

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

STATE OF WASHINGTON,

Respondent,

v.

TRAVIS B. COUNTS,

Appellant.

ON APPEAL FROM THE SUPERIOR COURT OF THE
STATE OF WASHINGTON FOR LEWIS COUNTY

The Honorable Nelson Hunt, Judge

BRIEF OF APPELLANT

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A. ASSIGNMENTS OF ERROR

1. Trial counsel was ineffective for failing to put on the record two side-bar conversations.

2. Appellant cannot receive effective assistance of counsel without a complete record of the trial proceedings.

3. Appellant was denied his right to a public trial by two side-bar conversations that were not made public.

4. Appellant was denied his right to a fair trial by two side-bar conversations held without his presence.

5. The trial court erred by imposing two sureties on appeal without considering CrR 3.2.

Issues Presented on Appeal

1. Was trial counsel ineffective for failing to put on the record a number of sidebar conversations?

2. Can appellant receive effective assistance of counsel without a complete record of the trial proceedings?

3. Did the trial court err by imposing tow sureties on appeal without considering CrR 3.2?

B. STATEMENT OF THE CASE

1. PROCEDURAL FACTS

Mr. Counts was charged by amended information with assault in the second degree with a firearm enhancement. CP 11-13. Mr. Counts was convicted as charged by a jury, the honorable Nelson Hunt, presiding. CP 44-51. Post-conviction, Mr. Counts requested an appeal bond. RP 402. The court imposed an appeal bound with two separate sureties. Supp. CP (Order Establishing Conditions of Release 3-13-13). This timely appeal follows. CP 56-64.

2. SUBSTANTIVE FACTS

Carrie Dodge met Travis Counts in high school, lost touch and reconnected with him in July 2010. RP 25-26. Ms. Dodge drinks a six pack per night and has been drinking and smoking pot since 1995. RP 23, 107. Ms. Dodge started dating Mr. Counts October 2010. RP 26. Ms. Dodge stated that she and Mr. Counts drank too much together and smoked pot. RP 27. Mr. Counts was adamant that he has not smoked pot since 1987 when he became a father. RP256.

Mr. Counts and Ms. Dodge had a stormy relationship where she moved in and out three times between October 2010 and July 31, 2012. RP

29-39. Ms. Dodge was drinking throughout the day on July 31, 2012 and she and Mr. Counts got into a heated argument. RP 52-54, Mr. Counts tried to leave the house in his truck, but Ms. Dodge did not want him to go because she paid for the gas in the truck. RP 70. Ms. Dodge was very drunk and Mr. Counts was afraid that she would use one of his guns on her so he unloaded the rifle he knew she had previously used. RP 261, 264, 291.

Ms. Dodge testified that Mr. Counts pointed a loaded gun at her head for a moment and then removed the gun and the bullet in the chamber and walked away. RP 74-77. Ms. Dodge testified that she was afraid, but during the 911 call asked Mr. Counts if he wanted to talk to the 911 operator. RP 131, 132, 341. She also told Mr. Counts that he could not leave his own home in his own truck. Mr. Counts asked her to move out: she paid no rent. RP 111.

The following is a portion of the 911 tape played for the jury: (Ms. Dodge speaking)

"Well, he pointed this gun at me about ten minutes ago." And what happened in that ten minutes? I don't know. That's when Travis says twice, "I'm sitting right here, I'm sitting right here." Then you can hear her say, "Do you want to talk, Travis?" She's on the phone with 9-1-1, and she's asking him if he wants to talk to the 9-1-1 operator. And when we hear nothing, "I'm getting no answer, of course." Why would she say "of course"? Because that's the Mr. Avoid Conflict, and that's why she says, "He's not saying anything, of course."

Then she says, "I'm packing my stuff, sweetie."

RP 341.

According to Ms. Dodge, Mr. Counts avoids conflict. RP 123.

a. Side Bar

The first sidebar:

When the court was reading out the charge, it indicated assault in the second degree, domestic violence, while armed with a firearm, and that, of course, clicked in my mind, and I was going to say something after the fact with regard to that, but then Mr. Halstead, when he started addressing the panel, started talking about domestic violence, and that's when I asked if we could approach the court, and we had a little sidebar. And at that point I believe at that time I asked for -- I know at that time I asked for a mistrial based on those comments, and I would on the record request a mistrial based on the comments from the court and from Mr. Halstead during jury selection with regard to domestic violence.

