

NO. 44569-7

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

STATE OF WASHINGTON, RESPONDENT

v.

RICHARD ANTHONY CARPENTER, APPELLANT

Appeal from the Superior Court of Pierce County
The Honorable Katherine M. Stolz

No. 11-1-04931-2

BRIEF OF RESPONDENT

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

1. Has defendant failed to show that the courtroom was closed during jury selection where the entire proceedings were held in an open courtroom in full view of the public?

2. Did the trial court properly deny defendant's request to discharge his attorney where the basis of the breakdown in communication was entirely due to defendant's refusal to cooperate with his attorney?

3. Has defendant failed to show that the trial court interfered with his right to testify where the trial court informed him that, without a valid waiver, he would be sworn in and defendant ultimately accepted his stepfather's pleas not to testify?

B. STATEMENT OF THE CASE.

1. Procedure

On December 9, 2011, the State charged RICHARD ANTHONY CARPENTER, hereinafter "defendant," with one count of robbery in the second degree (Count I), one count of theft of a motor vehicle (Count II), one count of possessing stolen property in the second degree (Count III), and one count of driving while in suspended or revoked status in the first

degree (Count IV). CP¹ 1-3. Prior to trial, during a motion to continue to acquire a competency evaluation, defendant stated, “Judge, can I make a request of a, a new attorney?” RP (5/11/12) 9. The court told defendant to make a written motion so he could review defendant’s issues and the State would have a chance to respond. RP (5/11/12) 9.

On June 8, 2012, the parties held a competency hearing and the State referenced the earlier hearing where defendant orally stated he wanted to dismiss his attorney. RP (6/8/12) 2. Defendant’s attorney stated that defendant was willing to work with him regarding the case. RP (6/8/12) 5. During the remaining pretrial hearings, defendant repeatedly proved to be uncooperative with his attorney, the court, and jail staff, but he did not renew his motion for a new attorney. *See* RP (9/11/12) 2-3, RP (10/5/12) 2, RP 34, 44-45. Defendant’s attorney moved to amend his plea from not guilty to not guilty by reason of insanity. RP 51-56. The court denied the motion. RP 56.

The parties held a CrR 3.5 hearing on January 8, 2013. RP 63. Tacoma Police Officer Matthew Graham testified regarding defendant’s

¹ Citations to Clerk’s Papers will be to “CP.” As the pretrial hearings in this case were not consecutively numbered, references to the verbatim report of proceedings for those matters will be to “RP,” followed by the date of the hearing. The trial transcript, which includes the CrR 3.5 hearing, covers several dates and is contained in one volume entitled “Volume I.” Citations to this transcript will be to “RP”.

statements to him during a “show up,” where the witness was brought to defendant’s location to see if she could identify him as the suspect. RP 71-72. When he indicated to defendant that the witness positively identified him, defendant asked, “she picked me?” RP 71-72.

Defendant testified that Officer Graham was not present for the witness identification. RP 76. He also claimed that the officer told him “she chose you.” RP 76. Finally, defendant testified that he asked to see the witness, so the officers illuminated the inside of the patrol car, revealing no one inside. RP 77, 79. The trial court ruled that defendant’s statement, “she picked me,” was admissible. RP 74, 80. Defendant’s counsel then asked the court to inquire if defendant wanted to proceed by a plea of not guilty by reason of insanity. RP 88. Defendant responded that he did not know and refused to answer definitively. RP 88-89. The court understood this to mean that defendant was not interested in pleading not guilty by reason of insanity. RP 89.

The following day, defendant refused to dress for court. RP 95-96. The court noted that any attorney representing defendant was going to receive a total lack of cooperation from defendant. RP 98. Defendant’s attorney agreed with the court’s assessment. RP 98. When defendant arrived in the courtroom, he stated that he had started to change into street clothes, but then decided that he wanted to attend trial in jail garb and

strapped to a chair. RP 107. Defendant referred to his attorney as a “clown” and was unwilling to change into civilian clothing. RP 112-13, 123-24. The court offered a limiting instruction relating to the jury’s view of defendant in jail clothes and restraint. RP 111.

