

NO. 46921-9-II

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

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STATE OF WASHINGTON,

Respondent,

v.

BRANDON ENGLISH,

Appellant.

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

The Honorable Barbara Johnson, Judge

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BRIEF OF APPELLANT

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A. ASSIGNMENTS OF ERROR

1. The procedure by which the court took peremptory challenges violated the appellant's right to a public trial.

2. The procedure also violated the appellant's constitutional right to be present for trial.

3. The State committed misconduct by referencing, on direct examination, an agreement its cooperating witness made with the State to provide truthful testimony in exchange for a reduced charge.

4. Insufficient evidence supports each of the firearm enhancements because the State failed to prove beyond a reasonable doubt that any firearm used in the robbery was operable.

Issues Pertaining to Assignments of Error

1. During jury selection, the trial court employed a procedure at sidebar that prevented the public from scrutinizing 12 of the parties' 16 peremptory challenges. Did this procedure violate appellant's constitutional right to a public trial?

2. Appellant also was excluded from the sidebar conference at which 12 jurors were excused. Did the procedure also violate appellant's constitutional right to be present and participate at trial?

3. The prosecutor committed misconduct by improperly vouching for its cooperating witness by referencing, on direct

examination, the witness's agreement with the State to provide truthful testimony in exchange for a reduced charge. The Washington Supreme Court has articulated a clear rule that a promise to testify truthfully may not be referenced in direct examination, before the defense has attacked the witness's credibility. Where the error was not harmless, did the prosecutor's misconduct deny the appellant a fair trial?

4. The State charged the appellant with firearm enhancements on all counts. To prove a firearm enhancement, the State must introduce facts from which the jury may find beyond a reasonable doubt that the item in question falls under the definition of a "firearm," that is, a weapon or device from which a projectile may be fired by an explosive such as gunpowder. This requires proof that the weapon or device is operable. Did the State present in sufficient evidence that an operable firearm was used in the robbery?

B. STATEMENT OF THE CASE<sup>1</sup>

1. Charges, verdicts, and sentences

The State charged appellant Brandon English and co-defendant Calvin Quichocho with two counts of first degree robbery (counts 1 and 2),<sup>2</sup> two counts of first degree kidnapping (counts 3 and 4), and two counts of second degree assault with a deadly weapon (counts 5 and 6). The State also alleged firearm enhancements as to each count. The complainants as to each pair of charges were Austin Bondy and Brittany Horn, who were at the apartment of their friend Colby Haugen at the time of the charged incident. CP 9-11.

A jury convicted English and Quichocho as charged. CP 135-46; 13RP 1633-41.

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<sup>1</sup> This brief refers to the verbatim reports as follows: 1RP – 10/8, 10/10, and 10/17/14; 2RP – 10/13/14; 3RP – 10/14/14 (morning); 4RP – 10/14/14 (afternoon); 5RP – 10/15/14 (morning); 6RP – 10/15/14 (afternoon); 7RP – 10/16/14 (morning); 8RP – 10/16/14 (afternoon); 9RP – 10/20/14 (morning); 10RP – 10/20/14 (afternoon); 11RP – 10/21/14 (morning); 12RP – 10/21/14 (afternoon); and 13RP – 10/22, 10/23, and 11/20/14. The volumes are consecutively and chronologically paginated with the exception of 1RP, which contains two dates.

<sup>2</sup> The robbery charge was elevated to the first degree by an allegation the robber displayed what appeared to be a firearm or other deadly weapon. CP 9-10; RCW 9A.56.200(1)(a)(ii).

The court sentenced English to concurrent standard range terms of incarceration on counts 1-3 and, under RCW 9.94A.589(1)(b),<sup>3</sup> ran the count 4 base sentence consecutive to those terms, for a total of 216 months. Recognizing that second degree assault counts 5 and 6 merged with the first degree robbery charges, 13RP 1651, the court added 240 months corresponding to the firearm enhancements on counts 1-4 only, for a total sentence of 456 months. CP 298.

English timely appeals. CP 310.

2. Trial testimony

Colby Haugen lived at the Prairie View apartments outside Vancouver in Clark County and sold marijuana by the ounce. 3RP 363;

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<sup>3</sup> Under RCW 9.94A.589(1)(b),

Whenever a person is convicted of two or more serious violent offenses arising from separate and distinct criminal conduct, the standard sentence range for the offense with the highest seriousness level under RCW 9.94A.515 shall be determined using the offender's prior convictions and other current convictions that are not serious violent offenses in the offender score and the standard sentence range for other serious violent offenses shall be determined by using an offender score of zero. The standard sentence range for any offenses that are not serious violent offenses shall be determined according to (a) of this subsection. All sentences imposed under (b) of this subsection shall be served consecutively to each other and concurrently with sentences imposed under (a) of this subsection.

4RP 403. He also earned money at more conventional employment. 3RP 363-64.

Haugen was at work the afternoon of December 4, 2013 when he began receiving phone calls, although he was at first unable to answer. 4RP 411. When he finally answered, his friend, 17-year-old Brittany Horn, was on the line. 3RP 365. Horn reported that she and Austin Bondy, a friend of Haugen's, had been at Haugen's apartment when two men entered, robbed them at gunpoint, tied them up, and placed them in a closet within the apartment. 3RP 365.

Haugen testified the robbers took an X-Box video game console, associated games, a change jar, Horn's purse, wallet and phone, Bondy's wallet, and other items. 3RP 366-67; 4RP 447, 483 (Bondy testimony). The robbers also took one to three ounces of marijuana and a small scale. 3RP 366-67.

Haugen returned home between 4:45 and 5:00 p.m. after getting off work. 4RP 411. Haugen, Bondy, and Horn discussed whether to call the police in light of Haugen's marijuana-related activities at the apartment. 3RP 366. They ultimately agreed to contact the police but to leave out the presence of marijuana. 3RP 368; 4RP 414.

Haugen testified that John Lujan, Juan Alfaro, and a young African-American man had come to his apartment the evening before,

December 3. Bondy, who had spent the night at the apartment, was present at the time. 4RP 417-19. Alfaro paid Haugen for some marijuana Alfaro had previously purchased, and the men bought a small additional amount. 3RP 371. Haugen knew Lujan and Alfaro from the apartment complex and from school. 3RP 369-70. Haugen did not know the African-American man but described him as approximately six feet tall and stocky, with acne scarring on his face. 3RP 371-72.

Based on Horn and Bondy's descriptions, Haugen told them he thought one of the robbers could have been the African-American man from the night before. 4RP 428-29. Haugen was unable to pick English out of a photomontage but said he recognized English in the courtroom during trial. 3RP 373-74; 4RP 393-94, 424.

Bondy testified he was waiting for Haugen to get home when he heard a knock at the door. 4RP 434, 436. It was Lujan wanting to buy marijuana. He was with the African-American man who had been at the apartment the night before,<sup>4</sup> as well as a third, shorter, man whom Bondy had never seen before. 4RP 436-37, 497. Bondy let them in because he knew Lujan. 4RP 443, 495-96.

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<sup>4</sup> Bondy testified it did not occur to him that it was the same person until Haugen suggested it. 4RP 512, 523-54.

