial by conducting a closed hearing in chambers to review pretrial motions.
4. Mr. Grover's conviction violated his Sixth and Fourteenth Amendment right to confront witnesses.
5. The trial court erred by admitting testimonial hearsay.
6. The trial court erred by admitting Marcia Grover's drivers license and documentation, which included an affidavit presented in lieu of testimony, establishing key facts in the prosecution's case.
7. Mr. Grover was denied his Sixth and Fourteenth Amendment right to the effective assistance of counsel.
8. Defense counsel unreasonably failed to object to testimonial hearsay used to establish an element of the offense.

ISSUES PERTAINING TO ASSIGNMENTS OF ERROR

1. The state and federal constitutions require that criminal trials be administered openly and publicly. Here, the trial judge consulted with counsel in chambers to review pre-trial motions. Did the trial judge violate the constitutional requirement that criminal trials be open and public by holding a hearing in chambers without first conducting any portion of a *Bone-Club* analysis?
2. In a criminal case, the Sixth Amendment's confrontation clause prohibits the admission of testimonial hearsay unless the

declarant is unavailable and the accused person had a prior opportunity for cross-examination. Here, the trial court admitted an affidavit, prepared on February 17, 2011, that purported to establish Marcia Grover's address on the offense date. Did the admission of this testimonial hearsay violate Mr. Grover's Sixth Amendment right to confront the witnesses against him?

3. The Sixth and Fourteenth Amendments guarantee an accused person the effective assistance of counsel in a criminal case. In this case, Mr. Grover's defense attorney failed to object to the admission of testimonial hearsay. Was Mr. Grover denied his Sixth and Fourteenth Amendment right to the effective assistance of counsel?

STATEMENT OF FACTS AND PRIOR PROCEEDINGS

Justin Grover went to his mother's house and knocked on the door. He banged and kicked the door, but no one came to let him in. His brother Shawn was inside, along with another person named James Ferguson. Shawn Grover called the police. RP (3/24/11) 43-49. Officers came, and confirmed there was a no contact order that required Justin Grover to stay 1000 feet away from the residence of Justin's sister Marcia. The order did not list Marcia Grover's address. Exhibit 1 (3/24/11), Supp. CP.

Mr. Grover was arrested, and charged with Violation of a Protection order, with two special allegations: that the offense was a domestic violence offense, and a third violation. CP 2; RP (3/24/11) 14-18, 29.

At the start of trial on January 18, 2011, defense counsel indicated he wanted to raise an issue "that I brought to Your Honor's attention in chambers."¹ RP (1/18/11) 22. Neither the court nor the parties provided any other information about the in-chambers discussion, including whether or not Mr. Grover (who was in custody) had been present. RP (1/18/11) 22-34.

¹ The issue was regarding whether the state should refer to the fact that the alleged victim, Marcia Grover, was staying at the local domestic violence shelter. The court later granted the defense motion on the matter. RP (1/18/11) 21-34.

At Mr. Grover's first trial, the prosecution did not offer records tending to prove that Marcia Grover did, in fact, reside at her mother's home. Exhibit List (1/19/11), Supp. CP. The first trial ended in a mistrial, after the court concluded that there was no reasonable probability that jurors could come to an agreement within a reasonable time. RP (1/19/11) 146-152.

A second trial took place on March 24, 2011. Marcia Grover did not appear at this trial.² RP (3/24/11) 14-54.

Through the arresting officer, the state presented a document prepared by the Department of Licensing. Exhibit 4, Supp. CP; RP (3/24/11) 26-27. The document included a declaration from DOL's records custodian, and purported to list Marcia Grover's address as of the date of the crime. The prosecutor used this document to support the allegation that Marcia Grover lived at her mother's address. RP (3/24/11) 26-27, 67-71, 84-88. Mr. Grover's attorney did not object to the exhibit or the testimony. RP (3/24/11) 26-27.

The jury voted guilty, and found both special verdicts applicable. After sentencing, Mr. Grover timely appealed. CP 3-15, 16.

² Nor did she appear for the first trial. RP (1/18/11) 51-97.