RP 17.

The second sidebar occurred during the direct testimony of the complainant and was requested by the trial judge. The record is silent regarding the nature of the sidebar.

Q Good afternoon, Carrie. I just have a couple questions for you.

A Okay.

Q One time, if I understand your testimony correctly, the sheriff or law enforcement was called to have you removed from his residence; is that correct?

A Yes.

Q Were there any other times other than the one time?

A No.

Q You're sure about that?

A Promise.

Q Now, do you know whether or not Mr. Counts smoked marijuana while you and he were dating?

A Yes.

Q And how do you know that?

MR. BLAIR: I'm going to object.

A Because --

MR. BLAIR: This is not rebuttal.

MR. HALSTEAD: Absolutely it is.

THE COURT: Well, I'm going to allow some limited inquiry here, so let's see what the answer is.

A Yes.

Q Okay.

A And how do I know? Because we would stand there outside and do it together.

Q Outside where?

A Outside the house.

Q And how often would that happen?

THE COURT: All right. Now may I see counsel at the bench, please.

(SIDE-BAR CONFERENCE.)

Q Did Mr. Counts ever drive you to your jobs?

A Once in a while.

RP 303-304 (emphasis added).

C. ARGUMENTS

2. APPELLANT WAS DENIED HIS RIGHT TO A PUBLIC TRIAL.

Whether a defendant's constitutional right to a public trial has been

violated is a question of law, which is reviewed de novo on direct appeal. *State v. Paumier*, 176 Wn.2d 29, 34, 288 P.3d 1126 (2012); *State v. Lormor*, 172 Wn.2d 85, 90, 257 P.3d 624 (2011); *State v. Wilson*, 174 Wn.App. 328, 334, 298 P.3d 148 (2013). A criminal defendant has a right to a public trial under the state and federal constitutions. *Lormor*, 172 Wn.2d at 90–91, U.S. CONST. amends. VI, XIV; WASH. CONST. art. I, § 22. Likewise, the public has a complementary right to open proceedings under the state and federal constitutions. *Lormor*, 172 Wn.2d at 91, 257 P.3d 624; U.S. CONST. amend. I; WASH. CONST. art. I, § 10.

The Constitutional right to a public trial is not waived by counsel's failure to object. *State v. Easterling*, 157 Wn.2d 167, 176 n.8, 137 P.3d 825 (2006); *State v. Brightman*, 155 Wn.2d 506, 514-515, 122 P.3d 150 (2005).

The right to a public trial, however, is not absolute, and a trial court may close the courtroom under certain circumstances. *State v. Momah*, 167 Wn.2d 140, 148, 217 P.3d 321 (2009), *cert. denied*, — U.S. —, 131 S.Ct. 160, 178 L.Ed.2d 40 (2010). To protect the public trial right and to determine whether a closure is appropriate, Washington courts must apply the factors set forth in *State v. Bone-Club*, 128 Wn.2d 254, 906 P.2d 325 (1995) and make specific findings on the record to justify a closure. *Momah*, 167 Wn.2d

at 148–49. Our state Supreme Court has consistently followed the Court's precedent under the Sixth Amendment when considering closures under both Sixth Amendment and article I, section 22 of the Washington State Constitution. *Subblett*, 169 Wn.2d at 102.1

This requires that the trial court consider “alternatives to closure” to ensure the least restrictive means of closure is adopted. *Paumier*, 176 Wn.2d at 35, *State v. Wise*, 176 Wn.2d 1, 10, 288 P.3d 1113 (2012). Failure to conduct a *Bone-Club* analysis before closing a proceeding required to be open to the public is a structural error warranting a new trial. *Paumier*, 176 Wn.2d at 35.