Bondy went to the kitchen to weigh out some marijuana. 4RP 443. As he was doing so, the shorter man, whom Bondy later identified as co-defendant Quichocho,<sup>5</sup> pulled out a revolver. 4RP 444. Bondy could see a metal “bullet” in the revolving chamber of the weapon.<sup>6</sup> 4RP 445. The man later identified as Quichocho told Bondy the bullet was for him. 4RP 445. Quichocho told Bondy to give him “the money.” But Bondy told Quichocho there was no money in the house. 4RP 446.

Bondy was made to lie face down on the kitchen floor. Eventually, the robbers sent him to Haugen’s bedroom to obtain the rest of Haugen’s marijuana, about three ounces. 4RP 448, 474. The gunman ordered Lujan to tie up Bondy and Horn. 4RP 448. Lujan used a hair clipper cord and a set of headphones to tie them. 4RP 456. Bondy and Horn were placed in a closet, where they remained for 10-15 minutes, until Lujan arrived to untie them. 4RP 457, 466.

Bondy acknowledged that he initially omitted the presence of marijuana in his statement to police. 4RP 459. He was unable to identify

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<sup>5</sup> Four months after the robbery, Bondy identified Quichocho to 70 percent certainty from a six-suspect photomontage. 4RP 441.

<sup>6</sup> Over defense objection, 9RP 1064-66, the jury was shown a front-view photograph of a revolver to demonstrate the cartridge would be visible. 9RP 1079. The court reminded jurors no gun was found and the photo was being shown for “demonstrative purposes” only. 9RP 1080.

English from a photomontage, but, like Haugen, claimed he was able to identify him in the courtroom during trial. 4RP 435, 515.

Horn testified she arrived at Haugen's apartment around 3:30 or 3:35 p.m. 5RP 552. There was a knock at the door 5-10 minutes later. Lujan, whom she knew from school, was at the door with a "bigger" African-American man and a "shorter, scrawny" person of Asian, Mexican, or mixed racial descent. 5RP 558, 582-83. Horn chatted with Lujan while Bondy went to the kitchen with the smaller person. 5RP 558.

Suddenly, the bigger person shoved Lujan onto the couch. From the kitchen, she heard Bondy say, "Whoa, what's going on?" 5RP 558. The shorter person then ordered Horn into the kitchen at gunpoint. 5RP 563. She sat cross-legged while Bondy lay facedown. 5RP 563.

The gunman took Horn's phone over her protests. 5RP 562. He then told Lujan to tie Horn and Bondy's wrists. 5RP 564-65. As Horn and Bondy were placed in the closet, the shorter man told them to remain there for an hour or he would return and kill them. 5RP 566. Horn and Bondy remained in the closet until Lujan found them. 5RP 576.

Afterward, Horn urged the others to call the police, but she was persuaded to leave out the presence of marijuana. Like the others, she eventually confessed that marijuana was involved. 5RP 576-80, 610.

Horn described the bigger man as having a short “Afro” hairstyle as well as “skin problems” on his cheeks. 5RP 568. The day after the incident, detectives showed her a photomontage including English. She identified English as the bigger man to only 50 percent certainty, 5RP 572, reporting that she “wasn’t positive at all” as to her identification. 5RP 603. At the trial nearly a year later, however, she claimed she was able to identify English. 5RP 573. Four months after the robbery, Horn picked Quichocho out of a photomontage to 80-90 percent certainty. 5RP 574.

Alfaro, a childhood friend of Haugen and Lujan, testified that he, Lujan, and a man whom Lujan described as his cousin went to Haugen’s the evening of December 3 for a possible robbery. 6RP 680-83, 705; see also 8RP 960 (Lujan testimony).

Lujan claimed to have seen Haugen with “three stacks,” i.e., three thousand dollars, days earlier. 6RP 698; 8RP 943. The “cousin,” who Alfaro later identified as English, showed Alfaro a revolver wrapped in a bandana. 6RP 694-95. Alfaro learned the evening of December 4 via text message that Lujan had committed a robbery without him. 6RP 684-85; 8RP 944-48.

Lujan, the third robber, testified at English and Quichocho’s trial pursuant to plea agreement. In December of 2013, he lived at the Prairie View apartments with his family, and he knew Haugen, Horn, Bondy, and

Alfaro. 7RP 819, 824. The night before the robbery, Lujan and Alfaro went to Haugen's. 7RP 824.

English was not a blood cousin but rather a friend of Lujan's sister's boyfriend, and he also hung out with Lujan's brother Anthony. 6RP 721; 7RP 832. Unlike the other witnesses, Lujan denied English was present at the apartment with him and Alfaro the night of December 3. 7RP 824. A few days earlier, however, Lujan and English had spoken about a plan to rob Haugen. 7RP 834.

The afternoon of December 4, Lujan went to Alfaro's apartment so Alfaro could work on a tattoo for Lujan. 7RP 831. Lujan left Alfaro's apartment and met up with English, who was hanging out outside Lujan's apartment. 7RP 831, 833. Lujan went inside for a while to "kill[] time." 7RP 834. When he emerged around 3:00, English was still outside, but a man who introduced himself as "Vince" had joined English. 7RP 836, 874. Lujan later identified "Vince" as Quichocho. 7RP 837-38; 8RP 964. Without explicitly discussing a plan, the three men made their way to Haugen's apartment. 7RP 839.

Lujan chatted with Horn while English and "Vince" transacted with Bondy. 7RP 839. At some point, English approached Lujan and whispered, "Just go with this." 7RP 839. Quichocho then emerged from the bathroom with a gun and told Horn, Bondy, and Lujan to get on the

floor. 7RP 840. English pushed Lujan. 7RP 841. Quichocho pointed the gun at Lujan and told him to tie up Horn and Bondy. 7RP 843.<sup>7</sup>

Lujan had previously seen significant quantities of money and marijuana in the apartment, but the robbers found relatively little of either on December 4. 7RP 842-43. After the others left, Lujan searched for Horn and Bondy and eventually found them in a closet. 7RP 844. Lujan claimed he had to leave and left the apartment about 20 minutes later, so he was not involved in reporting the matter to police. 7RP 847-48.

Lujan spoke with police that night, however, after his family sent him texts that the police were looking for him. Lujan initially denied knowing the two men, but he eventually gave up English and provided a description of “Vince” as well as a car he associated with Vince, which had a “Guam” sticker on the rear window. 7RP 849; 8RP 935, 941-42, 965.<sup>8</sup>

Lujan was initially charged with the same crimes as English and Quichocho. But he ultimately pled guilty to a significantly reduced charge

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<sup>7</sup> Lujan later claimed that tying up the victims and using a gun were not part of the plan. RP 843.

<sup>8</sup> After Lujan’s arrest, Lujan’s mother sent out text messages to members of the local Guamanian community in an attempt to identify “Vince.” 10RP 1250. She also asked her children to comb the Facebook website for individuals who might be Vince. She received various leads and showed a number of photos to Lujan hoping to identify the man. 10RP 1239.

of second degree robbery. He testified on direct examination that he did so in exchange for “testify[ing] truthfully.” 7RP 855. The prosecutor then asked, “[a]nd so, to the best of your recollection, your story hasn’t changed just because you got this offer to testify truthfully, has it?” 7RP 856. Lujan responded it had not changed. 7RP 856. The defense did not object. 7RP 755-56.

