

NO. 44966-8-II

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

STATE OF WASHINGTON,

Respondent,

v.

WESTON GARRETT MILLER

Appellant.

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

The Honorable Richard L. Brosey, Judge

BRIEF OF APPELLANT

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A. ASSIGNMENTS OF ERROR

1. The state failed to prove beyond a reasonable doubt the element of premeditation in first degree murder charge.
2. Appellant was denied his confrontation rights by not being able to see the jury and have the jury see him.
3. Appellant was denied his right to a fair trial by not being able to see the jury and have the jury see him.
4. Appellant was denied his right to a public trial right by not being able to see the jury and have the jury see him.
5. Appellant was denied his right to the presumption of innocence by not being able to see the jury and have the jury see him.
6. Appellant was denied his right to assist his attorney by not being able to see the jury and have the jury see him.
7. Appellant was denied his right to appear by not being able to see the jury and have the jury see him.

Issues Pertaining to Assignment of Error

1. Did the state fail to prove beyond a reasonable doubt the element of premeditation in first degree murder charge?
2. Was Appellant denied his confrontation rights by not being able to see the jury and have the jury see him?
3. Was Appellant denied his right to a fair trial by not being able to see the jury and have the jury see him?
4. Was Appellant denied his right to a public trial by not being able to see the jury and have the jury see him?

5. Was Appellant denied his right to the presumption of innocence by not being able to see the jury and have the jury see him?

6. Was appellant was denied his right to assist his attorney by not being able to see the jury and have the jury see him?

7. Was appellant was denied his right to appear by not being able to see the jury and have the jury see him?

B. STATEMENT OF THE CASE

Weston Miller was charged and convicted by a jury of murder in the first degree. CP 1-6, 408-409, 493-502. Miller pleaded guilty to four counts of unlawful possession of a firearm. CP 83-91. Miller could not see several members of the jury and those members could not see Miller during the trial due to the court room configuration. Miller made the following two objections on the record.

a. Courtroom Configuration

Trial Counsel objected the configuration of the jury room as it blocked the jurors view of Miller and vice versa. RP 289-90.

MR. ENBODY: Some of the jurors or alternates orwhatever have indicated they are having trouble seeing, because of the configuration of the wall and the tables. My suggestion would be that the bailiff put the alternates at the far end. I don't know whether that's where they are currently situated but that would seem to make more sense --

THE COURT: No, alternates are down here on this

end.

MR. ENBODY: -- which would make it a lot more --

THE COURT: Well, but, then, you are basically discriminating against the alternates, saying the alternates are more shall we say expendable than the regular 12 jurors.

MR. ENBODY: Well, it won't be a 14 to nothing verdict.

THE COURT: Do you have a position, Mr. Meagher?

MR. MEAGHER: No, your Honor.

THE COURT: Some of the jurors are also complaining to the bailiff that they are having a hard time hearing. Mr. Enbody.

MR. ENBODY: I understand that. I don't have any suggestions, anyway. I can barely see the jurors.

MR. MEAGHER: The wall hooks around.

THE COURT: Anything else?

MR. ENBODY: No.

THE COURT: Your witness is here?

MR. MEAGHER: Yes, she is.

THE COURT: So we are ready to resume. Bring the jury in.

THE COURT: I have a belief that the jury is able to see and observe adequately the way they are sitting right now.

MR. ENBODY: Even though they say they can't.

THE COURT: It isn't that they said they couldn't.

One juror in particular the juror back in seat number 1 was complaining and we solved that by pushing the table forward. I'll address it.

(WHEREUPON THE JURY ENTERS THE COURTROOM.)

THE COURT: Good morning, ladies and gentlemen.

Please be seated. Yesterday an issue came up with apparently some of the jurors having a hard time seeing everything that's going on in the courtroom. I've had the defense table moved up, which should help the line of sight issues. If any of you have a problem seeing or hearing during the proceedings, let me know. One alternative that I do have that I've done before in some of these trials is I have moved the alternates down in front and moved everybody over one seat, but I would rather not do that if I don't have to, because it makes it

a little crowded in here when I do it that way, so I would prefer that.

RP 289-90.

MR. ENBODY: We still have a continuing problem of configuration of the jury. Just for purposes of the record, from where we sit we cannot see at least two or three of the jurors. They cannot see us.

THE COURT: Well, you don't know that. That's your speculation that they can't see you.

MR. ENBODY: Well, I can't see them and I can't see through Officer Hughes and I can't see through the bailiff. They are in direct line, so once again I make my request to have the alternates be placed outside.

