NO. 48473-1-II
(consolidated)

IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON,

DIVISION II

STATE OF WASHINGTON,

Respondent,

vs.

BRADLEY KNOX,

Appellant.

RESPONDENT'S BRIEF

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Rules

CrR 3.5 2

I. ISSUE

1. Was the defendant's right to a public trial violated when the jury was permitted to review the audio and video recordings that were admitted into evidence at trial in a closed courtroom during its deliberations?

2. Should the State prevail, should appellate costs be awarded?

II. SHORT ANSWER

1. **No.** The defendant cannot show that the jury's review of the audio and video recordings in a closed courtroom during its deliberations implicated a public trial right.

2. **No.** The State will not be seeking appellate costs.

III. STATEMENT OF FACTS

By way of charging information in Cowlitz County Superior Court cause #s 14-1-00095-0, 14-1-01040-8, and 14-1-01283-4, the defendant was charged with Violation of Uniform Controlled Substances Act – Possession of Methamphetamine with Intent to Deliver with two Firearm Enhancements, two counts of Unlawful Possession of a Firearm in the First Degree, Bail Jumping, Unlawful Imprisonment, and three counts of Solicitation to Commit Murder in the First Degree. CP 1-6; 78-84, 149-51. On April 21, 2015, Cowlitz County Superior Court Judge Michael Evans granted the State's motion to join the three cause numbers into one trial. 1RP 19-34. The defendant's trial commenced on October 13, 2015 with

jury selection, CrR 3.5 hearing, and motions in limine. 2RP 77-277; 3RP 278-372.

Testimony in the defendant's trial commenced on October 14, 2015. 4RP. As evidence of the three counts of Solicitation to Commit Murder in the First Degree, the State presented an audio recording and video recording. Both the audio and video recordings were admitted into evidence without objection. 5RP 582. The trial court granted the State permission to publish both the audio and video recordings for the jury. 5RP 667. The video recording was first presented to the jury. 5RP 667-672. The State did not play the video in its entirety; instead, the State fast forwarded to specific parts of the video. 5RP 668, 669, 671. As with the video, the audio recording was also not played in its entirety; instead, select portions were played that coincided with the portions of the video that were published for the jury. 5RP 672-74, 674-676, 676. The defendant did not object to the State publishing the audio and video to the jury, nor did the defendant object to the manner in which the State published the audio and video. 5RP 667-676.

Prior to the jury beginning its deliberations, the trial court discussed with the State and the defendant the proper procedure if the jury requested to review the audio and video recordings. 7RP 1028-29. The jury did in fact request to review the audio and video recordings. 7RP 1030. The State

requested that the jury be permitted to have access to a laptop to review the audio and video recordings at the leisure. 7RP 1031-32. The defendant requested that the jury be required to listen and watch the entirety of the recordings. 7RP 1038; 1039; 1042; 1043. As part of their argument, the defendant stated "...I actually said in my closing listen to the entire audio...don't just listen to the parts that were referenced, listen to the entire audio." 7RP 1042. The trial court ultimately agreed with the defendant and allowed the jury to review the audio and video recordings in their entirety. 7RP 1042-43.

After the attorneys were excused, the jury was brought into the courtroom. The trial court read a limiting instruction to the jury in regards to their review of the audio and video recordings. 7RP 1050-51. In allowing the jury to review the recordings, the trial court specifically noted that the courtroom was now being considered an extension of the jury deliberation room. 7RP 1050.

The jury returned with their verdicts on October 21, 2015. 7RP 1052. The jury found the defendant guilty of Violation of Uniform Controlled Substances Act – Possession of Methamphetamine with Intent to Deliver, two counts of Unlawful Possession of a Firearm in the First Degree, Bail Jumping, and one count of Solicitation to Commit Murder in the First Degree. 7RP 1052-54. The jury also found the two firearm

enhancements. 7RP 1053-54. On December 22, 2015, the trial court sentenced the defendant to 396 months in prison. 7RP 1123. The defendant filed a timely appeal. CP 132-44, 186, 98.

IV. ARGUMENT

A. THE DEFENDANT'S RIGHT TO PUBLIC TRIAL WAS NOT VIOLATED.

i. Standard of Review

"A public trial claim may be raised for the first time on appeal and dos not require an objection at trial to preserve the error." *State v. Njonge*, 181 Wn.2d 546, 554, 334 P.3d 1068 (2014) (citing *State v. Wise*, 176 Wn.2d 1, 15-16, 288 P.3d 1113; *State v. Paumier*, 176 Wn.2d 29, 36, 288 P.3d 1126 (2012); *State v. Easterling*, 157 Wn.2d 167, 173 n. 2, 137 P.3d 825 (2006)). In evaluating a claim of closure a defendant must first show a closure occurred. *Njonge*, 181 Wn.2d at 556 (citing *State v. Jasper*, 174 Wn. 2d 96, 121-24, 271 P.3d 876 (2012)). If a defendant proves a closure occurred, the court must then determine whether the proceeding implicates the public trial right. *State v. Smith*, 181 Wn.2d 508, 513, 334 P.3d 1049 (2014) (citing *State v. Sublett*, 176 Wn.2d 58, 92, 292 P.3d 715 (2012)). "Not every interaction between the court, counsel, and defendants will implicate the right to a public trial, or constitute a closure if closed to the public." *State v. Wilson*, 174 Wn. App. 328, 335, 298 P.3d 148 (Div 2,