A defendant’s public trial right is implicated and a *Bone-Club* analysis is required when the proceeding falls within a specific category of trial proceedings that our Supreme Court has already established implicates the public trial right, and if the proceeding does not fall within such a specific

1 article I, section 10 of Washington's Constitution provides that “[j]ustice in all cases shall be administered openly,” granting both the defendant and the public an interest in open, accessible proceedings. *Seattle Times Co. v. Ishikawa*, 97 Wash.2d 30, 36, 640 P.2d 716 (1982). This right is mirrored federally by the First Amendment. *Press-Enter. Co. v. Superior Court*, 464 U.S. 501, 104 S.Ct. 819, 78 L.Ed.2d 629 (1984) (*Press I*). We have historically analyzed allegations of a court closure under either article I, section 10 or article I, section 22 analogously, although each is subject to different relief depending upon who asserts the violation. *See Press I*, 464 U.S. at 512, 104 S.Ct. 819.

category, if it satisfies the “experience and logic” test set forth in *State v. Sublett*, 176 Wn.2d 58, 71-73, 292 P.3d 715 (2012) (lead opinion).

a. The Right to a Public trial Attached to the Side-Bar Conferences.

It is difficult to assess a sidebar in a generic manner because as in the instant case, the two side-bars addressed very different issues: one, presumably a motion to dismiss, and two, testimony from the complainant. RP 17, 303-304.

“The resolution of whether the public trial right attaches to a particular proceeding cannot be resolved based on the label given to the proceeding.” *Sublett*, 176 at 72-73, citing, *Press–Enterprise Co. v. Superior Court*, 478 U.S. 1, 8–10, 106 S.Ct. 2735, 92 L.Ed.2d 1 (1986) (*Press II*).

In *Press*, the United States Supreme Court formulated and explained the experience and logic test to determine whether the core values of the public trial right are implicated. 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.” *Press II*, 478 U.S. at 8, 106 S.Ct. 2735. The logic prong asks “whether public access plays a significant positive role in the functioning of the particular process in question.” *Id.* 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. *Sublett*, 176 Wn.2d at 73 (quoting *Press II*, 478 U.S. at 8, 106 S.Ct. 2735); *In Re Pers. Restraint of Yates*, 177 Wn.2d 1, 29, 296 P.3d 872 (2013). If the answer to *both* prongs of the experience and logic test is yes, the public trial right “attaches” and the trial court must consider the *Bone-Club* factors on the record before closing the proceeding to the public. *Sublett*, 176 Wn.2d at 73.

Mr. Counts was entitled to a *Bone Club* analysis because the facts of this case meet this test. The initial sidebar appears to involve a motion for a mistrial due to the court discussing domestic violence during the trial court’s initial address to the jury. RP 17. This motion occurred during trial which is historically been open to the press and general public because under the federal constitution. A criminal “defendant has a right to be present at a proceeding ‘whenever his presence has a relation, reasonably substantial, to the fullness of his opportunity to defend against the charge’ ” but “does not have a right to be present when his or her ‘presence would be useless, or the benefit but a shadow.’ ” *State v. Irby*, 170 Wn.2d 874, 881, 246 P.3d 796 (2011) (quoting *Snyder v. Massachusetts*, 291 U.S. 97, 105–07, 54 S.Ct. 330, 78 L.Ed. 674 (1934), *overruled in part on other grounds sub nom. Malloy v.*

Hogan, 378 U.S. 1, 84 S.Ct. 1489, 12 L.Ed.2d 653 (1964)); *State v. Bennett*, 168 Wn.App. 197, 201-202, 275 P.3d 1224 (2012).

“[T]he defendant's public trial right in broader terms in that it “serves to ensure a fair trial, to remind the officers of the court of the importance of their functions, to encourage witnesses to come forward, and to discourage perjury.” *Bennett*, 168 Wn.App. at 202, quoting, *State v. Brightman*, 155 Wn.2d 506, 514, 122 P.3d 150 (2005); and *State v. Leyerle*, 158 Wn.App. 474, 479, 242 P.3d 921 (2010) (stating that the public trial right “ensure[s] a fair trial, foster[s] public understanding and trust in the judicial system, and give[s] judges the check of public scrutiny”) (citing *Brightman*, 155 Wn.2d at 514, 122 P.3d 150; *Dreiling v. Jain*, 151 Wn.2d 900, 903–04, 93 P.3d 861 (2004)). The role of the public in serving to ensure a fair trial plays a significant positive role as required under *Sublett*, 176 Wn.2d at 73.