THE COURT: I inquired of the jury yesterday as to whether anybody was having a problem seeing or hearing with the defense table being where it is. None of the jurors indicated that they had a problem seeing or hearing the evidence, and here again the evidence generally comes from the witness stand. It may very well be that the jurors have an opportunity to view the parties at the counsel table, during the trial, but I'm not aware that being able to view the parties at counsel table is necessarily such a fundamental issue in a trial that I have to be concerned with the configuration of the jury. The fact of the matter remains is that there are 14 chairs in the jury box in this particular courtroom and the 12 jurors are seated at one end and proceeding down the jury box with the alternates at the end and I'm not going to change that.

MR. ENBODY: For the record.

THE COURT: Bring the jury in.

(WHEREUPON THE JURY ENTERS THE COURTROOM.)

THE COURT: Please be seated. Good morning. Ladies and gentlemen, once, again, the issue has been brought to the Court's attention that some of you may have some difficulty in seeing what's transpiring in the courtroom during the trial. As I mentioned yesterday, if any of you during the course of the presentation of the

trial have difficulty either seeing or hearing what's going on, and I'm not aware and I don't catch it, please by all means have a hand up and let me know if there's an issue, because if there's not, I presume all of you have an opportunity to observe and listen and pay attention to what's going on in the courtroom.

RP 452-454.

This timely appeal follows. CP 507.

b. Sara DeSalvo

No one witnessed the shooting in this case but Sara DeSalvo, David Carson's (deceased) girlfriend told the police in her official statement that she screamed and hit her head against the bedroom wall while fighting with Carson. RP 264-265. "That's what I said that I hit my head on a nail and that I screamed, I screamed for Weston." RP 265. During cross examination DeSalvo denied this but later agreed that indeed she told the police she hit her head while fighting with Carson. RP 264-265.

DeSalvo and Carson argued frequently. RP 249. DeSalvo testified that after she screamed for Miller, Miller came to the door, knocked and told Miller and DeSalvo to stop arguing in his daughter's room. RP 248, 265-266. DeSalvo and Carson were staying in Miller's daughter's bedroom which contained Miller's daughter's belongings. RP 276. According to DeSalvo, after Miller came in and told them to stop arguing, Miller returned 15 minutes and again told DeSalvo and Carson to stop arguing, but DeSalvo denied that the argument continued. RP 268-269.

DeSalvo and Carson “got stoned” that morning and Carson and Miller too smoked marijuana that morning. RP 247, 269. DeSalvo told the police that the marijuana she smoked “was really good stuff”. RP 273.

Carson and DeSalvo had several knives in the bedroom, one of which they used to cut a pineapple the night before the incident. RP 280-281. DeSalvo denied that the argument the day of the shooting was physical, even though she told the police that it was physical and she had screamed to Miller for help. RP 249, 264-265. After the second request from Miller to stop fighting in his daughter’s bedroom, DeSalvo testified that Miller came to the door again and asked for Carson who left the room with Miller, and closed the door. DeSalvo testified that as soon as the door closed, she heard gunshots. RP 252. DeSalvo opened the door, saw Carson on the floor and heard Carson say “you shot me”. RP 253. DeSalvo never saw Miller with a gun. RP 274., 292-295.

Miller told police he retrieved his gun from his safe and put it in the front pocket of his sweatpants after first telling Carson to stop fighting in his daughter’s room, because he thought Carson was going to kill DeSalvo. When Miller returned to tell Carson again to stop arguing, he he stood by the door and heard threats directed toward himself. Miller opened the door to talk to Carson and Carson lunged at Miller with a knife . In response, Miller pulled his gun from his pocket and shot Carson three times. Supp. CP__EX 19 (Police Interview with Miller pp. 16-17, 36, 45-

46). After Miller shot Carson, he put the gun in his closet and left his house. Supp. CP __EX 19 (Police Interview with Miller pp. 41) .Miller was certain that Carson attacked him with a knife just before the shooting. (Supp. CP__EX 19 (Police Interview with Miller pp. 42.) Carson died of the gunshot wounds. RP 328-329.

C. ARGUMENT

1. THE STATE FAILED TO PROVE BEYOND A REASONABLE DOUBT THE ELEMENTS OF PREMEDITATED FIRST DEGREE MURDER.

Mr. Miller challenges the sufficiency of the evidence to establish premeditation in the charge of first degree murder. To prevail on a challenge to the sufficiency of the evidence, Miller must show that no rational trier of fact could have found all of the essential elements of the crime beyond a reasonable doubt. *State v. Elmi*, 166 Wn.2d 209, 214, 207 P.3d 439 (2009); *State v. Allen*, 159 Wn.2d 1, 7, 147 P. 3d 581 (2006).