On January 10, 2013, defendant appeared in court wearing his jail clothing and a spit hood. *See* RP 209. While being escorted back to the jail after trial the previous day, defendant spit on the corrections officers. RP 210. The jail staff requested that defendant appear in the spit hood. RP 210. Defendant’s attorney again suggested that defendant was not competent to assist in his own defense. RP 210. The State noted that defendant had had several competency evaluations and was able to control himself when it suited him. RP 212. Defendant stated that he would waive his presence during the trial. RP 219-20. The court offered a limiting instruction regarding defendant’s absence. RP 221.

Defendant reappeared in court on January 16, 2013, the last day of trial. RP 313. Prior to the close of the State’s case, defendant indicated that he wanted to testify on his own behalf. RP 315. The court ordered defendant’s spit mask removed while the jury was present, but noted that it would be replaced if defendant acted out. RP 316-17.

At the close of the State's case, defendant's attorney informed the court that he had advised defendant not to testify because defendant had a prior conviction for theft and because defendant was confusing the facts in the present case with the facts from other, pending cases. RP 330-31. Despite his attorney's advice, defendant indicated that he wished to testify. RP 331. Defendant made several equivocal statements regarding waiver of his right to testify. RP 332-40. Eventually, defendant indicated that he did not want to testify and he did not want to be present for the remainder of the trial. RP 341.

Prior to the case going to the jury, the State moved to dismiss Count IV, which was the driving while license suspended charge. RP 343. The court granted the motion and the jury was not given any instruction relating to the charge. RP 343.

On January 17, 2013, the jury found defendant guilty of robbery in the first degree, theft of a motor vehicle, and possession of stolen property in the second degree. CP 104, 106, 107; RP 427. Defendant was present for the verdict. RP 426-27.

On January 28, 2013, the court sentenced defendant to a standard-range² sentence of 46 months in custody, with standard fines and conditions. CP 139-152; RP 438. Defendant filed a timely notice of appeal. CP 157-171.

2. Facts

On December 8, 2011, Ms. Jane Preszler went to the bank and withdrew \$200.00. RP 134. She placed the cash in her checkbook and her checkbook in her purse before driving to the grocery store. RP 134. When she arrived home with her groceries, Ms. Preszler opened her garage door, but did not drive her car inside. RP 140. Ms. Preszler left her car running in the driveway, with the driver's side door still open, while she removed a bag of groceries from the trunk and put it into a refrigerator inside the garage. RP 140-42. She also left her purse inside the car. RP 149.

When Ms. Preszler returned to her car, a man "flew in front of her," jumped into the driver's seat of the car, and shut the door. RP 142. Ms. Preszler opened the car door and started hitting the man, later

² The court determined that all three counts merged for purposes of sentencing and sentenced on the first degree robbery charge only. *See* CP 139-152. Defendant had an offender score of one, giving him a standard range of 36-48 months. CP 139-152.

identified as defendant, with her fists. RP 149. Defendant put the car into reverse and hit the gas. RP 150. Ms. Preszler was struck by the open driver's side door, which knocked her to the ground and gave her cuts on her jaw and knee, and bruising on the left side of her torso. RP 151, 157. Defendant pulled out of the driveway and drove down the alley, with the car door and truck still open. RP 159-60.

Ms. Preszler called 9-1-1 to report the theft of her car. RP 161. Two officers arrived within minutes to take her statement. RP 161. Tacoma Police Officer Darren Reda was not one of the responders, but he did receive a signal on his LoJack³ system which ultimately resulted in his locating Ms. Preszler's car on East 54th Street between Pacific Avenue and A Street. RP 183-84. No one was with the car, but Officer Reda noticed that the hood was still very warm. RP 184.

Tacoma Police Officer Matthew Graham was one of the officers who responded to Ms. Preszler's 9-1-1 call. RP 259. Ms. Preszler gave

³ When a vehicle with a LoJack system is reported stolen, the system sends a signal notifying law enforcement with receivers when the stolen vehicle is nearby. RP 183.

him a description of the man who took her car and Officer Graham relayed that information to other officers. RP 263. When Officer Graham heard that Ms. Preszler's car had been located, he went to the scene. RP 263. On East 54th Street, he saw a person matching Ms. Preszler's description jogging, or trying to give the appearance that he was jogging, down the street. RP 265. Officer Graham detained defendant. RP 265.