Thus, historically, the defendant and public have a right to be present and the public’s presence serves to ensure a fair trial; this is no less true during substantive side-bars. In *State v. Slett*, 169 Wn.App. 766, 774-776, 282 P.3d 101 (2012), the Court held that the in-chambers conference that involved the dismissal of four jurors for case-specific reasons based at least in part on the jury questionnaires and the dismissal of the jurors was part of the

jury selection process to which the public trial right applied. *Slert*, 169 Wn.App. at 774-776.

In this case there is no evidence to suggest that the side-bars were ministerial rather than substantive and the evidence implies that the side-bars were substantive. Because the judge and parties did not put on the record the nature of the side-bars and they involved case-specific issues, the public trial right was violated. *Slert*, 169 Wn.App. at 774-776.

b. Under A Bone-Club Analysis, Appellant Was Denied His Right to a Public Trial.

Bone-Club applied to Mr. Count's case and the failure to conduct a *Bone-Club* analysis was structural error. *Paumier*, 176 Wn.2d at 35. The *Bone-Club* factors are as follows:

- “1. The proponent of closure or sealing must make some showing [of a compelling interest], and where that need is based on a right other than an accused's right to a fair trial, the proponent must show a ‘serious and imminent threat’ to that right.
2. Anyone present when the closure motion is made must be given an opportunity to object to the closure.
3. The proposed method for curtailing open access must be the least restrictive means available for protecting the threatened interests.

4. The court must weigh the competing interests of the proponent of closure and the public.

5. The order must be no broader in its application or duration than necessary to serve its purpose.”

Bone-Club, 128 Wn.2d at 258–59 (alteration in original) (quoting *Allied Daily Newspapers of Wash. v. Eikenberry*, 121 Wn.2d 205, 210–11, 848 P.2d 1258 (1993)).

The first *Bone-Club* factor was not exercised in this case because the trial court did not engage in any analysis or reasoning for the side-bar. There was no showing that the closed sidebar was more important than the defendant’s right to an open trial. Second, the record does not provide any evidence that Mr. Counts or any member of the public was given the opportunity to object to the side-bar. Third, there was no evidence that sidebar was the least restrictive means available. Fourth, the trial court did not weight the competing interests of Mr. Counts and the public’s right to an open trial versus the need for the sidebar. Fifth and finally, there was no evidence that the two sidebars were necessary. In sum the failure to conduct a *Bone-Club* analysis was structural error requiring reversal. *Paumier*, 176 Wn.2d at 35, 288 P.3d 1126; *Bone-Club*, 128 Wn.2d at 258–262.

Violation of the right to a public trial is prejudicial requiring a new trial. Id.

c. Right to be Present

Excluding Mr. Counts from the side-bar also violated his constitutional right to be present at a critical stage of the trial. A defendant has a fundamental right to be present at all critical stages of a trial, including voir dire and the empanelling of a jury. . *Rushen v. Spain*, 464 U.S. 114, 117, 104 S.Ct. 453, 78 L.Ed.2d 267 (1983); *Irby*, 170 Wn.2d at, 880; *see also. Slerf*, 169 Wn.App. at, 775.

This court has routinely analyzed alleged violations of the right of a defendant to be present by applying federal due process jurisprudence. *See In re Pers. Restraint of Benn*, 134 Wn.2d 868, 920, 952 P.2d 116 (1998); *In re Pers. Restraint of Lord*, 123 Wn.2d 296, 306, 868 P.2d 835 (1994); (adding “*see also* CONST. art. 1, §§ 3, 22”).

i. Due Process Clause of the Fourteenth Amendment

Although the right to be present is rooted to a large extent in the confrontation clause of the Sixth Amendment to the United States Constitution, the United States Supreme Court has recognized that this right is also “protected by the Due Process Clause in some situations where the

defendant is not actually confronting witnesses or evidence against him.” *United States v. Gagnon*, 470 U.S. 522, 526, 105 S.Ct. 1482, 84 L.Ed.2d 486 (1985). Accordingly, a defendant has a right to be present at a proceeding “whenever his presence has a relation, reasonably substantial, to the fullness of his opportunity to defend against the charge.” *Snyder*, 291 U.S. at 105–06.

