85306-1

FILED
SEP 17 2010
COURT OF APPEALS
DIVISION III
STATE OF WASHINGTON
By_____

ORIGINAL

FILED
NOV 18 2010
CLERK OF THE SUPREME COURT
STATE OF WASHINGTON

No. _____

SUPREME COURT

OF

THE STATE OF WASHINGTON

State of Washington,
Respondent

v.

Anthony D. Koss,
Petitioner

Appeal from the Superior Court of Spokane County,
Affirmed by Division III of the Court of Appeals

PETITION FOR DISCRETIONARY REVIEW

Attorney for Petitioner Anthony D. Koss:
Douglas D. Phelps, WSBA #22620
Phelps & Associates
N. 2903 Stout Rd.
Spokane, WA 99206
(509) 892-0467

TABLE OF CONTENTS

A. Assignments of Error .....

Assignments of Error .....

1. The trial court erred when it allowed the closure of the courtroom by conducting proceedings outside of an open court without first conducting a *Bone-Club* analysis on the record.

2. Whether the prosecutor's arguments in closing constitute a due process violation which misstated the law, misrepresented the role of the jury, and the burden of proof requiring a new trial.

Issues Pertaining to Assignments of Error.....

1. Whether the court erred, and whether it's decision conflicts with several Court of Appeals and Supreme Court decisions which requires the trial court apply *Bone-Club* guidelines and make specific findings on the record to justify a closure of the court.

2. Whether the failure of the Appellate Court to apply the constitutional harmless error analysis is contrary to the requirements of several Supreme Court and Appellate Court decisions.

B. Statement of the Case .....
C. Summary of Argument.....

D. Argument .....

1. Whether the court erred, and whether its decision conflicts with several Court of Appeals and Supreme Court decisions which requires the trial court apply *Bone-Club* guidelines and makes specific findings on the record to justify a closure of the court.....

2. Whether the failure of the Appellate Court to apply the constitutional harmless error analysis is contrary to the requirements of several Supreme Court and Appellate Court decisions.....

E. Conclusion 29

F. Appendix

1. *State v. Koss*, No. 28185-0-III, Decision Affirming on August 19, 2010 by the Court of Appeals A-1

TABLE OF AUTHORITIES

Table of Washington Cases

State v. Belgrade, 110 Wn.2d 504, 507, 755 P.2d 174 (1988).....15, 18

State v. Bone-Club, 128 Wash.2d 254, 261, 906 P.2d 325 (1995)..1, 11-14

State v. Bowen, No. 39096-5-II.....12-14

State v. Davenport, 100 Wash 2d. 757, 761-62, 675 P. 2d 1213(1984) 16, 18

State v. Easter, 130 Wash 2d. 228, 242-43, 922 P. 2d 1285(1996)....16, 18

State v. Easterling, 157 Wash.2d 167, 137 P.3d 825 (2006).....13-14

State v. Echevarria, 71 Wn. App. 595, 598, 860 P.2d 420 (1993).....15

State v. Fleming, 83 Wash. App. 209, 216, 92 P.2d 1076 (1996)..12, 16, 18

State v. Momah, 167 Wn.2d 140, 148, 217 P.3d 321 (2009).....13

State v. Neidigh, 78 Wn. App. 71, 79, 895 P.2d 423 (1995).....15

State v. Pirthe, 127 Wash 2d 628, 672, 904 P. 2d 245(1995).....16

State v. Strode, 167 Wn.2d 222, 217 P.3d 310 (2009).....11-14

Table of Federal Cases

Neder v. United States, 527 U.S. 1, 8, 119 S. Ct. 1827, 144 L.Ed.2d 35 (1999).....13

Other Authorities

Article 1 § 10.....12, 15

Article 1 § 21.....16

Article 1 § 22.....12, 15, 16

RAP 13.4(b).....14, 18

RAP 13.4(1).....14, 18

RAP 13.4(2).....14, 18

RAP 13.4(3).....15, 18-19

A. Assignments of Error

Assignments of Error

1. The trial court erred when it allowed the closure of the courtroom by conducting proceedings outside of an open court without first conducting a *Bone-Club* analysis on the record.

2. Whether the prosecutor's arguments in closing constitute a due process violation which misstated the law, represented the role of the jury, and the burden of proof requiring a new trial.