ARGUMENT

I. THE TRIAL COURT VIOLATED BOTH MR. GROVER’S AND THE PUBLIC’S RIGHT TO AN OPEN AND PUBLIC TRIAL BY CONDUCTING PROCEEDINGS BEHIND CLOSED DOORS.

A. Standard of Review.

Alleged constitutional violations are reviewed *de novo*. *State v. Schaler*, 169 Wash.2d 274, 282, 236 P.3d 858 (2010). Whether a trial court procedure violates the right to a public trial is a question of law reviewed *de novo*. *State v. Njonge*, 161 Wash.App. 568, 573, 255 P.3d 753 (2011). Courtroom closure issues may be argued for the first time on review. *Njonge*, at 574.

B. Both the public and the accused person have a constitutional right to open and public criminal trials.

The state and federal constitutions require that criminal cases be tried openly and publicly. U.S. Const. Amend. I, VI, XIV; Wash. Const. Article I, Sections 10 and 22; *State v. Bone-Club*, 128 Wash.2d 254, 259, 906 P.2d 325 (1995); *Presley v. Georgia*, ___ U.S. ___, ___, 130 S.Ct. 721, 175 L.Ed.2d 675, (2010) (*per curiam*). Proceedings may be closed only if the trial court enters appropriate findings following a five-step balancing process. *Bone-Club*, at 258-259. Failure to conduct the proper analysis requires automatic reversal, regardless of whether or not the accused person made a contemporaneous objection. *Bone-Club*, at 261-

262, 257.³ In addition, the court must consider all reasonable alternatives to closure, whether or not the parties suggest such alternatives. *Presley*, 130 S.Ct., at 724-725.

The public trial right ensures that an accused person “is fairly dealt with and not unjustly condemned.” *State v. Momah*, 167 Wash.2d 140, 148, 217 P.3d 321 (2009). Furthermore, “the presence of interested spectators may keep [the accused person’s] triers keenly alive to a sense of the responsibility and to the importance of their functions.” *Id.* The public trial right serves institutional functions: encouraging witnesses to come forward, discouraging perjury, fostering public understanding and trust in the judicial system, and exposing judges to public scrutiny. *State v. Strode*, 167 Wash.2d 222, 226, 217 P.3d 310 (2009); *State v. Duckett*, 141 Wash.App. 797, 803, 173 P.3d 948 (2007).

The public trial right “applies to all judicial proceedings.” *Momah*, at 148. The Supreme Court has never recognized any exceptions to the rule, either for violations that are allegedly *de minimis*, for hearings that address only legal matters, or for proceedings are merely “ministerial.”

³ See also *State v. Strode*, 167 Wash.2d 222, 229, 235-236, 217 P.3d 310 (2009) (six justices concurring); *State v. Brightman*, 155 Wash.2d 506, 517-518, 122 P.3d 150 (2005).

*See, e.g., Strode, at 230.*⁴

- C. The trial court violated the public trial requirement by holding a hearing in chambers.

In this case, the trial judge conducted an *in camera* hearing to review pre-trial motions. RP (1/18/11) 22. This was conducted outside the public's eye without the required analysis and findings and it violated Mr. Grover's constitutional right to an open and public trial. U.S. Const. Amend. VI, U.S. Const. Amend. XIV; Wash. Const. Article I, Sections 10 and 22; *Bone-Club, supra*. It also violated public's right to an open trial. *Id.* Accordingly, Mr. Grover's conviction should be reversed and the case remanded for a new trial. *Id.*

- D. The Court should reject exceptions to the public trial right that have not been recognized by the Supreme Court.

The Court of Appeals has held that the right to a public trial only extends to hearings that require the resolution of disputed facts, and does not encompass hearings to resolve issues that are purely legal or ministerial. *See, e.g., State v. Sublett*, 156 Wash.App. 160, 181, 231 P.3d 231, *review granted*, 170 Wash.2d 1016, 245 P.3d 775 (2010). This view of the public trial right is incorrect, and should be reconsidered.

⁴ ("This court, however, 'has never found a public trial right violation to be [trivial or] *de minimis*'") (quoting *State v. Easterling*, 157 Wash.2d 167, 180, 137 P.3d 825 (2006)).