The Court in *Snyder* highlighted that the relationship between the defendant’s presence and his “opportunity to defend” must be “reasonably substantial,[]”. *Snyder*, 291 U.S. at 106–07. Thus, the due process right to be present is not absolute; rather “the presence of a defendant is a condition of due process to the extent that a fair and just hearing would be thwarted by his absence.” *Snyder*, 291 U.S. at 107–08.

In *Irby*, the defendant was to be tried for murder. Prospective jurors were asked to fill out a questionnaire, with voir dire set to begin the next day. Some members of the jury panel indicated in their responses to the questionnaire that a three week trial would be a hardship for them, or that a parent had been murdered. That same day, the trial judge exchanged e-mails with counsel about the possibility of reaching agreement about excusing those jurors so they would not have to appear for voir dire. Irby had no opportunity to participate in the e-mail exchange. Counsel stipulated to the

dismissal of seven potential jurors for cause without Irby ever seeing them. The Supreme Court found a constitutional violation because in the e-mail exchange, jurors were “being evaluated individually,” *Irby*, 170 Wn.2d at 882, and Irby missed the opportunity to give advice and suggestions to defense counsel in this process. *Irby*, 170 Wn.2d at 883; *see also Skert*, 169 Wn.App. at 771 (after an unreported in-chambers conference, four jurors were excused for cause based on questionnaire answers indicating they had some knowledge about the defendant's prior trials.).

Here as in *Irby* and *Skert*, the trial court made a ruling to deny a motion to dismiss that Mr. Counts had no opportunity to review or provide input in any manner. Similarly, Mr. Counts did not have the opportunity to be present during the side bar involving the examination of the complaining witness. These side-bars like those in *Irby* and *Skert*, involved the evaluation of evidence where Mr. Counts missed the opportunity to give advice and suggestions to defense counsel. Mr. Counts had a right to be present because “his presence has a relation, reasonably substantial, to the fullness of his opportunity to defend against the charge.” *Irby*, 170 Wn.2d at 882-883; *Skert*, 169 Wn.App. at 771. In sum, the side-bars violated Mr. Counts’ constitutional right to be present at a critical stage of the trial under article 1,

section 22 of the state constitution and the Sixth Amendment. *Gagnon*, 470 U.S. at 526; *Bone-club*, 128 Wn.2d at 261. For this reason, this Court must reverse and remand for a new trial.

2. APPELLANT WAS DENIED DUE PROCESS AND EFFECTIVE ASSISTANCE OF COUNSEL WHEN TRIAL COUNSEL FAILED TO PUT SIDEBAR CONVERSATIONS ON THE RECORD.

Mr. Counts was denied his right to effective assistance of trial counsel under the Sixth Amendment to the United States Constitution and article I, section 22 of the Washington State Constitution. The Sixth Amendment right to counsel exists, and is needed, in order to protect the fundamental right to a fair trial. *Crace v. Hertzog*, 2013 WL 3338498, (W.D.Wash), citing, *Strickland v. Washington*, 466 U.S. 668, 684, 104 S.Ct. 2052, 80 L.Ed.2d 674 (1984); *In re Pers. Restraint of Davis*, 152 Wn.2d 647, 672, 101 P.3d 1 (2004). To establish a violation of the right to effective assistance of counsel, Mr. Counts must make two showings: that counsel's representation was deficient and that counsel's deficient representation caused prejudice. *Davis*, 152 Wn.2d at 672 (quoting *State v. McFarland*, 127 Wn.2d 322, 334-35, 899 P.2d 1251 (1995)).

To establish deficient performance, the defendant must show that trial counsel's performance fell below an objective standard of reasonableness. prejudice. *State v. Grier*, 171 Wn.2d 17, 33, 246 P.3d 1260 (2011); *see also Strickland*, 466 U.S. at 689; *Davis*, 152 Wn.2d at 672. Trial strategy and tactics cannot form the basis of a finding of deficient performance. *State v. Cienfuegos*, 144 Wn.2d 222, 227, 25 P.3d 1011 (2001] (*quoting State v. Hendrickson*, 129 Wn.2d 61, 77-78, 917 P.2d 563 (1996)).