Approximately 45 minutes after she reported the theft to police, Ms. Preszler was informed that the police had found her car. RP 163. A different officer picked her up and drove her to where defendant was being detained. RP 164-65. Defendant was trying to change his facial features by grimacing and "flicking" his eyes, but she recognized defendant as the man who had jumped into her car. RP 168-69, 173, 189. The officer then took her to her car where she noticed that the contents of her purse were scattered around the interior. RP 175.

Officer Graham stayed with defendant while Ms. Preszler was brought to identify him. RP 274. He noticed that, during the identification, defendant was "wiggling," hunching his shoulders, and squinting his eyes. RP 274. When Officer Graham told defendant that the witness had positively identified him, defendant responded, "[s]he picked

me?” RP 284. Officer Graham also found Ms. Preszler’s checkbook, which contained \$200.00 in cash, in the back pocket of defendant’s pants. RP 284, 286-88.

C. ARGUMENT.

1. AS JURY SELECTION OCCURRED IN AN OPEN COURTROOM, DEFENDANT FAILS TO SHOW ANY CLOSURE OF THE COURTROOM.
 - a. RAP 2.5(a)(3) Should Be Applied to Right to Public Trial Cases, As It Is To Other Constitutional Rights.

Ordinarily an appellate court will consider a constitutional claim for the first time on appeal only if the alleged error is manifest and truly of constitutional dimension. *State v. McFarland*, 127 Wn.2d 322, 332–33, 899 P.2d 1251 (1995); *State v. Davis*, 41 Wn.2d 535, 250 P.2d 548 (1952); RAP 2.5(a)(3). Such a restriction is necessary because the failure to raise an objection in the trial court “deprives the trial court of [its] opportunity to prevent or cure the error” thereby undermining the primacy of the trial court. *State v. Kirkman*, 159 Wn.2d 918, 926, 155 P.3d 125 (2007); *State v. Scott*, 110 Wn.2d 682, 687, 757 P.2d 492 (1988) (the constitutional error exception in RAP 2.5(a)(3) is not intended to afford criminal defendants a means for obtaining new trials whenever they can

identify a constitutional issue not litigated below). A defendant attempting to raise a claim for the first time on appeal must show both a constitutional error and prejudice to his rights. *Kirkman*, 159 Wn.2d at 926-27. A defendant can demonstrate actual prejudice on appeal by making a “plausible showing ... that the asserted error had practical and identifiable consequences in the trial of the case.” *Kirkman*, 159 Wn.2d at 935.

Prior to the adoption of RAP 2.5 the Washington Supreme Court held that a closed courtroom claim could be raised on appeal even if there was no objection on this ground in the trial court. *State v. Marsh*, 126 Wn. 142, 145-46, 217 P.705 (1923).

At common law, constitutional issues not raised in the trial court were not considered on appeal, with just two exceptions. If a defendant’s constitutional rights in a criminal trial were violated, such issue could be raised for the first time on appeal. Secondly, where a party raised a constitutional challenge affecting the jurisdiction of the trial court, an appellate court could also reach the issue.

State v. WWJ Corp., 138 Wn.2d 595, 601, 980 P.2d 1257, 1260 (1999) (citations omitted). These common law rules were replaced in 1976 by the adoption of the Rules of Appellate procedure, and specifically RAP 2.5(a). *WWJ Corp.*, 138 Wn.2d at 601. As noted in a recent opinion, *see State v. Beskurt*, 176 Wn.2d 441, 449-50, 293 P.3d 1159 (2013) (Madsen, J., concurring), when the Supreme Court decided *State v. Bone-Club* in

1995, it cited to the rule in *Marsh* without taking into consideration of the impact of RAP 2.5(a)(3). See *State v. Bone-Club*, 128 Wn.2d 254, 257, 906 P.2d 325 (1995). This failure to consider the impact of RAP 2.5(a)(3) has persisted in other decisions. See, e.g., *State v. Brightman*, 155 Wn.2d 506, 514–15, 122 P.3d 150 (2005).

As three justices of the Supreme Court recently concluded, the appellate courts should refuse to apply a rule that conflicts with the Rules of Appellate Procedure and subverts the intent of RAP 2.5(a). *State v. Beskurt*, 176 Wn.2d 441, 449-51, 293 P.3d 1159 (2013) (Madsen, J., concurring). The Court in *Bone-Club* did not consider the change effected by RAP 2.5(a); its holding that a public trial error need not be raised in the trial court to be considered on appeal should be corrected.