Lujan’s family members testified English was known to the family and joined them for a belated Thanksgiving dinner the Saturday after Thanksgiving of 2013. 6RP 713, 733, 738-39.

Lujan’s brother Anthony testified that he saw English outside his family’s apartment on December 3. English showed Anthony what appeared to be a “six cylinder” gun and said he was planning to “hit a lick,” i.e., commit a robbery. 6RP 730, 734.

Police searched English’s home December 6, two days after the robbery, and seized his phone. 5RP 652. Detectives used “Cellebrite” software to extract data from the phone, corresponding to phone number 360-609-2995, as well as a phone found on Quichocho’s person at the time of his arrest. 6RP 756; 10RP 1145. Quichocho’s girlfriend testified the phone belonged to her and took responsibility for most of the contents. 10RP 1286-1340.

Over a “foundation” objection by the defense, 8RP 984, 994, a Clark County detective testified that, using the Cellebrite software, he was able to generate a report listing incomplete deleted data from English’s phone. 10RP 1146-47. The report showed calls made the day of the robbery to a telephone number identified by the phone’s internal contact list as “Lil Huss.” 10RP 1152-58.<sup>9</sup> Other text messages from English’s phone referred to a “45” and “bullets.” 10RP 1149-50; Ex. 90. The report also indicated English’s phone was in contact with Lujan’s phone the day of the robbery. 10RP 1162-63. A similar report generated for Quichocho’s phone showed a single outgoing text message to English’s phone number. 10RP 1167-68, 1182; 11RP 1352; but see 10RP 1185 (no corresponding record on extraction report for English phone).

A Clark County detective who met Quichocho in 2009 testified that, at the time, Quichocho said he went by “Huss” or “Lil Hustler.” 7RP 810. Quichocho, however, denied using that nickname around the time of the robbery. 8RP 928. Police never found a phone associated with the “Lil Huss” phone number. 10RP 1179-80.

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<sup>9</sup> Quichocho objected to testimony referencing “Lil Huss” in the Cellebrite report on the grounds that that there was insufficient foundation to establish Quichocho was Lil Huss, and therefore the references were more prejudicial than probative. 9RP 1110. English joined the objection. 9RP 1111. The court overruled the objections. 9RP 1117.

Both English and Quichocho consented to police interrogation, English in December of 2013, and Quichocho after his arrest the following April. Excerpts of the interviews were played for the jury. English denied being involved in the robberies and denied knowing Lujan.<sup>10</sup> 9RP 1130-34. Quichocho denied being involved in the robberies and denied knowing English. 7RP 791-92; 8RP 899-910.

The defendants presented testimony by Dr. Daniel Reisberg, a professor and experimental psychologist who studies eyewitness identification. 11RP 1416. Dr. Reisberg testified various factors may diminish the accuracy of eyewitness identifications. These factors include stress during the initial event, the passage of time, contamination of memory by viewing of photos of an accused, and cross-racial identification. 11RP 1429-32. As to the latter factor, studies showed that Caucasians had difficulty identifying African-Americans and vice-versa.<sup>11</sup> 12RP 1452, 1455. Dr. Reisberg also testified that in-court identifications are of little value and “troubling” based on the inherently suggestive circumstances. 11RP 1434.

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<sup>10</sup> Detectives did not ask English about Quichocho, who was not yet a suspect. 9RP 1123-35.

<sup>11</sup> The complainants in this case are Caucasian, whereas English is African-American. 11RP 1387-88.

Despite searching English and Quichocho's residences, police never found any gun associated with the crimes. 5RP 653-54; 7RP 796.

C. ARGUMENT

1. THE PROCEDURE USED BY THE COURT DURING JURY SELECTION VIOLATED ENGLISH'S CONSTITUTIONAL RIGHTS TO A PUBLIC TRIAL AND TO BE PRESENT FOR AND PARTICIPATE IN TRIAL.<sup>12</sup>

During jury selection, the parties (two co-defendants and the State) exercised a total of four peremptory challenges before the jury panel reentered the courtroom. These challenges were made in open court. 2RP 252-57 (Appendix A, listing challenges to four prospective jurors).

After the prospective jurors returned, however, the court called counsel, but not the defendants, to the "bar" and had counsel exercise challenges silently, on a clipboard. 2RP 260-68 (Appendix B). After the parties made their challenges, the court seated the jurors in their new positions. 2RP 266-68.

The only way for the public to determine which jurors had been excluded by which party was to request to view written notes in the court file, filed at some point after voir dire. CP 331-32 (listing 12 additional

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<sup>12</sup> The Washington Supreme Court recently rejected these arguments in *State v. Love*, \_\_\_ Wn.2d \_\_\_, \_\_\_ P.3d \_\_\_, 2015 WL 4366419 (July 16, 2015). English raises these issues to preserve them in the event that petition for certiorari is filed in the case.

challenges split among the parties; also appearing to mistakenly attribute both defense peremptory challenges conducted in open court to England's counsel). There is no indication in the record, moreover, that the defendants were privy to the challenges made by their attorneys. In fact, the verbatim reports indicate only counsel were present at the sidebar. 2RP 260.

a. Public Trial Violation

Under the Washington and United States Constitutions, a defendant has a constitutional right to a speedy and public trial. Const. art. 1, § 22; U.S. Const. amend. VI. Additionally, article I, section 10 of the state constitution expressly guarantees to the public and press the right to open court proceedings. State v. Easterling, 157 Wn.2d 167, 174, 137 P.3d 825 (2006). The First Amendment implicitly protects the same right. Waller v. Georgia, 467 U.S. 39, 46, 104 S. Ct. 2210, 81 L. Ed. 2d 31 (1984).

The right to a public trial is the right to have a trial open to the public. In re Pers. Restraint of Orange, 152 Wn.2d 795, 804-05, 100 P.3d 291 (2004). This is a core safeguard in our system of justice. State v. Wise, 176 Wn.2d 1, 5, 288 P.3d 1113 (2012). The open and public judicial process helps assure fair trials, deters perjury and other misconduct by participants, and tempers biases and undue partiality. Id. at

6. It is a check on the judicial system, provides for accountability and transparency, and assures that whatever transpires in court will not be secret or unscrutinized. Id.

The right to a public trial encompasses jury selection. Presley v. Georgia, 558 U.S. 209, 723-24, 130 S. Ct. 721, 175 L. Ed. 2d 675 (2010); Wise, 176 Wn.2d at 11. As the Supreme Court has observed, historically, those portions of jury selection open to the public have included both for cause and peremptory challenges. Press-Enter. Co. v. Superior Court of California, Riverside Cnty., 464 U.S. 501, 505-06, 506 n.4, 104 S. Ct. 819, 78 L. Ed. 2d 629 (1984); cf. State v. Anderson, \_\_\_ Wn. App. \_\_\_, \_\_\_ P.3d \_\_\_, 2015 WL 2394961, at \*7 (May 29, 2015) (both “experience” and “logic” prongs of the test set forth in State v. Sublett, 176 Wn.2d 58, 71, 292 P.3d 715 (2012) support the conclusion that the exercise of juror challenges “for cause” should occur in open court).

Before a trial judge can close any part of voir dire, it must analyze the five factors identified in State v. Bone-Club, 128 Wn.2d 254, 906 P.2d 325 (1995). Orange, 152 Wn.2d at 806-07, 809; see also State v. Brightman, 155 Wn.2d 506, 515-16, 122 P.3d 150 (2005) (a trial court violates a defendant’s right to a public trial if the court orders the courtroom closed during jury selection but fails to engage in the Bone-Club analysis).