In testing the sufficiency of the evidence, this Court views the evidence in the light most favorable to the state, drawing all reasonable inferences from the evidence in the State's favor. *State v. Gregory*, 158 Wn.2d 759, 817, 147 P.3d 1201 (2006), quoting *State v. Clark*, 143 Wn.2d 731, 769, 24 P.3d 1006, *cert. denied*, 534 U.S. 1000, 122 S.Ct. 475, 151 L.Ed.2d 389 (2001).

a. Premeditated Intent

To prove the element of premeditation, the State was required to prove beyond a reasonable doubt that Miller acted with premeditated intent to cause Carson's death. RCW 9A.32.030(1)(a). "[T]he State is required to prove both intent and premeditation, which are not synonymous." *State v. Sargent*, 40 Wn.App. 340, 352, 698 P.2d 598 (1985), citing, *State v. Brooks*, 97 Wn.2d 873, 651 P.2d 217 (1982). Premeditation is the deliberate formation of and reflection on the intent to take a human life and involves the mental process of thinking beforehand, deliberating on, or weighing the contemplated act for a period of time, however short. *Allen*, 159 Wn. 2d at 7-8. It must involve more than a moment in time. RCW 9A.32.020(1); *Allen*, 159 Wn. 2d at 8.

The State can only prove premeditation by circumstantial evidence where the inferences argued are reasonable and the evidence supporting them is substantial. *Clark*, 143 Wn.2d at 769. No bright line test exists for premeditation, "a wide range of proven facts will support an inference of premeditation." *State v. Gentry*, 125 Wn.2d 570, 598, 999 P.2d 1105 (1995). Generally, "any planning activity by the defendant prior to the murder, which relates to the manner in which the murder was accomplished, can be evidence of premeditation." *State v. Lindamood*, 39 Wn.App. 517, 521-22, 693 P.2d 753 (1985).

Examples of circumstances supporting a finding of premeditation

include motive, prior threats, multiple wounds inflicted or multiple shots, striking the victim from behind, assault with multiple means or a weapon not readily available, and the planned presence of a weapon at the scene. *See Allen*, 159 Wn. 2d at 8 (“multiple wounds” and defendant retrieved a rifle from a cabinet after the telephone cord snapped); *Clark*, 143 Wn.2d at 769 (sexual assault of a young girl with seven stab wounds to the neck and evidence of a struggle); *State v. Pirtle*, 127 Wn.2d 628, 644-45, 904 P.2d 245 (1995), *cert. denied*, 518 U.S. 1026, 116 S.Ct. 2568, 135 L.Ed.2d 1084 (1996) (brought weapon in car, staked out victim, waited to approach, cut telephone cord, bound and killed victim); *State v. Hoffman*, 116 Wn.2d 51, 83, 804 P.2d 577 (1991).

While the method of inflicting death is relevant it will not support premeditation alone without other evidence supporting an inference “that the defendant not only had the time to deliberate, but that he actually did so.” *Sargent*, 40 Wn.App. at 355. Similarly, multiple wounds and prolonged violence are insufficient standing alone to establish premeditation. *State v. Ortiz*, 119 Wn.2d 294, 312, 831 P.2d 1060 (1992).

In *Bingham*, the State Supreme Court held that there was insufficient evidence of premeditation in a murder by strangulation. The Court reasoned that “to allow a finding of premeditation only because the act takes an appreciable amount of time obliterates the distinction between first and second degree murder.” *State v. Bingham*, 105 Wn.2d 820, 826,

719 P.2d 109 (1986).

In *Ortiz*, the Court found sufficient evidence of premeditation based on these factors: (1) the killing was committed with a knife; (2) multiple wounds were inflicted; and (3) with a knife that was procured on the premises. The Court held that the jury could have found that the act of obtaining the knife involved deliberation because the murder occurred in a bedroom, and not in the kitchen where the knife was found. Additionally, the victim was struck in the face with something other than the knife and the defensive wounds found on the victim indicate a prolonged struggle. *Ortiz*, 119 Wn.2d 312-313.

In this case, by contrast to *Ortiz*, there were no multiple wounds, there was no evidence of a prolonged struggle or planning and Carson's girlfriend admitted to screaming to Miller for help during a fight with Carson. RP 265. The only factor which a jury might have construed to be premeditation was the retrieval of the gun from the bedroom. However, because Miller was responding to a scream for help, it was not reasonable to infer that he was planning to commit murder, rather than planning to assist Carson's girlfriend.

In this case, unlike in *Ortiz*, *Allen*, *Clark*, and *Pirtle*, where there was a variety of evidence of premeditation ranging from multiple wounds, prolonged violence and motive. If the ongoing strangulation in *Bringham*, which logically took more time than shooting of a gun here, was

insufficient to establish premeditation; then the several defensive gunshots here were insufficient to find premeditation.

b. Intent.