Respect for *stare decisis* requires a clear showing that an established rule is incorrect and harmful before it is abandoned. *State v. Devin*, 158 Wn.2d 157, 168, 142 P.3d 599 (2006). In this instance, the rule is incorrect because it contradicts the spirit and letter of the Rules of Appellate Procedure adopted by this Court. It is harmful in at least three respects: 1) the trial court is denied the opportunity to correct any error when no objection is required to preserve the issue for review; 2) it allows a defendant to participate in procedures and practices in the trial court that are to his benefit, yet still claim that these practices are the basis for error

in the appellate court; and 3) as the *Marsh* rule does not require a defendant to show a manifest error or any actual prejudice before obtaining new trial, public respect for the court is diminished and judicial resources are wasted when retrial is given as a remedy when it is evident from the record that there is no prejudice to the defendant.

These harms can be seen in the case now before the court. The trial court had the parties indicate their peremptory challenges in writing on a paper that was passed back and forth; neither party voiced an objection to this procedure. RP 115; CP 187. Defendant exercised all of his peremptory challenges thereby eliminating venire persons he did not want on his jury. Had defendant objected to this procedure and argued it constituted a violation of his right to an open courtroom, the trial court might have opted for different procedure just to eliminate a potential claim. Defendant cannot articulate any practical and identifiable negative consequences to his trial or show that he was prejudiced by the use of the written process to indicate peremptory challenges. His failure to object to what he now claims was a courtroom closure and a denial of his right to a public trial, coupled with his inability to establish resulting actual prejudice, should preclude appellate review. Despite the fact that he

cannot show any actual prejudice from the procedures used, defendant nevertheless, argues that he is entitled to a new trial. This is an abuse of the judicial process that should not be condoned.

This court should find that defendant's failure to object brings this issue under RAP 2.5(a)(3) in that he has failed to show an issue of truly constitutional magnitude that has caused him actual prejudice. As such, this court should refuse to review the claim.

b. The Courtroom Was Open Throughout Voir Dire Proceedings.

A criminal defendant's right to a public trial is found in article I, section 22 of the Washington Constitution, and the Sixth Amendment to the United States Constitution; both provide a criminal defendant the right to a "public trial by an impartial jury." The state constitution also provides that "[j]ustice in all cases shall be administered openly," which grants the public an interest in open, accessible proceedings, similar to rights granted in the First Amendment of the federal constitution. Wash. Const. article I, section 10; *State v. Lormor*, 172 Wn.2d 85, 91, 257 P.3d 624 (2011); *Seattle Times Co. v. Ishikawa*, 97 Wn.2d 30, 36, 640 P.2d 716 (1982); *Press-Enterprise Co. v. Superior Court*, 464 U.S. 501, 104 S. Ct. 819, 78 L. Ed. 2d 629 (1984). The public trial right "serves to ensure a fair trial, to remind the prosecutor and judge of their responsibility to the

accused and the importance of their functions, to encourage witnesses to come forward, and to discourage perjury.” *State v. Sublett*, 176 Wn.2d 58, 72, 292 P.3d 715 (2012). “There is a strong presumption that courts are to be open at all trial stages.” *Lormor*, 172 Wn.2d at 90. The right to a public trial includes voir dire. *Presley v. Georgia*, 558 U.S. 209, 130 S. Ct. 721, 175 L. Ed. 2d 675 (2010).

Whether the right to a public trial has been violated is a question of law reviewed de novo. *State v. Momah*, 167 Wn.2d 140, 147, 217 P.3d 321 (2009). The right to a public trial is violated when: 1) the public is fully excluded from proceedings within a courtroom, *State v. Bone-Club*, 128 Wn.2d 254, 257, 906 P.2d 325 (1995) (no spectators allowed in courtroom during a suppression hearing), and *State v. Easterling*, 157 Wn.2d 167, 172, 137 P.3d 825 (2006) (all spectators, including codefendant and his counsel, excluded from the courtroom while codefendant plea-bargained); 2) the entire voir dire is closed to all spectators, *State v. Brightman*, 155 Wn.2d 506, 511, 122 P.3d 150 (2005); 3) and is implicated when individual jurors are privately questioned in chambers, see *State v. Momah*, 167 Wn.2d 140, 146, 217 P.3d 321 (2009) and *State v. Strode*, 167 Wn.2d 222, 224, 217 P.3d 310 (2009) (jury selection is conducted in chambers rather than in an open courtroom without consideration of the *Bone-Club* factors). In contrast, conducting

individual voir dire in an open courtroom without the rest of the venire present does not constitute a closure. *State v. Erickson*, 146 Wn. App. 200, 189 P.3d 245 (2008).