Prejudice can be shown when there is a reasonable probability that, absent counsel's unprofessional errors, the result of the proceeding would have been different. *Strickland*, 466 U.S. at 694; *Davis*, 152 Wn.2d at 672-73. The reasonableness of trial counsel's performance is reviewed in light of all of the circumstances of the case at the time of counsel's conduct. *Lord*, 117 Wn.2d at 883.

a. Counsel Was Ineffective For Failing To Preserve The Record For Appeal.

Trial counsel failed to put two side-bar conferences on the record. These unreported sidebars appear neither in clerk's minutes nor in the verbatim report of proceedings. The failure to preserve the record for appeal denies an appellant his constitutional right to the effective assistance of

counsel because without preservation of the record, the appellant cannot obtain effective review. *State v. Koloske*, 100 Wn.2d 889, 896, 676 P.2d 456 (1984), *overruled on other grounds by*, *State v. Brown*, 113 Wn.2d 520, 782 P.2d 1013 (1989). Moreover there are no tactical reasons to fail to preserve a record for review for a motion to dismiss and discussion of examination of the main witness, the complainant. *Koloske*, 100 Wn.2d at 896.

In *Crace*, the Federal District Court reversed the state supreme court's assumption of deficient without reviewing counsel's declaration (in which he stated that the only reason he did not ask for the lesser included offense instruction was because he failed to consider it) and without deciding that counsel's performance was deficient. The Federal Court also reversed the state court's holding that Crace could not establish prejudice because the evidence was sufficient for a jury to convict him of attempted second degree assault. *Crace* at p. 7.

the Washington Supreme Court, failed to ask the critical question of the prejudice analysis, which is not whether there was sufficient evidence to convict, but whether it is reasonably likely that the result would have been different if the lesser included instruction had been given to the jury. This Court concludes that such a reasonable likelihood exists.

Crace, supra, at page 7; *Strickland*, 466 U.S. at 694. The Federal Court reversed because the state court because it is impermissible to “assume” either prong of the Strickland test. *Crace* at p. 7.

By analogy, here, as in *Crace*, counsel’s failure to make a record requires this Court to impermissibly **assume** whether it is reasonably likely that the result would have differed. This results in prejudice to Mr. Counts because he is denied appellate review.

In *Koloske*, the Court discussed the importance of preserving the record for appeal.

We realize that the purpose of an unrecorded sidebar conference is to dispose quickly of uncomplicated issues without repeatedly removing the jury from the courtroom. But **the danger of such conferences cannot be overemphasized. Failure to record the resulting ruling may preclude review.** See *Schiffman v. Hanson Excavating Co.*, 82 Wn.2d 681, 690, 513 P.2d 29 (1973); *Falcone v. Perry*, 68 Wn.2d 909, 915, 416 P.2d 690 (1966).

Koloske, 100 Wn.2d at 896. (Emphasis added in bold; Italics in original). In *Koloske*, the Court did not reach the merits of his appeal because *Koloske* was a fugitive and the record was not preserved for appeal. *Id.* The Court in

Koloske did not consider the circular reasoning requiring an assumption in the face of an inadequate record such as presented in *Crace*.

In *State v. Ermert*, 94 Wn.2d 839; 621 P.2d 121 (1980), the Supreme Court held that the defendant was denied her due process right to a fair trial and “defendant's present [appellate] counsel was hampered on appeal by the failure at trial to adequately preserve error for review.” *State v. Ermert*, 94 Wn.2d at 843, 848. In *Ermert*, counsel failed to preserve for review a flawed to-convict jury instruction. This essentially precluded appellate review. The Court in *Ermert*, determined that the defendant could not have been convicted of the crime charged and thus examined the issue under an effective assistance of counsel analysis:

[This] helps demonstrate that she was denied effective assistance of counsel, and thus justifies examination of the substantive issue of failure of proof despite trial counsel's failure to adequately preserve the issue at trial.