The trier of fact determines “intent” by determining whether a person acts with the “objective or purpose to accomplish a result which constitutes a crime.” RCW 9A.08.010(1)(a); *Elmi*, 166 Wn.2d at 216-217. To determine intent, the trier of fact also looks to “all of the circumstances of the case, including, the nature of the prior relationship and any previous threats”. *State v. Ferreira*, 69 Wn.App. 465, 468-69, 850 P.2d 541 (1993).

The period of premeditation required for first degree murder may be short. But the very existence of a lesser degree “intentional” crime and the legislature’s definition of premeditation as requiring “more than a moment in point of time,” RCW 9A.32.020 and .030, makes clear that more is required to prove premeditation than simply that the defendant first formed the intent to commit murder and then acted upon it.

Miller did not have a motive, there was no evidence of planning, the shooting was not prolonged and Miller was concerned for DeSalvo’s safety. Here based on the affirmative evidence that Miller armed himself to aid DeSalvo, suggests that Miller either acted in self-defense or acted intentionally but impulsively, rather with the premeditation required for

first degree premeditated murder. 1.

2. MILLER WAS DENIED HIS RIGHT TO, CONFRONTATION, A FAIR AND PUBLIC TRIAL AND THE RIGHT TO ASSIST HIS ATTORNEY BECAUSE THE COURTROOM CONFIGURATION PREVENTED MILLER FROM BEING ABLE TO OBSERVE THE JURY DURING THE TRIAL PROCEEDINGS

During trial, defense counsel repeatedly informed the trial court that he could not see the jury due to the court room configuration. RP 298-90; 452-454. Rather than change the configuration or permit counsel and Miller to move, the court simply asked the jurors if they could see the witness on the stand. *Id.* The trial court's refusal to provide a remedy resulted in Miller and his attorney being unable to view the jurors and the jury being unable to see Miller, which ultimately denied Miller his due process right to a fair.

- a. Right To a Jury Trial

The trial court dismissed Miller's request to reconfigure the court room or to move jury members so that he could observe the jury and have the jury able to see him during trial. RP 289-90; 453. Even though some of the jurors stated that they could not see Miller, the trial court did not believe this, but rather chose to believe that the defendant did not have a fundamental right to be able to see the jury or have the jury see the

1 A defendant can present inconsistent defenses. *State v. Fernandez-Medina*, 141 Wn.2d 448, 456, 6 P.3d 1150 (2000), citing, *State v. McClam*, 69 Wn.App. 885, 850 P.2d 1377 (1993).

defendant. RP 453. Miller has both a state and federal constitutional right to a jury trial. Sixth Amendment; Article 1 § 21. Article 1 § 21 provides:

The right of trial by jury shall remain inviolate, but the legislature may provide for a jury of any number less than twelve in courts not of record, and for a verdict by nine or more jurors in civil cases in any court of record, and for waiving of the jury in civil cases where the consent of the parties interested is given thereto.

The Sixth Amendment provides:

In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed, which district shall have been previously ascertained by law, and to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor, and to have the Assistance of Counsel for his defence [in original].

The right of jury trial:

“is no mere procedural formality, but a fundamental reservation of power in our constitutional structure. Just as suffrage ensures the people's ultimate control in the legislative and executive branches, jury trial is meant to ensure their control in the judiciary.”

State v. Kirkman 159 Wn.2d 918, 938, 155 P.3d 125 (2007) (citations omitted). Perhaps because the issue is so fundamental, counsel has been unable to locate any cases discussing the impact of court room obstructions on a defendant's right to a fair trial.

Here Miller could not see the jury and some of the jurors could not see Miller. This in essence denied him his right to a jury trial because he could not observe the juror's reactions, the jurors could not observe Miller's demeanor. This inability to see the jury and vice versa is analogous to why a sleeping juror deprives a defendant of his right to a jury trial sleeping during trial. Sixth Amendment; Article 1 § 21.

ii. Sleeping Juror

RCW 2.36.110 governs the removal of jurors:

It shall be the duty of a judge to excuse from further jury service any juror, who in the opinion of the judge, has manifested unfitness as a juror by reason of bias, prejudice, indifference, inattention or any physical or mental defect or by reason of conduct or practices incompatible with proper and efficient jury service.

A sleeping juror who misses an essential portion of a trial cannot fairly consider the case during deliberations. This denies the accused his right to a fair trial. *United States v. Hendrix*, 549 F.2d 1225, 1229 (9th Cir.), *cert. denied*, 434 U.S. 818, 98 S. Ct. 58, 54 L. Ed. 2d 74 (1977). Such a juror is also unfit to serve.