When faced with a claim that a trial court has improperly closed a courtroom, the Washington Supreme Court has held that the reviewing court determines the nature of the closure by the presumptive effect of the plain language of the court's ruling, not by the ruling's actual effect. *In re Personal Restraint of Orange*, 152 Wn.2d 795, 807-8, 100 P.3d 291 (2004).

In the case now before the Court, defendant argues that the procedure used by the court for exercising peremptory challenges constituted a courtroom closure. The record shows the following occurred: At the close of questioning, the court informed the venire that the attorneys would be exercising challenges, a process that did not require their participation. RP (1/8/13) 125. The parties exercised their peremptory challenges by passing a piece of paper between them. CP 187. While this was occurring, the court stated:

THE COURT: All right. This part does not require audience participation. The attorneys are going to be going back and forth exercising challenges; so you're free, if you want to, to talk among yourselves quietly, if you want to stand up and stretch. I realize that the benches are not the most comfortable places to sit for extended periods of time. If you are selected on the jury, you get the comfy, padded

chairs; or if you want to read, you know, check your e-mail. Try to keep the sound off of, you know, whatever games you may be playing electronically; so - - until they're finished with this process.

RP (1/8/13) 125-26. When the parties completed their peremptory challenges, they handed the paper to the court. RP (1/8/13) 126. The court then called out the jurors who would be serving on the case. RP (1/8/13) 126-27. No objections were raised regarding either party's use of peremptory challenges. RP (1/8/13) 126-27. The written sheet indicating the peremptory challenges used by each side was filed, thereby making it a public document. CP 187.

Defendant has failed to identify any ruling of the court that closed the courtroom to any person. All jury selection was conducted in the courtroom as opposed to the judge's chambers or the jury room. Defendant can point to no Washington case that has found a courtroom closure under these circumstances. Rather, defendant argues that conducting the peremptory challenge process in writing effectively "closed" the courtroom.

The right to a public trial serves to ensure a fair trial, to remind the prosecutor and judge of their responsibility to the accused and the importance of their functions, to encourage witnesses to come forward,

and to discourage perjury. *Brightman*, 155 Wn.2d at 514 (citing *Peterson v. Williams*, 85 F.3d 39, 43 (2d Cir. 1996)). But not every interaction between the court, counsel, and defendants will implicate the right to a public trial. *Sublett*, 176 Wn.2d at 71. To decide whether a particular process must be open to the press and the general public, the court in *Sublett* adopted the “experience and logic” test formulated by the United States Supreme Court in *Press–Enterprise Co. v. Superior Court*, 478 U.S. 1, 8, 106 S. Ct. 2735, 92 L. Ed. 2d 1 (1986). *Sublett*, 176 Wn.2d at 73, 141.

The first part of the test, the experience prong, asks “whether the place and process have historically been open to the press and general public.” The logic prong asks “whether public access plays a significant positive role in the functioning of the particular process in question.” If the answer to both is yes, the public trial right attaches and the Waller or Bone–Club factors must be considered before the proceeding may be closed to the public. We agree with this approach and adopt it in these circumstances.

Sublett, 176 Wn.2d at 73. Applying that test, the court held that no violation of Sublett’s right to a public trial occurred when the court considered a jury question in chambers. *Sublett*, 176 Wn.2d at 74–77. “None of the values served by the public trial right is violated under the facts of this case.... The appearance of fairness is satisfied by having the question, answer, and any objections placed on the record.” *Sublett*, 176 Wn.2d at 77.

Division III of the Court of Appeals recently addressed whether challenges for cause done in a sidebar constituted a courtroom closure under the experience and logic test in *State v. Love*, 176 Wn. App. 911, 309 P.3d 1209 (2013). As to the experience prong the court concluded:

The history review confirms that in over 140 years of cause and peremptory challenges in this state, there is little evidence of the public exercise of such challenges, and some evidence that they are conducted privately. Our experience does not require that the exercise of these challenges be conducted in public.