A defendant's public trial right is violated if there has been a closure of court proceedings. State v. Njonge, 181 Wn.2d 546, 556, 334 P.3d 1068 (stating that "[a] defendant asserting violation of his public trial rights must show that a closure occurred."), cert. denied, 135 S.Ct. 880 (2014). A closure of the entire courtroom is not the only action that may constitute a closure. A closure also occurs when the public is excluded from particular proceedings within a courtroom such a sidebar conference that prevents anyone other than those present at the sidebar from hearing what is being said. Anderson, 2015 WL 2394961, at \*2-3 (distinguishing State v. Andy, 182 Wn.2d 294, 301-02, 340 P.3d 840 (2014), which held the public was able to access the courtroom at all times during trial and that no member of the public was deterred from entry by a misleading sign indicating the court was closed when, in fact, it was not). Conducting challenges during a sidebar conference may present a "clear obstacle to public scrutiny" of the challenges. Anderson, 2015 WL 2394961, at \*2-3.

Under the Bone-Club test, (1) the proponent of closure must show a compelling interest for closure and, when closure is based on a right other than an accused's right to a fair trial, a serious and imminent threat to that compelling interest; (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; and (5) the order must be no broader in its application or duration than necessary to serve its purpose. Bone-Club, 128 Wn.2d at 258-60; Wise, 176 Wn.2d at 12.

A violation of the public trial right is structural error, presumed prejudicial, and not subject to harmless error analysis. Wise, 176 Wn.2d at 13-15; State v. Strode, 167 Wn.2d 222, 231, 217 P.3d 310 (2009); Easterling, 157 Wn.2d at 181; Orange, 152 Wn.2d at 814. Moreover, the error can be raised for the first time on appeal. Wise, 176 Wn.2d at 13 n.6; Strode, 167 Wn.2d at 229; Brightman, 155 Wn.2d at 517-18; Orange, 152 Wn.2d at 801-02.

At English's trial, the court conducted peremptory challenges in the privacy of a closed sidebar discussion without ever considering or even articulating the Bone-Club factors. While members of the public could later look at the written notes to determine which party challenged which prospective juror, the mere opportunity to find out, sometime after the process, which side eliminated which jurors was not sufficient. Twelve of the challenged jurors were never identified in open court. Thus, even if members of the public scrutinized the minutes, there was no way to

associate a juror's name with a particular individual. It was therefore impossible, for example, to determine whether any particular racial group has been purposefully excluded. See Batson v. Kentucky, 476 U.S. 79, 88-89, 106 S. Ct. 1712, 90 L. Ed. 2d 69 (1986) (prohibiting such exclusions); State v. Burch, 65 Wn. App. 828, 833-34, 830 P.2d 357 (1992); see also State v. Saintcalle, 178 Wn.2d 34, 309 P.3d 326 (2013) (lead opinion, concurrence, and dissent underscore harm resulting from improper race-based exercises of peremptory challenges and difficulty of prevention), cert. denied, 134 S. Ct. 831 (2013).

Because the trial court failed to consider the Bone-Club factors before conducting peremptory challenges at sidebar, it violated English's right to public trial. Reversal is the only proper course.

b. Violation of Right to Be Present

The federal and state constitutions also guarantee criminal defendants the right to be present at trial. State v. Irby, 170 Wn.2d 874, 880-881, 246 P.3d 796 (2011). The federal Constitution does not explicitly guarantee the right to be present, but the right is rooted in the Sixth Amendment's confrontation clause and the Fourteenth Amendment's due process guarantee. Irby, 170 Wn.2d at 880-81. Under the federal Constitution, a defendant has the right to be present "whenever his presence has a relation, reasonably substantial, to the

fullness of his opportunity to defend against the charge.” Id. at 881 (quoting Snyder v. Massachusetts, 291 U.S. 97, 105-06, 54 S. Ct. 330, 78 L. Ed. 2d 674 (1934)).

The federal constitutional right to be present for the selection of one’s jury is well recognized.<sup>13</sup> See Gomez v. United States, 490 U.S. 858, 873, 109 S. Ct. 2237, 104 L. Ed. 2d 923 (1989); Lewis v. United States, 146 U.S. 370, 373-74, 13 S. Ct. 136, 36 L. Ed. 1011 (1892); State v. Wilson, 141 Wn. App. 597, 604, 171 P.3d 501 (2007). “Jury selection is the primary means by which [to] enforce a defendant’s right to be tried by a jury free from ethnic, racial, or political prejudice, or predisposition about the defendant’s culpability[.]” Gomez, 490 U.S. at 873 (citations omitted). The defendant’s presence “is substantially related to the defense and allows the defendant ‘to give advice or suggestion or even to supersede his lawyers.’” Wilson, 141 Wn. App. at 604 (quoting Snyder, 291 U.S. at 106); see also United States v. Gordon, 829 F.2d 119, 124 (D.C. Cir. 1987) (Fifth Amendment requires opportunity to give advice or suggestions to lawyer when assessing potential jurors).

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<sup>13</sup> Consistent with this constitutional guarantee, CrR 3.4 (a) explicitly requires the defendant’s presence “at every stage of the trial including the empanelling of the jury . . . .”

In contrast to the United States Constitution, article 1, section 22 of the Washington Constitution explicitly guarantees the right to be present,<sup>14</sup> and provides even greater rights. Under our state provision, the defendant must be present to participate “at every stage of the trial when *his* substantial rights may be affected.” Irby, 170 Wn.2d at 885 (quoting State v. Shutzler, 82 Wash. 365, 367, 144 P. 284 (1914)). This right does not turn “on what the defendant might do or gain by attending . . . or the extent to which the defendant’s presence may have aided his defense[.]” Irby, 170 Wn.2d at 885 n.6.

Whether there has been a violation of the constitutional right to be present at trial is a question of law this Court reviews de novo. Id. at 880. There was a violation in English’s case when he was excluded from the sidebar conference during which 12 of the 16 prospective jurors were excused. 2RP 260 (calling only counsel to the sidebar).

The circumstances in this case are similar to those in People v. Williams, 52 A.D.3d 94, 858 N.Y.S.2d 147 (2008). At Williams’s trial, the court conducted sidebar discussions during voir dire to determine whether three prospective jurors should be excused. At each conference, only the judge, counsel, and the juror were included in the discussion.

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<sup>14</sup> Article 1, section 22 provides, “In criminal prosecutions the accused shall have the right to appear and defend in person, or by counsel.”

One potential juror was retained and ultimately served. Two other jurors were excused on consent of the attorneys based on concern regarding their abilities to put aside prior experiences. Williams, 52 A.D.3d at 95-96.

On appeal, Williams alleged a violation of her right to be present at all critical stages of trial based on her absence from the sidebar conferences. The Supreme Court of New York agreed and reversed her convictions. Id. at 96. The Court held that the exclusion of a juror—without a knowing, intelligent, and voluntary waiver of the right to be present—requires reversal, even when the juror is excused on consent of counsel. Id. The Court also rejected “the People’s speculative suggestion that the defendant may have been able to hear what was said during the sidebar[.]” Id. at 97 (citation omitted); see also Lewis, 146 U.S. at 372 (“where the [defendant’s] personal presence is necessary in point of law, the record must show the fact.”); Irby, 170 Wn.2d at 884 (so holding).