Issues Pertaining to Assignments of Error

1. Whether the court erred, and whether its decision conflicts with several Court of Appeals and Supreme Court decisions which requires the trial court apply *Bone-Club* guidelines and make specific findings on the record to justify a closure of the court.

2. Whether the failure of the Appellate Court to apply the constitutional harmless error analysis is contrary to the requirements of several Supreme Court and Appellate Court decisions.

B. Statement of the Case

On October 1, 2007, at 12:30a.m., Spokane Police responded to a call at 1101 East Indiana in Spokane, Washington. (RP 87-88) Police were directed to 1104 East Indiana in an effort to locate a possible suspect. (RP 89) Police were allowed to enter the home and proceeded to search the house at 1104 East Indiana. (RP 90-91) Officer Ottmar exited the home and was going to look in a shed in the back of the house. During his walk to the shed he looked into the basement windows and observed Anthony

Koss changing his shirt in the basement. (RP 94) Officer Ottmar believed that Anthony Koss was hiding and avoiding being illuminated by his flashlight shining through the window. (RP 95) A fact that the officer failed to document in his police report but testified to at trial. (RP 107) His memory of Mr. Koss hiding in the basement was triggered after he read Spokane Sgt. Walkers' report. (RP 108-109)

At 1104 East Indiana Sgt. Walker found two white males believed to be possible suspects in the reported assault at 1101 East Indiana. One suspect, a Mr. Drake was asked to go outside for the identification by the alleged victim. (RP 114) The same request was made of Anthony Koss. (RP 118)

Officer Meyer spoke with Ms. Katy Jones, the alleged victim, at 1101 East Indiana. Ms. Jones was described at 5'5" and 120lbs and she opened her door while armed with a baseball bat. (RP 146-147) Ms. Katy Jones also had blood on her lower lip. (RP 148) The officer also observed a small cut on the inside of her bottom lip. (RP 150)

Ms. Katy Jones told Officer Meyer she was standing near the entryway of the front door. (RP 152) Ms. Jones told him that the suspects went across the street to 1104 East Indiana. (RP 153) Mr. Drake was described as a large white male 6'6" and 260lbs. (RP 154) Ms. Jones identified Mr. Drake as one of the people involved. (RP 155) Mr. Anthony

Koss was identified as 5'8" and approximately 150lbs. (RP 155) Officer Meyer further described Mr. Koss as reportedly wearing a "wife-beater" type tank top. (RP 159) Ms. Katy Jones identified Anthony Koss at the police show-up. (RP 158) Officer Meyer then decided to arrest Mr. Anthony Koss for First Degree Burglary. (RP 160)

Katy Jones testified at the trial that she lived at 1101 Indiana with two other female roommates. (RP 168) She had moved into the house the month before the incident occurred. (RP168) She did not know Mr. Drake or Anthony Koss before that night. (RP 169) Ms. Jones was awakened by a knocking on the front door of the house. (RP 170) During the month that she had lived there she had altercations with various people from across the street. (RP 171) She opened the door of the house and met two men. (RP 172) A man 5'9" with very short hair wearing a wife beater, gray sweatpants, and tattoos on each of his shoulders. (RP 172) Behind the shorter guy was a 6'2" to 6'4" with red hair and a tattoo on his neck. (RP 172) She had seen the red haired person at the house across the street once before. (RP 172)

She stated that she never opened the door all the way and never stepped outside the doorway. (RP 174) She stated Mr. Anthony Koss asked if a lady with a particular name lived there and she only

remembered the name began with an M. (RP 174) After asking what her name was Mr. Koss hit her in the lip with a closed fist. (RP 174)

Upon being struck she stumbled back one, maybe two steps. She promptly closed the door and dead bolted it and ran upstairs. (RP 175) As she closed the door she reported seeing both men running across the street toward the house across the street. (RP 175-176)

Ms. Katy Jones stated she was a couple of feet in her home when she was punched in the face. (RP 179) She stated that Mr. Koss' arm had to have breached the threshold of the door when she was punched. (RP 179) Ms. Jones stated she never went onto the porch of the house. (RP 180) Ms. Katy Jones stated she had a "fat lip but had to (sic) eat through straws—for about a week or so." (RP 180 lines 7-10) Mr. Anthony Koss had changed his clothes after the incident at the door. (RP 181) Ms. Katy Jones stated that the neighbors across the street would cat call at her and weren't the greatest neighbors. (RP 185)