Love, 176 Wn. App. at 919. Under the logic prong, the court found that none of the purposes of the public trial right were furthered by a party's actions is making a challenge for cause or a peremptory challenge as a challenge for cause creates an issue of law for the judge to decide and a peremptory challenge "presents no questions of public oversight." *Love*, 176 Wn. App. at 919. The court concluded that use of a side bar to conduct challenges for cause did not constitute a courtroom closure. *Love*, 176 Wn. App. at 920.

In addition to the historical review conducted in *Love*, there is some additional authority that the public announcement of a peremptory challenge in open court by the party exercising the challenge is not a widespread practice. When the United States Supreme Court decided that it was just as improper for a criminal defendant to excuse a potential juror

for an improper reason as it was a prosecutor, the court commented that “it is common practice not to reveal the identity of the challenging party to the jurors and potential jurors[.]” *Georgia v. McCollum*, 505 U.S. 42, 53 n.8, 112 S. Ct. 2348 (1992), citing Underwood, *Ending Race Discrimination in Jury Selection: Whose Right Is It, Anyway?*, 92 Colum.L.Rev. 725, 751, n. 117 (1992).

In the case now before the court, defendant does not point to any ruling of the court that excluded spectators or any other person from the courtroom during the voir dire process. The record indicates that all of voir dire and the exercise of peremptory challenges were carried out in an open courtroom. Challenges for cause were performed on the record in open court. RP (1/8/13) 16, 81, 82. Peremptory challenges were made by the attorneys in open court, albeit by a written process. CP 187; RP (1/8/13) 125-56. Presumably, defendant could see the peremptory sheet and discuss the process with his attorney while it was going on. The written record of the process was reviewed by the court and filed, making it available for public inspection. CP 187. None of the peremptory challenges were contested and there was no need for the court to make any decisions on the peremptory challenges. RP 126-27. The record offers no basis to assume that anything occurred during this process other than the written communication, among counsel and the court, of the names of the

prospective jurors each counsel had decided to excuse by the right of peremptory challenge. Anyone can look at the peremptory challenge sheet and see exactly which party exercised which peremptory against which prospective juror and in what order. CP 187.

It should be noted that under *McCullum*, both the prosecution and defense are forbidden from removing a juror with a peremptory challenge for an improper purpose. Thus, if there was a concern that a juror was being removed for an improper reason, it is immaterial which party exercised a peremptory against that juror. Any potential juror who felt that he or she was being improperly removed from the jury could raise his or her concern with the trial court. Under the written process used here, the court would know who had exercised its peremptory against that person and could decide whether it was necessary for that party to explain its reasons for doing so. The procedure used below protects the values of the public trial right.

Defendant has failed to identify any closure of the courtroom during voir dire and fails to show how the procedures used in an open court undermined the purposes of the public trial right. Anyone sitting in the court room would know which jurors were excused for cause and why. RP (1/8/13) 16, 81-82. The parties carefully recorded the names of the prospective jurors who were removed by peremptory challenge, as well as

the order in which each challenge was made and the party who made it. CP 187. This document is easily understood, and it was made part of the open court record, available for public scrutiny. These procedures satisfied the court's obligation to ensure the open administration of justice.

Defendant has failed to show that any of the values served by the public trial right was violated by use of the written peremptory challenge procedure during the voir dire process when the written document created in the peremptory process is later filed, making it a public record. He relies on *State v. Paumier*, 176 Wn.2d 29, 32-33, 288 P.3d 1126 (2012) and *State v. Wise*, 176 Wn.2d 1, 7-8, 288 P.3d 1113 (2012) to support his argument, but both of these cases involve situations where the prospective jurors were questioned in chambers, but the matter was transcribed as if it were in open court. Brief of Appellant at 19. Defendant suggests that, like those cases, the filing of the peremptory sheet after the fact precludes the public from raising a concern. However, unlike *Paumier* and *Wise*, the peremptory challenges were performed in open court, in full view of the public. The court announced which jurors would be seated on the jury, which had the effect of informing the public which jurors had been challenged. Any public spectator with a concern could have raised the issue immediately, before the jury was sworn.

As defendant has failed to show that any improper closure of the courtroom occurred, this issue is without merit.