The evils addressed by the requirement of open and public trials do not arise solely in the context of adversary proceedings to resolve disputed facts. Instead, a judge, an attorney, or another player in the judicial system can be guilty of impropriety at any stage, regardless of the substance of the hearing. Without public scrutiny, such impropriety remains hidden.

The problem is primarily one of appearance. For example, a murder victim's family, already upset that the murder weapon was suppressed prior to trial, might feel that the judge is colluding with the defense upon learning—after an acquittal is entered—that a jury question about the missing gun was met only with an instruction to continue deliberating. While such a response may well be appropriate, the fact that it was arrived at in secret could lead the victim's family to speculation about judicial impropriety.

The difficulty with closed hearings extends beyond mere appearance issues. In another era, racist judges, prosecutors, and defense attorneys may have met secretly in chambers to ensure that a black defendant was convicted, or a white defendant acquitted. Milder forms of misconduct may have taken the form of grumblings about female or

minority jurors.⁵ Such blatant sexism and racial prejudice may be less common now than they were in years past; however, closed hearings allow such prejudices to be voiced with impunity, regardless of whether or not the hearing involves adversarial positions or disputed facts.

Even without actual malfeasance of the sort described, secret hearings degrade the public's perception of the judicial system. When hearings are conducted behind closed doors, members of the public are free to imagine the worst: the conspiracy-minded will see vast plots, the cynical will see corruption or incompetence. Only by opening all hearings—no matter how trivial—to the light of public scrutiny, can the judiciary be assured that it will be accorded the respect it deserves.

In *Sublett*, the Court of Appeals also implied that the need for an open and public hearing was obviated by the production of a written answer to the jury's question. *Sublett*, at 182. Under this reasoning, no proceeding need ever be open to the public, since courts excel at producing written records of their proceedings. The production of written jury instructions in this case does not eliminate the constitutional requirement that proceedings be open and public.

⁵ Similarly, in chambers, a judge may improperly silence a contract public defender's objections in a particular case by threatening to withhold assignment to future indigent cases. Such pressure could be applied during argument over purely legal issues, and would place counsel's ethical duties in conflict with her or his livelihood.

In this case, the *in camera* hearing violated Mr. Grover’s public trial right under the state and federal constitutions. It also violated the public’s right to monitor proceedings. For these reasons, Mr. Grover’s conviction must be reversed, and the case remanded for a new trial. *Bone-Club, supra*.

II. THE ADMISSION OF TESTIMONIAL HEARSAY VIOLATED MR. GROVER’S SIXTH AND FOURTEENTH AMENDMENT RIGHT TO CONFRONTATION.

A. Standard of Review

Constitutional questions are reviewed *de novo*. *Schaler, at 282*.

A manifest error affecting a constitutional right may be raised for the first time on review.⁶ RAP 2.5(a)(3); *State v. Kirwin*, 165 Wash.2d 818, 823, 203 P.3d 1044 (2009). A reviewing court “previews the merits of the claimed constitutional error to determine whether the argument is likely to succeed.” *State v. Walsh*, 143 Wash.2d 1, 8, 17 P.3d 591 (2001).⁷ An error is manifest if it results in actual prejudice, or if the appellant

⁶ In addition, the court has discretion to accept review of any issue argued for the first time on appeal. RAP 2.5(a); see *State v. Russell*, 171 Wash.2d 118, 122, 249 P.3d 604 (2011). This includes constitutional issues that are not manifest, and issues that do not implicate constitutional rights. *Id.*

⁷ The policy is designed to prevent appellate courts from wasting “judicial resources to render definitive rulings on newly raised constitutional claims when those claims have no chance of succeeding on the merits.” *State v. WWJ Corp.*, 138 Wash.2d 595, 603, 980 P.2d 1257 (1999).

makes a plausible showing that the error had practical and identifiable consequences at trial. *State v. Nguyen*, 165 Wash.2d 428, 433, 197 P.3d 673 (2008).