2013) (citing *Sublett*, 176 Wn. 2d at 71. Upon the inquiry of whether there is a public trial right, a court should ask, "[d]oes the proceeding fall within a specific category of trial proceedings that our Supreme Court has already established implicates the public trial right? Second, if the proceeding does not fall within such a specific category, does the proceeding satisfy *Sublett's* 'experience and logic' test?" *Wilson*, 174 Wn. App. at 337. The "experience and logic" test asks 1) "whether the place and process have historically been open to the press and general public;" and 2) "whether public access plays a significant positive role in the functioning of the particular process in question." *Smith*, 181 Wn.2d at 514.

ii. The public trial right was not implicated when the jury was allowed to listen and observe the audio and video.

The defendant cannot establish that the jury's listening and viewing of the audio and video satisfies the experience prong. The Washington Supreme Court has previously determined that a jury rehearing of a 911 recording during their deliberations is not a process that has "historically been open to the press and public." *Sublett*, 176 Wn.2d at 73; see also *State v. Magnano*, 181 Wn. App. 689, 326 P.3d 845 (Div III, 2014) (the jury rehearing the audio recording of a 911 call, which was admitted without objection as an exhibit at trial and submitted to the jury with the agreement of both parties, in a closed courtroom, did not establish the experience

prong). The defendant's argument relies upon the assumption that the State was able to reopen its case and introduce new evidence when the jury was allowed to review the audio and video recordings during its deliberation. This argument is illogical. The State admitted both the audio and video recordings, in their entirety, into evidence. The State then chose to play selected portions of the audio and video. This is akin to admitting into evidence 500 photographs, but choosing to publish only 6 of those photographs to the jury during testimony. The remaining 496 photographs in evidence are not suddenly "new evidence" nor does the State "reopen its case" when the jury observes said photographs during deliberations.

The defendant likewise cannot establish the logic prong. "We have recognized that the right to a public trial serves to ensure a fair trial, to remind the prosecutor and judge of their responsibility to the accused and the importance of their functions, to encourage witnesses to come forward, and to discourage perjury." *Sublett*, 176 Wn.2d at 72 (citing *State v. Brightman,* 155 Wn.2d 506, 514, 122 P.3d 150 (2005) (citing *Peterson v. Williams,* 85 F.3d 39, 43 (2d Cir.1996))). "The process of replaying property admitted evidence to a deliberating jury is not one that benefits from public access." *Magnano*, 181 Wn. App. 699. "To allow the public to participate in the jury's review of admitted evidence invites the public to influence jury deliberations. '[T]here can be no question that [the jury] must

reach its decision in private, free from outside influence.'" *Magnano*, 181 Wn. App. at 699 (quoting *State v. Cuzick*, 85 Wn.2d 146, 149, 530 P.2d 288 (1975)).

Again, the defendant's argument would have this court assume that when the jury listened to the audio and viewed the video during its deliberations, they were being presented with "new evidence." Again, this argument is illogical. Both recordings were admitted into evidence without objection. The State chose to play portions of the recordings. The defendant could have presented the other parts of the recordings, but chose not to. Instead, during its closing, the defendant directly told the jury to listen to the remaining parts of the recordings.

Despite the defendant's contention now, the State's presentation of portions of the admitted evidence does not render the remaining parts of the audio and video inadmissible or separate from the evidence as a whole. The jury was entitled to review the recordings. The public is not entitled to impede upon the jury's deliberations. "The secrecy of jury deliberations is a 'cardinal principle' of the 6th Amendment right to an impartial jury." *Magnano*, 181 Wn. App. at 700 (citing *State v. Elmore*, 155 Wn.2d 758, 773, 123 P.3d 72 (2005)).

B. THE STATE WILL NOT BE REQUESTING APPELLATE COSTS.

The trial court found the defendant indigent when reviewing the imposition of legal financial obligations. The State has no reason to believe that the defendant's indigence has changed for purposes of this appeal. Therefore, the State will not be seeking to recoup appellate costs.

V. CONCLUSION

For the above stated reasons, the Appellant's claim that his public trial right was violated should be denied. The State will not seek appellate costs.

Respectfully submitted this 1 day of December, 2016.

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CERTIFICATE OF SERVICE

Michelle Sasser, certifies that opposing counsel was served electronically via the Division II portal:

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

Signed at Kelso, Washington on December 5, 2016.

Michelle Sasser

Michelle Sasser

COWLITZ COUNTY PROSECUTOR

December 01, 2016 - 3:34 PM

Transmittal Letter

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