2. THE TRIAL COURT DID NOT COMMIT ERROR WHEN IT DENIED DEFENDANT'S REQUEST TO DISCHARGE HIS ATTORNEY WHERE THE BASIS OF THE BREAKDOWN IN COMMUNICATIONS WAS DUE TO DEFENDANT'S REFUSAL TO COOPERATE WITH HS ATTORNEY.

A criminal defendant has a constitutional right to receive effective representation from his attorney. *Wheat v. United States*, 486 U.S. 153, 159, 108 S. Ct. 1692, 100 L.Ed.2d 140 (1988). This right does not guarantee a defendant the right to her counsel of choice or to counsel with whom she has a meaningful attorney-client relationship. *Wheat*, 486 U.S. at 159; *Daniels v. Woodford*, 428 F.3d 1181, 1197 (9th Cir.2005), *cert. denied*, 550 U.S. 968 (2007); *State v. Varga*, 151 Wn.2d 179, 200, 86 P.3d 139 (2004). Furthermore, a qualified appointed counsel, and not the client, is generally in charge of the choice of trial tactics and the theory of defense. *United States v. Wadsworth*, 830 F.2d 1500, 1509 (9th Cir.1987).

Whether to substitute counsel is a matter within the discretion of the trial court. *State v. Schaller*, 143 Wn. App. 258, 267, 177 P.3d 1139 (2007). The defendant must show good cause to justify appointment of new counsel, as shown by a conflict of interest, an irreconcilable conflict, or a complete breakdown in attorney-client communication. *Varga*, 151 Wn.2d at 200. If the attorney-client relationship completely collapses, the refusal to substitute new counsel violates the defendant's right to effective

assistance of counsel. *United States v. Moore*, 159 F.3d 1154, 1158 (9th Cir.1998). However, “it is well settled that a defendant is not entitled to demand a reassignment of counsel on the basis of a breakdown in communications where he simply refuses to cooperate with his attorney[.]” *State v. Thompson*, 169 Wn. App. 436, 457-58, 290 P.3d 996 (2012) (quoting *Shaller*, 143 Wn. App. at 271).

Here, the trial court did not abuse its discretion when it declined to consider defendant’s equivocal request for a new attorney where nothing in the record showed that there was any conflict of interest, irreconcilable conflict, or a complete breakdown in attorney-client communication that was not wholly one-sided. It was apparent that defendant’s attorney was making substantial efforts to communicate with defendant, and defendant refused to cooperate with any effort that did not result in his immediate release from custody. RP (5/11/12) 1-2. Counsel indicated that, if the communication issue was just with him, he would withdraw as attorney, but noted that defendant’s refusal to cooperate extended to other people involved to help with the defense and that called into question defendant’s competency. RP (5/11/12) 3. The court concluded that defendant’s competency would have to be addressed before it could assess any other issue. RP (5/11/12) 5. Throughout the rest of the hearing, defendant indicated that he did not want a competency evaluation and that he was innocent of all charges. RP (5/11/12) 5-9. When the court granted the motion for the competency evaluation, but ordered it to be conducted at

the jail, defendant asked, “Judge, can I make a request of a, a new attorney?” RP (5/11/12) 9. The court told defendant to put the request in writing so he could consider it. RP (5/11/12) 9. The trial court did not abuse its discretion in asking defendant to make his motion in writing, as the court would not consider an issue as serious as substitution of counsel while defendant’s competency was still at issue.

When the parties returned for the results of defendant’s competency evaluation, counsel indicated that defendant still refused to speak to him. RP (5/18/12) 6. Counsel was unsure if defendant’s refusal to speak to him was a competency issue or a tactic. RP (5/18/12) 6. The court noted that two evaluators found him competent and the most recent evaluation did not refute those findings. RP (5/18/12) 7. The court asked defendant about his motion to fire his attorney and mentioned he had not seen anything in writing. RP (5/18/12) 14. Defendant stated that he was not allowed a pencil or a kite. RP (5/18/12) 14-15. The court denied defendant’s motion, concluding that “this is just partly his way of trying to manipulate getting what he wants.” RP (5/18/12) 15. The court obviously concluded that, since defendant was competent, his refusal to cooperate with his attorney was a tactic.

A substantial record was created throughout the course of the hearings describing the breakdown in communication and the reasons for it. The record shows that counsel was making constant efforts to communicate with defendant, but to no avail. Clearly the court

determined that defendant's lack of cooperation was not a breakdown in communication that warranted a new attorney. As the breakdown in communication was entirely based on defendant's refusal to talk to his attorney, the trial court did not abuse its discretion when it denied defendant's request to fire him.