Constitutional error is presumed to be prejudicial, and the state bears the burden of proving harmlessness beyond a reasonable doubt. *State v. Watt*, 160 Wash.2d 626, 635, 160 P.3d 640 (2007). To overcome the presumption of prejudice, the state must establish beyond a reasonable doubt that the error was trivial, formal, or merely academic, that it did not prejudice the accused, and that it in no way affected the final outcome of the case. *City of Bellevue v. Lorang*, 140 Wash.2d 19, 32, 992 P.2d 496 (2000). Reversal is required unless the state can prove that any reasonable fact-finder would reach the same result absent the error and that the untainted evidence is so overwhelming it necessarily leads to a finding of guilt. *State v. Burke*, 163 Wash.2d 204, 222, 181 P.3d 1 (2008).

B. Testimonial hearsay is inadmissible at trial unless the declarant is unavailable and the accused person had a prior opportunity for confrontation.

The Sixth Amendment to the U.S. Constitution guarantees that “In all criminal prosecutions, the accused shall enjoy the right ... to be

confronted with the witnesses against him.” U.S. Const. Amend. VI.⁸ A proponent of hearsay evidence bears the burden of establishing that its admission would not violate the confrontation clause. *Idaho v. Wright*, 497 U.S. 805, 110 S.Ct. 3139, 111 L.Ed.2d 638 (1990).

The admission of testimonial hearsay violates the confrontation clause unless the declarant is unavailable and the accused had a prior opportunity for cross-examination. *Crawford v. Washington*, 541 U.S. 36, 124 S.Ct. 1354 (2004). A *Crawford* issue is “unquestionably constitutional in nature,” and thus qualifies for review under RAP 2.5(a) if it is manifest. *State v. Kronich*, 160 Wn.2d 893, 901, 161 P.3d 982 (2007).

The admission of records from the Department of Licensing violates *Crawford*, because the affidavit that is integral to it is “plainly created in order to provide evidence against [the accused] for purposes of prosecuting him [or her].” *State v. Jasper*, 158 Wash.App. 518, 532, 245 P.3d 228 (2010); *see also Melendez-Diaz v. Massachusetts*, ___ U.S. ___, 129 S.Ct. 2527, 174 L.Ed.2d 314 (2009).

⁸ This provision is applicable to the states through the Due Process Clause of the Fourteenth Amendment. *Pointer v. Texas*, 380 U.S. 400, 403, 85 S.Ct. 1065, 13 L.Ed.2d 923 (1965); U.S. Const. Amend. XIV.

- C. The admission of an affidavit containing testimonial hearsay violated Mr. Grover's confrontation rights.

Marcia Grover's driver's license information was prepared on February 17, 2011. Exhibit 4 (3/24/11), Supp. CP. It included an affidavit like that in *Jasper*, and purported to list Marcia Grover's official address on the offense date. Exhibit 4 (3/24/11), Supp. CP. As in *Jasper*, the affidavit was testimonial hearsay, and its admission violated Mr. Grover's constitutional right to confront adverse witnesses. *Jasper, supra; Melendez-Diaz, supra.*

The admission of this evidence had practical and identifiable consequences at Mr. Grover's trial,⁹ and is presumed to have prejudiced Mr. Grover. *Watt, at 635.* The record was not admitted at the first trial, and the prosecution was unable to obtain a conviction.¹⁰ Exhibit List (1/19/11), Supp. CP.

At the second trial, the prosecution used Exhibit 4 to bolster its case that Marcia Grover lived at the Bush Street address. Exhibit 4

⁹ Accordingly, the error is manifest, and may be addressed for the first time on review. RAP 2.5(a)(3). In the alternative, if the issue is not "manifest," the court should exercise its discretion and review the argument on its merits. RAP 2.5(a); *Russell, at 122.* Furthermore, Mr. Grover has raised the issue in his ineffective assistance of counsel claim, elsewhere in this brief.

¹⁰ The admission of the record was not the only difference between the first and second trials. However, as an official document, it likely carried more weight than the testimony of family members.