We otherwise could not have reached this issue because instructions must be adequately objected to at trial in order to preserve the issue [***17] on appeal. [*849] *CR 51(f)*; *RAP 2.5(a)*; *Reed v. Pennwalt Corp.*, 93 Wn.2d 5, 604 P.2d 164 (1979).

Ermert, 94 Wn.2d at 848-49. After reviewing the entire record, the Supreme Court held that trial counsel’s performance fell below an objectively

reasonable attorney standard that prejudiced Ms. Ermert's right to a fair trial.

In *State v. Hicks*, 163 Wn.2d 163 Wn.2d 477, 181 P.3d 831 (2008), there was an unreported sidebar conversation followed by the court instructing the jury that the case was a non-capital case. *State v. Hicks*, 163 Wn.2d 163 Wn.2d at 483. Relying on *State v. Townsend*, 142 Wn.2d 838, 846-847, 15 P.3d 145 (2001), the Supreme Court held trial counsel's performance in *Hicks* was deficient for informing the jury that the case was a non-capital case and for failing to object to the prosecution's and court's similar references, following a side-bar on this issue. *Hicks*, 163 Wn.2d at 488. In *Hicks*, although the single sidebar conversation was unreported the Court responded to the sidebar and determined that Hicks was not prejudiced by the remarks because "[t]here is no indication that the jurors failed to take their duty seriously." *Hicks*, 163 Wn.2d at 488.

Hicks is distinguishable because in that case there was only one sidebar and its contents were put made known by the Court's discussion with the jury following the single juror's concerns with the death penalty. Here as in *Ermert*, trial counsel's failure to object to the two sidebars, just as counsel's failure to request a lesser included instruction in *Ermert*, constituted deficient performance because the record was not preserved for appellate review. And

counsel's performance was prejudicial because without a record of the sidebars, Mr. Counts' constitutional right to effective appellate review is precluded. Wash. Const. art. I, § 22; *State v. Sweet*, 90 Wn.2d 282, 581 P.2d 579 (1978).

b. Failure to Put Side-Bars ON Record Analogous to Unconstitutional Waiver of Right to Appeal.

Counsel's failure to put the sidebars on the record acted as an unconstitutional waiver of Mr. Counts' right to effective appellate review. *State v. Klein*, 161 Wn.2d 554,565-66; *Sweet*, 90 Wn.2d at 286-87. In *Klein*, the State Supreme Court held that defendant in a criminal case cannot waive right to effective appeal unless it is knowing, voluntary and intelligent. *Klein*, 161 Wn.2d at 560-62, citing *Sweet*, 90 Wn.2d at 287.

Because there was no record of what was omitted from the record, Mr. Counts' could not have agreed to the omission and could not have made a knowing, voluntary and intelligent waiver of his right to effective representation. Without a complete record of proceedings, appellate counsel cannot determine what occurred during the numerous sidebar conversations, much less raise issues related to those sidebar conversations.

These failures denied Mr. Counts his due process right to: (1) a fair trial; (2) to the effective assistance of counsel; and (3) to effective appellate review. For these reasons this Court should vacate the judgment and sentences and remand for a new trial.

3. THE TRIAL COURT ERRED BY IMPOSING TWO SURETIES IN THE APPEAL BOND WITHOUT CONSIDERING CRR 3.2.

The trial court erred by relying exclusively on RCW 10.73.040 to impose two separate appeal bonds with two separate sureties in order to release Mr. Counts from custody pending this appeal. The trial court did not review or apply CrR 3.2, which exclusively governs the procedure for setting post-conviction bail pending appeal, and does not explicitly require the posting of two separate surety bonds. CrR 3.2(b) states in part:

If the court determines that the accused is not likely to appear if released on personal recognizance, the court shall impose the least restrictive of the following conditions that will reasonably assure that the accused will be present for later hearings, or, if no single condition gives that assurance, any combination of the following conditions:

(5) Require the execution of a bond with sufficient solvent sureties, or the deposit of cash in lieu thereof.