In Washington State, the determination of whether a juror is fit to serve is governed by statute:

It **shall** be the duty of a judge to excuse from further jury service any juror, who in the opinion of the judge, has manifested unfitness as a juror by reason of bias, prejudice,

indifference, **inattention** or any physical or mental defect or by reason of conduct or practices incompatible with proper and efficient jury service.

(emphasis added) RCW 2.36.110. CrR 6.5 requires the judge to seat an alternate juror when another juror is unfit to serve. CrR 6.5 provides in part: "if at any time before submission of the case to the jury a juror is found unable to perform the duties the court **shall** order the juror discharged." *Id.* (Emphasis added). "RCW 2.36.110 and CrR 6.5 place a continuous obligation on the trial court to excuse any juror who is unfit and unable to perform the duties of a juror." *State v. Jorden*, 103 Wn. App. 221, 226-27, 11 P.3d 866, *rev. denied*, 143 Wn.2d 1015, 22 P.3d 803 (2001).

Review of the standard of proof used by the judge in determining whether or not to dismiss a juror under RCW 2.36.110 is a question of law reviewed de novo. *State v. Elmore*, 121 Wn. App. 758, 767-68, 123 P.3d 72 (2005) (error to dismiss a juror unless judge is certain that the juror misconduct is not related to his or her evaluation of the evidence). The determination of whether or not to dismiss a juror is reviewed for an abuse of discretion. *Id.*

A trial court abuses his discretion by refusing to excuse a juror who is sound asleep during cross examination of the state's primary forensic

expert. *Jorden*, 103 Wn. App. at 226, 230; *Accord, Elmore*, 155 Wn.2d at 761.

In *Jorden*, the Court of Appeals citing to RCW 2.36.110 and CrR 6.5 held that the judge's removal of a juror for sleeping was not an abuse of discretion because "the record establishes that the juror engaged in misconduct." *Jorden*, 103 Wn. App. at 229-230. The record in *Jorden* included the prosecutor's and the judge's observations of the juror sleeping during several days of testimony in the first degree murder trial. *Jorden*, 103 Wn. App. at 229..

In *United States v. Barrett*, 703 F.2d 1076 (9th Cir. 1983), the trial judge (1) refused to dismiss a juror who asked to be removed because he slept during part of the trial; and (2) without further investigation, the trial court took judicial notice of the fact that "there was no juror asleep during this trial". *Barrett*, 703 F.2d at 1083. The Ninth Circuit held that the trial court abused its discretion by failing to investigate the admission and reversed and remanded for an evidentiary hearing to determine if Barrett's due process rights to a fair trial were prejudiced. *Barrett*, 703 F.2d at 1083.

In *United States v. Monreal-Miranda*, 103 Fed. App. 83 (9th Cir. 2004), after being informed that several jurors were sleeping, the district court, outside the presence of other jurors, directly questioned the juror who was sleeping and dismissed the juror who admitted to sleeping. The other juror denied sleeping and was not dismissed. The Court on review

held that the judge conducted an adequate investigation and did not abuse her discretion in dismissing one juror and retaining another. *Monreal-Miranda*, 103 Fed. App. at 85.

In *State v. Rafay*, 168 Wn.App. 734, 821, 285 P.3d 83 (2012), the Court upheld the trial court's removal of a sleeping juror based on the trial court's determination that the juror's inattention, distraction, physical and personal problems, and desire to be off the jury rendered her unable to perform her duties as a juror. *Rafay*, 168 Wn.App. at 823.

These cases illustrate that a juror who cannot fully participate in the proceedings due to any significant obstacle, such as inattention, medical condition or physical issues must be removed from the jury to preserve the defendant's right to a fair trial. Here the juror's inability to see Miller was an insurmountable obstacle analogous to juror inattention, distraction, physical and personal problems. The only difference here was the jurors had no control over their inability to attend. Instead, the courtroom configuration created an impediment to the jury's ability to function. Under the rationale of these cases and in an effort to preserve the right to a fair trial, this Court should declare that the courtroom obstruction denied Miller his right to a fair jury trial.

b. Confrontation Clause Rights

The defendant's right to be able to see the jury and to have the jury see him is part of the right to confrontation. The Confrontation Clause of

the Sixth Amendment, made applicable to the States through the Fourteenth Amendment, provides: “[i]n all criminal prosecutions, the accused shall enjoy the right ... to be confronted with the witnesses against him.” *Maryland v. Craig*, 479 U.S. 836, 844, 110 S.Ct. 3157, 111 L.Ed.2d 666 (1990).

Confrontation is paramount to an ability to examine and cross-examine witnesses effectively. Confrontation “involves the ability to evaluate blinking eyelids or expressive facial gestures and to hear the hesitation in the voice or observe the uneasy fidgeting of a witness, uncomfortable under sharp questioning.” *Detention of Stout*, 159 Wn.2d 357, 382, 150 P.3d 86 (2007)(Madsen, J. concurring).