(3/24/11), Supp. CP. Had the record been excluded, a reasonable juror might have voted to acquit Mr. Grover. Accordingly, Respondent cannot prove that the error was harmless beyond a reasonable doubt. *Burke, supra.*

The admission of testimonial hearsay violated Mr. Grover's Sixth and Fourteenth Amendment right to confront adverse witnesses. *Crawford.* His conviction must be reversed and the case remanded for a new trial. *Id.*

III. MR. GROVER WAS DENIED HIS SIXTH AND FOURTEENTH AMENDMENT RIGHT TO THE EFFECTIVE ASSISTANCE OF COUNSEL.

A. Standard of Review

An ineffective assistance claim presents a mixed question of law and fact, requiring *de novo* review. *In re Fleming*, 142 Wash.2d 853, 865, 16 P.3d 610 (2001); *State v. Horton*, 136 Wash. App. 29, 146 P.3d 1227 (2006).

B. An accused person is constitutionally entitled to the effective assistance of counsel.

The Sixth Amendment provides that “[i]n all criminal prosecutions, the accused shall enjoy the right... to have the Assistance of Counsel for his defense.” U.S. Const. Amend. VI. This provision is

applicable to the states through the Fourteenth Amendment. U.S. Const. Amend. XIV; *Gideon v. Wainwright*, 372 U.S. 335, 342, 83 S.Ct. 792, 9 L.Ed.2d 799 (1963). Likewise, Article I, Section 22 of the Washington Constitution provides, “In criminal prosecutions, the accused shall have the right to appear and defend in person, or by counsel....” Wash. Const. Article I, Section 22. The right to counsel is “one of the most fundamental and cherished rights guaranteed by the Constitution.” *United States v. Salemo*, 61 F.3d 214, 221-222 (3rd Cir., 1995).

An appellant claiming ineffective assistance must show (1) that defense counsel’s conduct was deficient, meaning that it fell below an objective standard of reasonableness; and (2) that the deficient performance resulted in prejudice, meaning “a reasonable possibility that, but for the deficient conduct, the outcome of the proceeding would have differed.” *State v. Reichenbach*, 153 Wash.2d 126, 130, 101 P.3d 80 (2004) (citing *Strickland v. Washington*, 466 U.S. 668, 104 S. Ct. 2052, 80 L. Ed. 2d 674 (1984)).

There is a strong presumption that defense counsel performed adequately; however, the presumption is overcome when there is no conceivable legitimate tactic explaining counsel’s performance. *Reichenbach*, at 130. Furthermore, there must be some indication in the record that counsel was actually pursuing the alleged strategy. *See, e.g.*,

State v. Hendrickson, 129 Wash.2d 61, 78-79, 917 P.2d 563 (1996) (the state’s argument that counsel “made a tactical decision by not objecting to the introduction of evidence of... prior convictions has no support in the record.”)

C. Defense counsel was ineffective for failing to object to inadmissible and prejudicial evidence.

Failure to challenge the admission of evidence constitutes ineffective assistance if (1) there is an absence of legitimate strategic or tactical reasons for the failure to object; (2) an objection to the evidence would likely have been sustained; and (3) the result of the trial would have been different had the evidence been excluded. *State v. Saunders*, 91 Wash.App. 575, 578, 958 P.2d 364 (1998).

In this case, defense counsel should have objected to the admission of the Department of Licensing records on confrontation grounds. As argued above, an objection would have been sustained. The state needed the records to establish Marcia Grover’s residence. They failed to obtain a conviction after the first trial when they did not introduce the records. RP (1/19/11) 146-151; Exhibit List (1/19/11), Supp. CP. Accordingly, defense counsel’s failure to seek suppression deprived Mr. Grover of the effective assistance of counsel. *Saunders*, at 578.

CONCLUSION

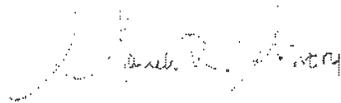
For the foregoing reasons, Mr. Grover's conviction must be reversed and the case remanded for a new trial.

Respectfully submitted on September 13, 2011.

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CERTIFICATE OF MAILING

I certify that on September 13, 2011:

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I delivered an electronic version of the brief, using the Court's filing portal, to:

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I filed the Appellant's Opening Brief electronically with the Court of Appeals, Division II, through the Court's online filing system.

I CERTIFY UNDER PENALTY OF PERJURY UNDER THE LAWS OF THE STATE OF WASHINGTON THAT THE FOREGOING IS TRUE AND CORRECT.

Signed at Olympia, Washington on September 13, 2011.



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