CrR 3.2 allows, but does not require, that trial courts impose multiple

surety bonds before releasing a convicted person pending his appeal. Here, the trial court mistakenly believed that the law required multiple surety bonds under RCW 10.73.040. In ruling on Mr. Counts' request for an appeal bond, the trial court stated:

THE COURT: And the statute goes on, and this is one of the reasons why it's very confusing, because it's one long sentence, but it says, "...the sum so fixed should be executed on his or her behalf by at least two sureties," and then it goes on to talk about their qualifications. So \$150,000 times two, \$300,000

RP 402-404.

A trial court abuses its discretion when it bases its decision on an error of law. *Noble v. Safe Harbor Family Pres. Trust*, 167 Wn.2d 11, 17, 216 P.3d 1007 (2009). Thus, although the trial court here had discretion to impose two surety bonds under CrR 3.2, its stated rationale for doing so was an error of law. RCW 10.73.040 provides in part:

In all criminal actions, except capital cases in which the proof of guilt is clear or the presumption great, upon an appeal being taken from a judgment of conviction, the court in which the judgment was rendered, or a judge thereof, must, by an order entered in the journal or filed with the clerk, fix and determine the amount of bail to be **required** of the appellant; and the appellant shall be committed until a **bond** to the state of Washington in the sum so fixed be executed on his behalf *by at least two sureties* possessing the qualifications **required**

for sureties on **appeal bonds**.

(Emphasis added.)

In *State v. Smith*, 84 Wn.2d 498, 500-01, 527 P.2d 674 (1974), the state Supreme Court recognized a conflict between RCW 10.73.040's requirement that trial courts set bail pending appeal “ ‘[i]n all criminal actions, except capital cases in which the proof of guilt is clear or the presumption great’ “ and former CrR 3.2(h) (1973), which required trial courts to set post-conviction bail “ ‘unless the court finds that the defendant may flee the state or pose a substantial danger to another or to the community.’ “

To resolve this conflict, the Supreme Court first noted that that convicted persons have no constitutional right to bail pending appeal. *Smith*, 84 Wn.2d 499. Thereafter, it ruled that the right to bail is essentially procedural and, thus, within the province of the court rules. *Smith*, 84 Wn.2d at 502. The Supreme Court held that to the extent former CrR 3.2(h) conflicted with RCW 10.73.040, the court rule controlled, reasoning, “[s]ince the promulgation of rules of procedure is an inherent attribute of the Supreme Court and an integral part of the judicial process, such rules cannot be abridged or modified by the legislature.” *Smith*, 84 Wn.2d at 502. The state

Supreme Court alternatively held that the legislature delegated to our Supreme Court the power to proscribe rules for bail pending appeal under RCW 2.04.190 and RCW 2.04.200. *Smith*, 84 Wn.2d at 502. RCW 2.04.200 provides:

When and as the rules of courts herein authorized shall be promulgated all laws in conflict therewith shall be and become of no further force or effect.

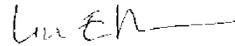
Applied to Mr. Counts' case, because RCW 10.73.040's two-surety bond provision restricts the trial court's discretion to impose a bond with an amount of sureties it finds sufficient to secure the convicted person's presence at future hearings, it conflicts with CrR 3.2. Accordingly, CrR 3.2 controls and grants a trial court discretion to impose multiple sureties but does not mandate that it do so. The trial court erred by requiring two separate surety bonds under that portion of RCW 10.73.040 in conflict with CrR 3.2. For this reason, this Court must remand for reconsideration of the appeal bond.

D. CONCLUSION

Mr. Counts respectfully requests this Court reverse his conviction and remand a new trial with new trial counsel and request a remand for reconsideration of his appeal bond.

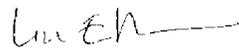
DATED this 2nd day of August 2013.

Respectfully submitted,



LISE ELLNER
WSBA No. 20955
Attorney for Appellant

I, Lise Ellner, a person over the age of 18 years of age, served the Lewis County prosecutor's office appeals@lewiscountywa.gov and Travis Counts DOC # 364760 Washington Corrections Center P. O. Box 900 Shelton, WA 98584. On August 2, 2013 by depositing in the mails of the United States of America, properly stamped and addressed and electronically.



Signature

ELLNER LAW OFFICE

August 02, 2013 - 9:57 AM

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