The only remaining issue is whether the violations of English’s rights can be deemed harmless. When a defendant is excluded from a portion of jury selection, reversal is required unless the State proves the violation was harmless beyond a reasonable doubt. Id. at 886. The only way to accomplish that task is to show that no juror excused in violation of the defendant’s rights had a chance to sit on the jury. If a prospective juror in question fell within the range of jurors who ultimately comprised

the jury, reversal is required. Id. The peremptory challenges in this case fell within this range because the parties exercised the challenges only against jurors projected to fall within the jury box. E.g. 2RP 254. Thus, all 12 jurors excused without English's presence fell within the range of individuals who ultimately served, and the error was not harmless beyond a reasonable doubt. Reversal is required.

2. THE STATE COMMITTED MISCONDUCT BY REFERENCING, ON DIRECT EXAMINATION, LUJAN'S AGREEMENT TO PROVIDE "TRUTHFUL" TESTIMONY IN EXCHANGE FOR A REDUCED CHARGE.

"A prosecutor must enforce the law by prosecuting those who have violated the peace and dignity of the state by breaking the law." State v. Monday, 171 Wn.2d 667, 676, 257 P.3d 551 (2011) (citing State v. Case, 49 Wn.2d 66, 70-71, 298 P.2d 500 (1956) (quoting People v. Fielding, 158 N.Y. 542, 547, 53 N.E. 497 (1899))). At the same time, a prosecutor "functions as the representative of the people in a quasijudicial capacity in a search for justice." Monday, 171 Wn.2d at 676. A prosecutor fulfills neither role by securing a conviction based on proceedings that violate a defendant's right to a fair trial. Rather, such convictions undermine the integrity of the criminal justice system as a whole. State v. Walker, 182 Wn.2d 463, 476, 341 P.3d 976 (2015). When a prosecutor commits

misconduct, he may deny the accused a fair trial. Id. at 518; see also U.S. Const. amend. 14; Const. art. 1, § 3.

Five years ago, the highest court of this state held that evidence that a witness has entered into a formal agreement with the State to testify truthfully should be excluded during direct examination. Once admitted, such evidence should be strictly circumscribed, and the prosecutor may not express a personal belief regarding the witness's credibility or imply that evidence outside of the record would ensure that the promise has been kept. State v. Ish, 170 Wn.2d 189, 201, 241 P.3d 389 (2010) (four-judge lead opinion of Chambers, J., joined by Sanders, J., dissenting as to outcome).

Ish was charged with alternative murder charges for the beating death of his girlfriend. He did not deny killing the girlfriend but asserted that the drugs he had taken, along with his bizarre behavior following the incident, demonstrated that he had not formed the required mental state for either alternative charge. Id. at 192.

Before trial, the State entered into a plea agreement with Ish's jail cellmate, who had been charged with first degree robbery, second degree theft, and second degree assault in an unrelated matter. In return for his testimony at Ish's trial, the State agreed to, among other benefits, reduce

the charges to a single charge of second degree robbery and to recommend a reduced sentence. Id.

Accordingly, the cellmate testified that while in jail, Ish told him details he remembered about the crime but said that “he was going to just say he didn’t remember anything at all that happened that night, just like it never happened.” Id. at 192-93.

The Supreme Court held that the trial court erred in permitting the State to ask the cellmate about his promise to testify truthfully during direct examination, before his credibility had been attacked. Id. at 199. Explaining that, if a plea agreement contains provisions requiring the witness to give truthful testimony, the State may ask the witness about the terms of the agreement on redirect only, provided the defendant has opened the door on cross-examination.<sup>15</sup> Id.

But, the Court warned, prosecutors must not be allowed to comment on the evidence or suggest they are able to independently verify that the witness is in fact complying with the agreement. The Court held

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<sup>15</sup> A party may “open the door” to the introduction of otherwise inadmissible evidence. The door is opened only by the introduction of evidence, but not by counsel’s opening statements to the jury. 5 Karl B. Tegland, *Washington Practice: Evidence Law and Practice*, § 103.14 (5th ed.); see also *State v. Whelchel*, 115 Wn.2d 708, 801 P.2d 948 (1990) (defense counsel’s references to certain evidence “several times” during opening statement did not open the door to use of the evidence by the prosecution).

that referencing the cellmate's out-of-court promise to testify truthfully was irrelevant and had the potential to prejudice the defendant by placing the prestige of the State behind his testimony. Id.

The lead opinion, reflecting a four-judge plurality, ultimately found the misconduct harmless.<sup>16</sup> The lead opinion observed that the testimony was not the only evidence tending to prove Ish possessed the required mental state at the time of the assault: "The State produced many witnesses who were present just after the assault, who described Ish as angry but not out of touch with reality." Id. at 200.

Here, the prosecutor committed misconduct by ignoring the Supreme Court's admonition to avoid reference to a promise to testify truthfully on direct examination. 7RP 855-86. Unlike the Ish case, however, the error in this case was not harmless. The complainants' and Haugen's shaky identifications were largely undermined by the defense eyewitness identification expert. Lujan's testimony—as well as the related testimony of his family members—was therefore crucial in establishing English's involvement in the robbery. Thus, the State's efforts at bolstering his credibility were likely to have affected the jury's

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<sup>16</sup> The four-justice plurality was joined by four other justices who found no error and also voted to affirm the conviction. Ish, 170 Wn.2d at 205-06 (Stephens, J., concurring).

verdict. This Court should decline to find the error harmless and, following the rationale set forth in Ish, reverse English's convictions.

3. INSUFFICIENT EVIDENCE SUPPORTS EACH OF THE FIREARM ENHANCEMENTS BECAUSE THE STATE FAILED TO PROVE ANY FIREARM WAS OPERABLE.

Insufficient evidence supports the firearm enhancements on each count. The State failed to present any evidence that the firearm purportedly possessed by the robber was operable and therefore met the statutory firearm definition.

Due process requires the State to prove beyond a reasonable doubt all the necessary facts of the crime charged. U.S. Const. Amend. 14; State v. Hundley, 126 Wn.2d 418, 421, 895 P.2d 403 (1995). Evidence is sufficient to support a conviction only if, when viewed in the light most favorable to the State, a rational trier of fact could find each element of the crime beyond a reasonable doubt. State v. Brown, 162 Wn.2d 422, 428, 173 P.3d 245 (2007); State v. Salinas, 119 Wn.2d 192, 201, 829 P.2d 1068 (1992).

“[T]o prove a firearm enhancement, the State must introduce facts upon which the jury could find beyond a reasonable doubt the weapon in question falls under the definition of a ‘firearm’: ‘a weapon or device from which a projectile may be fired by an explosive such as gunpowder.’”

State v. Pierce, 155 Wn. App. 701, 714, 230 P.3d 237 (2010) (quoting State v. Recuenco, 163 Wn.2d 428, 437, 180 P.3d 1276 (2008) (quoting 11 Washington Practice: Washington Pattern Jury Instructions: Criminal 2.10.01 (Suppl. 2005)). The State must present the jury with sufficient evidence to find a firearm operable under this definition. Recuenco, 163 Wn.2d at 437 (citing State v. Pam, 98 Wn.2d 748, 754-55, 659 P.2d 454 (1983), overruled in part on other grounds by State v. Brown, 111 Wn.2d 124, 761 P.2d 588 (1988)).