Assessing credibility is a critical part of the jury’s role. When determining whether evidence is credible, the jury considers: “demeanor, bias, opportunity, capacity to observe and narrate the event, character, prior inconsistent statements, contradiction, corroboration, and plausibility. Fact finders are in the best position to resolve issues of credibility and determine how much weight to give evidence because they see and hear the witnesses.” *State v. Stout*, 159 Wn.2d at 382, citing, *State v. Maxfield*, 125 Wn.2d 378, 385, 886 P.2d 123 (1994) (trier of fact is in better position to assess the credibility of the witnesses and observe the demeanor of those testifying).

Demeanor relates to a person's “manner ... bearing, mien: facial

appearance.” Webster's Third New International Dictionary 599 (2002). It is “the carriage, behavior, bearing, manner and appearance of a witness.” *Dyer v. MacDougall*, 201 F.2d 265, 268, 269 (2d Cir.1952) (“[t]he words used are by no means all that we rely on in making up our minds about the truth of a question that arises in our ordinary affairs, and it is abundantly settled that a jury is as little confined to them as we are”). A witness's demeanor includes the “expression[s] of his countenance, how he sits or stands, whether he is inordinately nervous, his coloration during critical examination, the modulation or pace of his speech and other non-verbal communication.” *Penasquitos Village v. N.L.R.B.*, 565 F.2d 1074, 1078-79 (9th Cir. 1977).

The State Supreme Court has repeatedly held that “appellate courts are reluctant to disregard fact finders' determinations of credibility *because* appellate courts are unable to observe witness demeanor.” *Stout*, 159 Wn.2d at 382, citing, *State v. Zhao*, 157 Wn.2d 188, 202, ¶ 26, 137 P.3d 835 (2006) (appellate court defers to the trier of fact on issues of credibility).

“[T]he Confrontation Clause expressly guarantees the defendant a face-to-face meeting with witnesses appearing before the trier of fact.” *Coy v. Iowa*, 487 U.S. 1012, 1016, 108 S.Ct. 2798, 101 L.Ed.2d 857 (1988); *Mattox v. United States*, 156 U.S. 237, 244, 15 S.Ct. 337, 340, 39 L.Ed. 409 (1895).

The primary object of the constitutional provision in question was to prevent depositions or *ex parte* affidavits, such as were sometimes admitted in civil cases, being used against the prisoner in lieu of a personal examination and cross-examination of the witness in which the accused has an opportunity, not only of testing the recollection and sifting the conscience of the witness, **but of compelling him to stand face to face with the jury in order that they may look at him, and judge by his demeanor upon the stand and the manner in which he gives his testimony whether he is worthy of belief.**”

Craig, 497 U.S. at 845, quoting, *Mattox*, 156 U.S., at 242-243 (emphasis added). Requiring face-to-face confrontation “permits the jury that is to decide the defendant's fate to observe the demeanor of the witness in making his statement, thus aiding the jury in assessing his credibility.” *Craig*, 497 U.S. at 846, quoting, *Green*, *supra*, 399 U.S., at 158, 90 S.Ct. at 1935 (footnote omitted).

In much the same manner that the defendant has a right to confront the witnesses, by analogy, requiring face-to-face observation between the jury and the defendant and his attorney permits the jury that is to decide the defendant's fate to observe the demeanor of the defendant, to see his humanity, and to permit the defendant to witness the juror's expressions, which is also an essential tool in the defendant's ability to assist his attorney throughout trial.

“[F]ace-to-face confrontation enhances the accuracy of factfinding

by reducing the risk that a witness will wrongfully implicate an innocent person.” Craig, 497 U.S. at 846, citing, *Coy*, 487 U.S., at 1019-1020 (“It is always more difficult to tell a lie about a person ‘to his face’ than ‘behind his back.’”). The defendant’s ability to view the jury and to have the jury view the defendant is no less important in protecting and enhancing the reliability of the proceedings by reducing the risk of wrongfully implicating the defendant.

“[T]here is something deep in human nature that regards face-to-face confrontation between accused and accuser as ‘essential to a fair trial in a criminal prosecution’ ”) *Craig*, 497 U.S. at 847, citing, *Coy*, 487 U.S., at 1017, “, quoting, *Pointer v. Texas*, 380 U.S. 400, 404, 85 S.Ct. 1065, 1068, 13 L.Ed.2d 923 (1965). A jury that observes the defendant sees his reactions, sees him interact with his attorney, and allows the defendant to similarly observe the jury. This process satisfies the deep human nature to witness and decide for oneself the credibility and character of the individual being observed.