3. DEFENDANT'S WAIVER OF HIS RIGHT TO TESTIFY
WAS NOT RENDERED INVOLUNTARY BY THE
COURT'S ACTION.

A criminal defendant has a federal and state constitutional right to testify on his or her own behalf. *State v. Thomas*, 128 Wn.2d 553, 556–57, 562, 910 P.2d 475 (1996). This right is fundamental and cannot be abrogated by defense counsel or by the trial court. *Thomas*, 128 Wn.2d at 558. Only the defendant has the authority to decide whether or not to testify. *Thomas*, 128 Wn.2d at 558. Although the defendant does not need to waive the right to testify on the record, such a waiver must be made knowingly, voluntarily, and intelligently. *Thomas*, 128 Wn.2d at 558. Trial courts rely on defense counsel to inform defendants of their constitutional right to testify. *Thomas*, 128 Wn.2d at 560.

Here, defendant claims that the trial court interfered with his right to testify. However, the record shows that the court attempted to accommodate defendant's right to present his story to the jury by addressing his visibility to the jury combined with the need for security in the courtroom. RP 332. When he was told he would have to move,

defendant asked, “I don’t understand what would be the point of me testifying?” RP 332. The court informed him that he had the right to testify, even though his counsel was advising against it. RP 332. The court explained that defendant was a security risk due to his own choice of behavior, and that he would have to testify while still strapped to a chair. RP 333. Defendant claimed that he did not understand how he had any choice when he was incarcerated. RP 333. The court explained that he had the choice to testify, but that he would be doing it while restrained. RP 333. The court then reiterated the risks as stated by counsel and ensured defendant understood them: “Now, you want to testify, you’re saying. Do you understand what I’m saying the risks are that your attorney already indicated to you?” RP 333-35. Defendant indicated that he understood. RP 335. The court reminded defendant to listen to his attorney’s questions and not volunteer information. RP 335. At that point, it was defendant’s stepfather who spoke up and told defendant not to testify. RP 335-36. The court then stated:

All right. Mr. Carpenter, do you want to testify or not? It’s your right. It’s your decision. You can testify if you want, or you can listen to the advise of [counsel] and your stepfather and choose not to testify.

RP 336. The court then gave defendant a ten-minute recess for him to decide. RP 337. When the court reconvened, the judge asked defendant if he wanted to testify and defendant responded, “I can’t.” RP 337. The trial court refused to accept this response or defendant’s repeated equivocal

statements as waiver and informed him that he would be sworn in to testify. RP 337-41. At that point, defendant's stepfather asked defendant to clearly answer "yes or no." RP 341. Defendant responded, "no." RP 341. The court asked, "no, you don't want to testify," to which defendant responded, "[t]hat's my answer." RP 341. The court accepted defendant's statement as a waiver.

Nothing in this exchange shows that the court interfered with defendant's right to testify. The trial court reiterated the risks associated with testifying, which were already stated in the record by counsel. If defendant had testified, he would have been subject to questioning about his prior crime of dishonesty and, if he testified to any facts relating to his other pending cases, it would have opened the door to questioning about other bad acts. The trial court ensured that defendant understood this so he could make an informed decision, but did not give any opinion one way or the other. Without a clear expression of his desire to waive his right, the trial court was in the process of ensuring his right to testify. If anyone interfered with defendant's right to testify, it was his stepfather - not the court - who encouraged him to change his mind.

Defendant has failed to show that his waiver of his right to testify was rendered involuntary by the actions of the court.

D. CONCLUSION.

For the reasons stated above, the State respectfully requests this Court to affirm defendant's convictions.

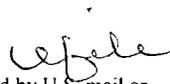
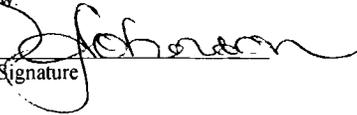
DATED: April 4, 2014.

MARK LINDQUIST
Pierce County
Prosecuting Attorney


KIMBERLEY DEMARCO
Deputy Prosecuting Attorney
WSB # 39218

Certificate of Service:

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


4/4/14 
Date Signature

PIERCE COUNTY PROSECUTOR

April 08, 2014 - 11:33 AM

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