In Pierce, this Court held the State failed to present evidence from which a reasonable jury could find the firearm Pierce allegedly used during the commission of certain crimes was operable. During the incident supporting most of Pierce's enhancements, the victims noticed that an intruder, later determined to be Pierce, was holding "what appeared to be" a handgun. 155 Wn. App. at 705. The intruder directed the victims to cover their heads and then ransacked and robbed their home. Id.

The State argued it was not required to *produce* the weapon used to support a firearm enhancement. This Court did not disagree but observed:

*This may be true when there is other evidence of operability, such as bullets found, gunshots heard, or muzzle flashes. Although the evidence is sufficient to prove an element of the offense of robbery or burglary or a deadly weapon enhancement, where proof of operability is not required, the evidence here is insufficient to support the*

imposition of a firearm sentencing enhancement where proof of operability is required.

Pierce, 155 Wn. App. at 714 n.11 (citing Recuenco, 163 Wn.2d at 437; Pam, 98 Wn.2d at 754-55) (emphasis added).

Finding the evidence of operability insufficient, this Court remanded to the superior court with directions that it dismiss the firearm enhancements and resentence Pierce without them. Pierce, 155 Wn. App. at 715.

As in Pierce, the State presented no evidence the purported gun was an operable weapon. None of the witnesses described any tell-tale characteristics, such as spent bullets, gunshots, or muzzle flashes. Pierce, 155 Wn. App. at 714 n.11. Although Bondy used the term “bullets,” apparently indicating unspent cartridges, 4RP 445, the relevant passage in Pierce appears to refer to spent projectiles, which, like “muzzle flashes” or the sound of gunshots, would be consistent with a fired weapon. As in Pierce, this Court should remand for vacation of the firearm enhancements.

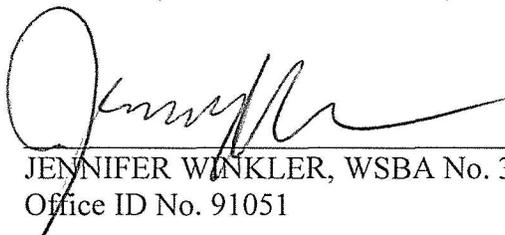
D. CONCLUSION

The procedure by which the court took peremptory challenges violated the appellant's rights to a public trial and his right to be present at and participate in the trial. Reversal is the remedy for these constitutional violations. Moreover, the State committed misconduct by referencing on direct examination an agreement its cooperating witness made with the State to provide truthful testimony in exchange for a reduced charge. Because the error was not harmless, reversal is required for this reason as well. Finally, insufficient evidence supports each of the firearm enhancements because the State failed to prove that any weapon used in the robbery was an operable firearm. Vacation of the enhancements is therefore required.

24 TH JAW  
13  
DATED this 13 day of July, 2014.

Respectfully submitted,

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# APPENDIX A

1 go first and then the defendants.

2 MR. GASPERINO: Do you want us to come up to the bar, Your  
3 Honor?

4 MR. YOSEPH: You can just announce it.

5 THE COURT: No, you can just remain --

6 MR. GASPERINO: Oh, okay.

7 THE COURT: -- seated, if you want.

8 MR. YOSEPH: Can't you just announce it? There's nobody  
9 here.

10 MR. GASPERINO: Yeah. I didn't know. Sometimes some  
11 courtrooms have the clipboard.

12 Your Honor. The State would first challenge No. 9.

13 THE COURT: All right.

14 MR. YOSEPH: Paleno-Ruiz?

15 MR. GASPERINO: Correct.

16 THE COURT: That would be plaintiff's first.

17 And next on our list is McCuddy, I believe. Matt McCuddy  
18 was No. 16.

19 And as far as defense, are you joining in your challenges?  
20 Or are you each going to take four? Or how do you want to  
21 do that?

22 MR. YOSEPH: Well, Mr. Lowe can you first. And then I  
23 guess I can take the next one.

24 THE COURT: Okay.

25 MR. LOWE: I'm going to challenge No. 9, Matt McCuddy,

1 Your Honor.

2 THE COURT: McCuddy. All right. That would be  
3 defendant's first.

4 Why don't we go State, defendant, State, defendant, and  
5 then after the third we'll have a defendant's again because  
6 there's fewer challenges.

7 MR. YOSEPH: Okay.

8 THE COURT: So whenever you're ready, Mr. Gasperino.

9 MR. GASPERINO: Yes, Your Honor. So just that I  
10 understand the process, Your Honor, you're going to  
11 alternate State, defense, State, defense, State, defense  
12 until the State runs out, and then the defense will --

13 THE COURT: No, I was going go through three. And then  
14 after defendant's third, have defendant's fourth, also.

15 MR. GASPERINO: Okay. Thank you, Your Honor. The State  
16 would next challenge No. 1, Your Honor.

17 THE COURT: Mr. Carton?

18 And next up is Nichols, Diana Nichols.

19 MR. GASPERINO: Your Honor, I thought Mr. Lowe challenged  
20 Mr. McCuddy and would Ms. Nichols not go in his spot?

21 THE COURT: Oh, did I skip that? Oh, I'm sorry. You are  
22 absolutely right.

23 MR. GASPERINO: Sorry.

24 THE COURT: I don't know what I was thinking. Yes.

25 Diana Nichols goes to No. 9. And the next one is McDowall.

1 I hope I got that right.

2 MR. YOSEPH: So McDowall takes McCuddy; is that right?

3 MR. LOWE: Nichols.

4 MR. YOSEPH: No. Nichols takes McCuddy -- I'm sorry. Who  
5 takes Mr. Carton's place? I'm sorry. I had the wrong --  
6 Ms. McDowall? Okay.

7 THE COURT: Okay. Let me just go back then. Currently,  
8 we have McDowall --

9 MR. YOSEPH: Right.

10 THE COURT: -- in Seat No. 1. We have Nichols in  
11 Seat No. 9.

12 MR. YOSEPH: Right.

13 THE COURT: And the previous change had been made that  
14 Halverson is in Seat No. 8, but otherwise as originally  
15 typed up there.

16 MR. YOSEPH: Okay. Now, is it my --

17 THE COURT: So we would be up to defendant's second.

18 MR. YOSEPH: Is that me or Mr. Lowe?

19 THE COURT: I think that's you.

20 MR. YOSEPH: That's me. Okay. I will challenge No. 17,  
21 in Seat 9, Ms. Nichols.

22 THE COURT: And that's defendant's second.

23 And hopefully, Fletcher is next.

24 MR. YOSEPH: Fletcher or -- yeah. Or McDowall? No,  
25 McDowall already --

1 THE COURT: McDowall's already in --

2 MR. YOSEPH: -- went in. I'm sorry. I'm sorry.

3 THE COURT: Right.

4 MR. YOSEPH: I'm just trying to catch up. So, yeah.

5 Fletcher.

6 And I think it's your number three.

7 MR. GASPERINO: Yes, sir. Thank you.

8 THE COURT: And if you need the folks back so you that  
9 know who's who by face, speak up and we'll do that.

10 MR. GASPERINO: Thank you, Your Honor.

11 MR. LOWE: Actually, I think I would like that, Your  
12 Honor.

13 THE COURT: All right. We'll, let's see if we have one  
14 more and we'll...

15 MR. GASPERINO: Your Honor, would it be possible for me to  
16 join in Mr. Lowe's motion?

17 THE COURT: Oh, okay. Sure. That's fine. Let's see.  
18 What I will do is ask the bailiff to change the people that  
19 we have changed so that we'll have an up-to-date panel. So  
20 in Seat 1 will be McDowall and Seat 9 will be Fletcher. And  
21 then the next order of business will be Seat Number -- or  
22 Mr. Gasperino's -- State's third challenge. And at that,  
23 I'll ask you to come up to the clerk. And she will have you  
24 exercise challenges on the board.