When Miller defendant was denied this opportunity during his first degree murder trial, he was denied his due process right to confrontation.

c. Ability to Assist

Competency cases are analogous to Miller’s situation because, Miller, like an incompetent defendant could not assist his attorney due to his inability to see the jury and vice versa. A defendant has the right to be

able to assist his attorney. *State v. Marshall*, 144 Wn.2d 266, 277, 27 P.3d 192 (2001), *reversed on other grounds in, State v. Sisouvanh*, 175 Wn.2d 607, 290 P.3d 942 (2012). Failure to observe procedures adequate to protect an accused's right not to be tried while incompetent to stand trial is a denial of due process. *State v. O'Neal*, 23 Wn.App. 899, 901, 600 P.2d 570 (1979), citing, *Drope v. Missouri*, 420 U.S. 162, 171-172, 95 S.Ct. 896, 904, 43 L.Ed.2d 103, 113 (1975), citing, *Pate v. Robinson*, 383 U.S. 375, 385, 86 S.Ct. 836, 15 L.Ed.2d 815 (1966).

“Requiring that a criminal defendant be competent has a modest aim: It seeks to ensure that he has the capacity to understand the proceedings and to assist counsel.” *Godinez v. Moran*, 509 U.S. 389, 402, 113 S.Ct. 2680, 125 L.Ed.2d 321 (1993).

Here, the trial court's minimal inquiry to the jury as a group asking if they could hear the witnesses testimony did not protect Miller's due process right to a fair trial. Rather, the inquiry was minimal and did not permit individual responses by the jurors and did not get to the basis of the concern: the jury's ability to see Miller and his ability to see the jury. This limited inquiry is analogous to an inadequate inquiry into a defendant's competency because it failed to protect Miller's right not to be tried and convicted while he could not assist his attorney due to the courtroom obstructing his view of the jury. *Pate*, 383 U.S., 385.

A defendant who cannot see the jury, like a defendant who is incompetent and is unable to assist his attorney is denied his right to due process. *State v. DeClue*, 157 Wn.App. 787, 792, 239 P.3d 377 (2010). Here the court room configuration denied Miller his right to appear, to assist his attorney and his right to be present.

d. Public Trial

Miller's inability to see the jury and the jury's inability to see Miller, violated Miller's United States Constitution Sixth Amendment guarantee, and article I, section 22 of the Washington Constitution's guarantee, to protect a criminal defendant's right to a public trial. *State v. Easterling*, 157 Wn.2d 167, 174, 137 P.3d 825 (2006). Article I, section 10 of the Washington Constitution requires that "justice in all cases shall be administered openly." It provides the public and the press a right to open and accessible court proceedings. *Easterling*, 157 Wn.2d at 174. The right to a public trial ensures the defendant a fair trial, reminds the officers of the court of the importance of their functions, encourages witnesses to come forward, and discourages perjury. *State v. Brightman*, 155 Wn.2d 506, 514, 122 P.3d 150 (2005).

This Court has held that the right to a public trial applies to evidentiary phases of the trial as well as other " 'adversary proceedings,' " including suppression hearings, voir dire, and the jury selections process. *State v. Sadler*, 147 Wn.App. 97, 114, 193 P.3d 1108 (2008), quoting,

State v. Rivera, 108 Wn.App. 645, 652–53, 32 P.3d 292 (2001). But that right does not extend to purely ministerial and procedural matters: “A defendant does not ... have a right to a public hearing on purely ministerial or legal issues that do not require the resolution of disputed facts.” *Id.* We again affirmed that proposition in *State v. Sublett*, 156 Wn.App. 160, 181, 231 P.3d 231 (2010).

The Supreme Court in *State v. Strode*, 167 Wn.2d 222, 229, 217 P.3d 310 (2009), in the context of waiver held that the right to a public trial, like the right to a trial by jury, are afforded the same constitutional protections and cannot be waived by less than a knowing, voluntary and intelligent waiver. *Id.* The Court in *Strode* reiterated that the Court “has never found a public trial right violation to be [trivial or] de minimis.” *Strode*, 167 Wn.2d at 230, quoting, *Easterling*, 157 Wn.2d 167.

In *Strode*, the Supreme Court held that the questioning of jurors in chambers violated Strode’s right to a public trial and reiterated that “[t]he denial of the constitutional right to a public trial is one of the limited classes of fundamental rights not subject to harmless error analysis.” *Strode*, 167 Wn2d at 230-231, quoting, *Easterling*, 157 Wn.2d at 181, citing *Neder v. United States*, 527 U.S. 1, 8, 119 S.Ct. 1827, 144 L.Ed.2d 35 (1999).