25 MR. YOSEPH: Okay.

1 THE COURT: And we do preserve that as part of the record  
2 so it is done in open court as part of the record, all  
3 right?

4 Just let me make one more check before I do that. As far  
5 as Mr. Carton, Ms. Paleno-Ruiz, Mr. McCuddy, and  
6 Mr. Nichols [sic], any objection to excusing them before we  
7 bring in the rest of the jury?

8 MR. YOSEPH: No, ma'am.

9 MR. GASPERINO: Not from the State.

10 MR. LOWE: No.

11 THE COURT: All right.

12 We can -- now, do you have an up-to-date chart? When you  
13 bring in the jury -- when you bring in the jury, seated in  
14 Seat 1 will be McDowall, Rhonda McDowall. Everybody else is  
15 the same as was first -- previously selected.

16 Seat 8 is Halverson.

17 Seat 9 is Fletcher.

18 And you can excuse Carton, McCuddy. Well, you can excuse  
19 Carton who was in Seat 1. And then Paleno-Ruiz, McCuddy,  
20 and Nichols who were the next up. And why don't you not  
21 have them leave until we make sure we have everybody seated  
22 as we should. So have them wait in the jury room until we  
23 make sure we have everybody as we should.

24 THE BAILIFF: Okay.

25 THE COURT: And then you can bring everybody in.

1           Let's see. And while they're doing that -- that will take  
2 a few minutes -- as far as our schedule goes, I'll be  
3 instructing them as to the rest of the pattern jury  
4 instructions, preliminarily here. And then we'll let them  
5 go and we'll need to tell them a time tomorrow to return.  
6 We still have the 3.5 hearing to do. It will probably be a  
7 few minutes after 4:00. Can we do one of them today, or I  
8 don't know if we have an officer here for that.

9           MR. GASPERINO: Yeah, Your Honor, that's what I was kind  
10 of mentioned to defense, that I was hoping that maybe we  
11 could get one of the two done today. We have either officer  
12 available.

13          THE COURT: Okay. And probably about 10:00, then, to tell  
14 the jury in the morning; would that be about right?

15          MR. GASPERINO: I would think so, but defense may have  
16 a --

17          THE COURT: Think we'll be ready --

18          MR. GASPERINO: -- different opinion.

19          THE COURT: -- to go by then?

20          MR. LOWE: Yeah. I don't know. I also want to address,  
21 as I discussed earlier --

22          THE COURT: We have a few motions and so on, right?

23          MR. LOWE: Yeah.

24          THE COURT: Uh-huh.

25          MR. LOWE: Okay.

# APPENDIX B

1 participation.

2 THE BAILIFF: I'll have (inaudible).

3 THE COURT: Okay?

4 (Prospective jury panel present)

5 THE COURT: All right. Let's see. We've made a few  
6 changes. We have Ms. McDowall, correct? And Ms. Fletcher,  
7 correct? Okay.

8 And, counsel, whenever you're ready, please come up to the  
9 bar.

10 And members of the jury panel, as I advised you earlier,  
11 the attorneys do have some chance to excuse jurors if they  
12 wish. And at this point we're going through that process.  
13 We need your patience in bearing with us here while this is  
14 in process.

15 MR. YOSEPH: Whose turn is it? Gasperino's.

16 MR. LOWE: Yeah.

17 THE COURT: Mr. Gasperino.

18 Did you get your chart back?

19 THE CLERK: I did, thank you.

20 THE COURT: And you can go ahead and excuse the...

21 You need to put the chart on the clipboard, please,  
22 Madam Clerk. And if you'd hand that forward, please.

23 And counsel can also make a note of it.

24 And to Mr. Lowe, please. We only have one chart. The  
25 clerk, we only have one chart -- one master chart.

1 THE CLERK: Okay.

2 THE COURT: So you would just continue it on the second...

3 THE CLERK: Okay.

4 THE COURT: Okay?

5 THE CLERK: Thank you.

6 THE COURT: All right. Then you need to write in the

7 new -- the new person there, the next up in our order.

8 Would you pass that back to me first, please. Yes, that's

9 correct.

10 THE CLERK: Okay.

11 THE COURT: And to Mr. Yoseph. Thank you.

12 Let's see. Okay. Would you write in the next

13 (inaudible). Thank you. To Mr. Gasperino.

14 MR. YOSEPH: Huh?

15 MR. GASPERINO: I think it needs to go to the judge.

16 MR. YOSEPH: Oh, I'm sorry.

17 THE COURT: And then this back to Mr. Lowe.

18 Thank you. Back to Mr. Gasperino.

19 MR. GASPERINO: So when were we going to switch the order,

20 Your Honor?

21 THE COURT: Well, you have challenges remaining so we'll

22 just have it go back to you.

23 MR. GASPERINO: Okay.

24 MR. YOSEPH: (Inaudible).

25 MR. GASPERINO: It goes to the judge. I'll show you what

1 I did.

2 MR. YOSEPH: You bet.

3 THE COURT: And let's see. It would be Mr. Yoseph, I  
4 believe.

5 All right. I'm handing it back to you.

6 Back to Mr. Lowe I think it is.

7 THE CLERK: On the second?

8 THE COURT: Yeah. Second page now.

9 And let's see. Back to Mr. Gasperino.

10 Let's see. Okay. And Mr. Yoseph.

11 Let's see. Oh, I see. Okay. And back to Mr. Gasperino.

12 MR. YOSEPH: We don't have any more left.

13 MR. LOWE: Huh-uh.

14 MR. GASPERINO: I do.

15 MR. YOSEPH: You can't use them.

16 MR. GASPERINO: Yeah, I can.

17 MR. YOSEPH: How?

18 MR. GASPERINO: (Inaudible).

19 MR. YOSEPH: (Inaudible). But you're not going to.

20 MR. GASPERINO. Yeah, I am.

21 THE COURT: Okay. Let's see.

22 MR. YOSEPH: How do you (inaudible)?

23 MR. GASPERINO: I can't tell you.

24 THE COURT: And back to Mr. Gasperino.

25 That was State's third.

1 MR. GASPERINO: Correct, Your Honor. Thank you.

2 THE COURT: Thank you. And that was State's fourth.

3 And that was State's fifth.

4 All right. The next will be the first alternate.

5 MR. YOSEPH: Here's the alternate.

6 MR. GASPERINO: Got to write it on --

7 MR. YOSEPH: Huh?

8 MR. GASPERINO: The alternate is going to be the one after  
9 Mr. (Inaudible). So it's No. 28 -- or 30. No. 30,  
10 Ms. Bowen. That's our first alternate.