This denial of the public trial right is not subject to the harmless error analysis because it is deemed to be a structural error and prejudice is

necessarily presumed. *Neder*, 527 U.S. at 8, 119 S.Ct. 1827; *Easterling*, 157 Wn.2d at 181, citing, *State v. Bone-Club*, 128 Wn.2d 254, 261-262, 906 P.3d 325 (1995), citing *State v. Marsh*, 126 Wn. 142, 146-47, 217 P. 705 (1923). The remedy for the presumptively prejudicial error of closing the jury trial is remand for a new trial. *Strode*, 167 Wn.2d at 231, citing, *State v. Orange*, 152 Wn.2d 795, 814, 100 P.3d 291 (2004); *Bone-Club*, 128 Wn.2d at 261-262.

Here Miller was shut out of his trial by a court room obstruction which rendered meaningless his right to a public trial. The ability to see and be seen during a jury trial for first degree murder is fundamental to the right to a public trial. The courtroom obstruction, like a trial, was presumptively prejudicial structural error requiring reversal and remand for a new trial.

e. Right to Appear and
Presumption of Innocence.

The right to a fair trial is a fundamental liberty secured by the Fourteenth Amendment. *Estelle v. Williams*, 425 U.S. 501, 504, 96 S.Ct. 1691, 48 L.Ed.2d 126 (1976); *Drope*, 420 U.S. at, 172. The presumption of innocence, although not articulated in the Constitution, is a basic component of a fair trial under our system of criminal justice. *Estelle*, 425 U.S. at 504. “The principle that there is a presumption of innocence in favor of the accused is the undoubted law, axiomatic and elementary, and its enforcement lies at the foundation of the administration of our criminal

law.” Id, quoting, *Coffin v. United States*, 156 U.S. 432, 453, 15 S.Ct. 394, 403, 39 L.Ed. 481, 491 (1895).

Article 1 § 22 provides in part:

In criminal prosecutions the accused **shall have the right to appear and defend in person**, or by counsel, to demand the nature and cause of the accusation against him, to have a copy thereof, to testify in his own behalf, to meet the witnesses against him **face to face**, to have compulsory process to compel the attendance of witnesses in his own behalf, to have a speedy public trial by an impartial jury of the county in which the offense is charged to have been committed and the right to appeal in all cases

(Emphasis Added) Id. As an initial matter, Article 1 § 22 provides the defendant the inviolate “right to appear”. Id. As a practical matter, when the defendant cannot see the jury and jurors cannot see the defendant, this right is violated. The need for the jury to see the defendant and the defendant to see the jury is part of the right to appear. Courts have determined that to maintain the presumption of innocence, the defendant’s right to appear includes the right to appear well dressed, and without shackles or any stigma of guilt. *Estelle*, 425 U.S. at 504, 512-132. If it was not necessary for the defendant to see the jury and vice versa, there would be no prohibition against shackles and jail garb.

In the context of presenting the defendant in front of the jury in jail attire the U.S. Supreme Court reiterated that because the “actual impact of a

² Defendant must object to jail attire for error not to be harmless. *Estelle*, 425 U.S. at 512-13.

particular practice on the judgment of jurors cannot always be fully determined”, the Court must closely scrutinize the practice “to evaluate the likely effects of a particular procedure, based on reason, principle, and common human experience.”. *Estelle*, 425 U.S. at 504. In *Estelle*, the Court held that presenting a defendant to the jury in jail attire required reversal and remand for a new trial due to undermining the presumption of innocence. *Estelle*, 425 U.S. at 504, 512-13.³

Here, applying the principles articulated in *Estelle*, based on reason, principle, and common human experience, the actual impact of the jurors being hidden from Miller and vice versa, must have adversely impacted the jurors judgment regarding Miller’s presumption of innocence. For this reason, as in *Estelle*, this Court should reverse and remand for a new trial.

D. CONCLUSION

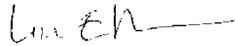
Mr. Miller respectfully requests this Court reverse his conviction for first degree murder and remand for a new trial based on numerous substantive and structural due process violations and for insufficient evidence of premeditation.

DATED this 10th day of October 2013.

³ Defendant must object to jail attire for error not to be harmless. *Estelle*, 425 U.S. at 512-13.

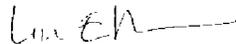
Respectfully submitted

LAW OFFICES OF LISE ELLNER



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 Deputy Prosecutor sara.beigh@lewiscountywa.gov and Weston G. Miller DOC# 366767 Washington State Prison 1313 N13th Ave. Walla Walla, WA 99362 a true copy of the document to which this certificate is affixed, on October 10, 2013. Service was made by depositing in the mails of the United States of America, properly stamped and addressed to Mr. Bale and electronically to the prosecutor.



Signature

ELLNER LAW OFFICE

October 10, 2013 - 9:30 AM

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