11 Is that correct, Your Honor?

12 THE COURT: Yes.

13 MR. GASPERINO: He got booted early on.

14 MR. YOSEPH: So who does the first one?

15 MR. GASPERINO: I think it's me.

16 Your Honor, the same order? The State has the first  
17 challenge; is that correct?

18 THE COURT: Well, that's a good question. Let's see.

19 Well, the rule doesn't say. I'll say defense has first  
20 because of the additional number.

21 Can I see the chart, please?

22 Is that Mr. Yoseph's second? And then we'll have  
23 Mr. Gasperino's third.

24 Let's see. Where was it?

25 Let's see. And okay. Mr. Gasperino.

1 MR. YOSEPH: Now I've got one left?

2 MR. GASPERINO: You guys collectively, total.

3 MR. YOSEPH: That should be mine because I passed. You  
4 used it.

5 MR. GASPERINO: It's between you guys.

6 MR. YOSEPH: The next guys is...

7 MR. GASPERINO: IT'S A FEMALE.

8 MR. YOSEPH: Huh?

9 MR. GASPERINO: Female.

10 THE COURT: All right.

11 MR. YOSEPH: Okay. The last strike.

12 Do we have one more?

13 MR. GASPERINO: Uh...

14 MR. YOSEPH: Just one?

15 MR. GASPERINO: Two alternates.

16 MR. YOSEPH: But that's just one.

17 MR. GASPERINO: Oh, correct.

18 MR. YOSEPH: We have one more alternate to pick, Judge; is  
19 that right?

20 THE COURT: Defense had three -- this is a strange rule --  
21 and has exercised two.

22 Okay. And are we ready for number two, then?

23 MR. GASPERINO: Yeah. Sure.

24 THE COURT: Oh, okay. Let's see.

25 THE CLERK: There's a separate form.

1 THE COURT: That's fine. We can do that. Okay. Good  
2 idea.

3 MR. GASPERINO: Where's the other one?

4 THE COURT: She's doing the second alternate on the next  
5 page.

6 THE CLERK: Right here on the second.

7 THE COURT: But you need to write it in on the first page  
8 on the master.

9 MR. GASPERINO: Proof as to who it is?

10 THE CLERK: I apologize.

11 MR. YOSEPH: It's Martin, right?

12 MR. GASPERINO: Only for clarification, Your Honor, the  
13 same rule now applies to the second alternate, as well, with  
14 the same amount of challenges; is that correct?

15 THE COURT: Yes.

16 MR. YOSEPH: Ms. Woodhouse must be dealt with.

17 THE COURT: The rule provides...

18 MR. YOSEPH: Okay. Well, let's pass.

19 THE COURT: Okay. Let's see. Let's see. I was going to  
20 have defendants go first on that.

21 MR. YOSEPH: Huh?

22 THE COURT: Defendants go first. Same procedure we used  
23 for the first alternate, unless you all want to accept.

24 MR. GASPERINO: I think we're all accepting, Your Honor.

25 THE COURT: Oh, okay. Very good.

1 MR. YOSEPH: I think we're there, Judge.

2 THE COURT: Great. Let me see.

3 MR. GASPERINO: Do you need us to sign those?

4 THE COURT: All right. Thank you very much for your  
5 patience here, folks. It takes a while to go through that.  
6 And what we're going to do now is make some changes to the  
7 jury panel. What I'll be doing is having some people step  
8 down from up here. And then I'll call other people up from  
9 the benches and chairs there to take their place.

10 Now, this always happens, we don't have a lot of room to  
11 step by there, and I need to make changes to Seat No. 1. So  
12 I kind of need everybody in the back row there to give  
13 enough room or step down so that Ms. McDowall can step down.

14 And then I need Lonny -- if you can just step down into  
15 the courtroom; you can have seat in the front row there.  
16 And Lonny Bays, I need you to come forward to be seated in  
17 Seat No. 1 there in the back row.

18 And then everybody else, 2 through 7, can be seated again  
19 in the back row.

20 Then in the front row, Ms. Halverson -- is that right --  
21 we need you to stay where you are, but we'll ask everybody  
22 else to step out here to start with here.

23 And I need -- let's see. We need -- I need the first name  
24 here.

25 MR. GASPERINO: 28, I believe.

1 THE COURT: Donald Mackay, we need you to step forward,  
2 please, sir. Is it Mackay or Mackay?

3 JUROR: Mackay.

4 THE COURT: Mackay. I apologize. And we need you to be  
5 seated in Seat No. 9 there in the front row.

6 Mr. Linchuk, we need you to be seated back in Seat No. 10.

7 Then we need Ms. Hutchinson. Do we have Ms. Hutchinson up  
8 here? Yes. We need you to step down.

9 And in Seat No. 11 we need Lamaunte Fritz to come forward.  
10 And you're to be seated in Seat No. 11.

11 And Greg Taylor will be seated in Seat No. 12.

12 Let's see. I'm sorry. What was your name, again, ma'am?

13 JUROR: Fletcher.

14 THE COURT: Ms. Fletcher, yes, you can step down and be  
15 seated in the courtroom.

16 And then we are going to have two alternate jurors. The  
17 first alternate, I need Paul Anderson to come forward. And  
18 the second alternate, Deborah Martin to come forward.

19 And we'll need your chair there for the time being.

20 All right. Then I'm going to ask again just for everybody  
21 to state your last name starting in Seat 1.

22 JUROR: Bays.

23 JUROR: Rakes.

24 JUROR: Johnson.

25 JUROR: Nolin.

1 JUROR: Warner.

2 JUROR: Mitchell.

3 JUROR: Alexander.

4 JUROR: Halverson.

5 JUROR: Mackay.

6 JUROR: Linchuk.

7 JUROR: Fritz.

8 JUROR: Taylor.

9 JUROR: Anderson.

10 JUROR: Martin.

11 THE COURT: All right. And do the parties accept the jury  
12 as presently constituted?

13 The State?

14 MR. GASPERINO: Yes, Your Honor.

15 THE COURT: And Defendant Mr. Quichocho?

16 MR. LOWE: Yes, Your Honor.

17 THE COURT: And Defendant Mr. English?

18 MR. YOSEPH: Yes, ma'am.

19 THE COURT: All right. Very well. Thank you very much.  
20 These folks have been selected as the final jury. That  
21 means I'm able to excuse the rest of you from further  
22 attendance here today.

23 I do want to thank each and every one of you, though, for  
24 your service here. It is important that we have a full  
25 panel available so that we can go through the selection



**NIELSEN, BROMAN & KOCH, PLLC**

**July 24, 2015 - 2:07 PM**

**Transmittal Letter**

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Case Name: Brandon English

Court of Appeals Case Number: 46921-9

**Is this a Personal Restraint Petition?**  Yes  No

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- Answer/Reply to Motion: \_\_\_\_\_
- Brief: Appellant's
- Statement of Additional Authorities
- Cost Bill
- Objection to Cost Bill
- Affidavit
- Letter
- Copy of Verbatim Report of Proceedings - No. of Volumes: \_\_\_\_\_  
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- Personal Restraint Petition (PRP)
- Response to Personal Restraint Petition
- Reply to Response to Personal Restraint Petition
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