Ms. Katy Jones stated that she believed the men were trying to be invited in but didn't force their way into the house. (RP 186 line 14-18) At first the two men were pleasant and were being a little bit friendly. (RP 186 line 19-24) The door to the house opens into the house and opens on the left. (RP 187)

The defense presented its first witness Delanzo Pleasant who lived at 1104 East Indiana at the time of the incident and for a period of ten years. (RP 191) Mr. Pleasant believed that there was a group of girls from Gonzaga living there because of parties and stuff. (RP 193) Mr. Pleasant heard a car pull up and then heard a female and male voice yelling from across the street. (RP 195 lines 1-10) Mr. Pleasant saw the men knock on the door and an Asian female answer the door. Then an argument followed between the female and the men. (RP 196 lines 14-24) Mr. Pleasant stated he observed Andrew Drake strike the female. Then the female went back into the house, slamming the door of the house. (RP 197 lines 6-13)

Jonathan Boltz testified that he was across the street with Mr. Pleasant when he heard a female yelling from the house across the street. (RP 213) After the female started yelling he observed Andrew Drake and Anthony Koss pull up in a car. (RP 213-214) Mr. Boltz stated that the female stepped out onto the porch yelling and throwing her arms around. Mr. Drake stepped back and then swung at the female. (RP 215 lines 13-25) Mr. Boltz stated the female was out on the porch when she was struck. (RP 216 lines 1-13) After the struggle occurred both of the men ran away from the scene. (RP 227 lines 17-23)

The defense called Andrew Drake who testified he had gone to Red Lobster in Coeur d' Alene with Anthony Koss on the night of the

incident. (RP 233 lines 6-16) The female across the street was yelling something about a stolen keg. (RP 234 lines 11-22) Mr. Drake and Mr. Anthony Koss went across the street and knocked on the door. The female came out of the house and was not happy. (RP 236 lines 7-14) Then the female pushed Mr. Drake knocking the cigarette from his hands. (RP 237 lines 10-22) As she pushed him he reacted in self defense because the female was "freaking out". (RP 237 lines 17-22) Mr. Drake stated that he hit her with his left hand as he pushed her. (RP 238 lines 9-23) After pushing Ms. Jones he ran away and into Delanzo Pleasants' house. (RP 239-240) Mr. Drake stated that Mr. Koss was on DOC at the time of the incident. (RP 240 lines 11-14)

On cross examination the prosecutor asked Mr. Drake:

> Q: And Mr. Koss ran, correct?
>
> A: Yes. Yes.
>
> Q: And was it your testimony because something about DOC?
>
> A: Yeah. (RP 253 lines 5-8)

At that point in the examination the defense attorney objected. (RP 253 line 9) The defense later argued that there was no relevance to the statement. (RP 254 line 3-5) In a hearing conducted on the record outside of the presence of the jury, the court ruled that the evidence was

inadmissible as speculative evidence on Mr. Koss' reason for flight. (RP 255-262)

The court on April 29, 2009 returns to the record discussing jury instructions by stating that "counsel and I met in chambers." The record does not reflect what the discussions were regarding the instructions and the defendant's presence was not discussed on the record. (RP 271 lines 13-23) There was no discussion as to why this occurred outside of the open courtroom and no findings explaining the conduct of the hearings in chambers. (RP 271)

Anthony Koss was called to testify for the defense. (RP 275) Mr. Koss testified that on the evening of the incident, he, Mr. Drake, and his fiancé were at Red Lobster in Coeur d'Alene, Idaho. (RP 279) As they pulled up at the Pleasants' residence they saw a female yelling across the street. (RP 281 lines 11-14) When they went to the house to knock on the door the female came outside closing the door of the house. (RP 282 lines 10-16) Mr. Koss stated he asked what her name was and she started yelling and swinging her arms around her. (RP 283 lines 17-25) It was during this exchange that Mr. Drake pushed Katy Jones causing the injury. After that exchange Ms. Katy Jones pushed the door of the house open and stepped back into the house closing the door. (RP 284 lines 10-16) The two men then ran away down the street. (RP 284 lines 12-25) Anthony

Koss testified that he did not assault Katy Jones. (RP 290 line 19) Katy Jones bumped into him as she slapped at the side and brushed against him. (RP 297 lines 9-13)

The court on April 29, 2009 comes back into session stating that counsel and the trial judge met in chambers. There is no indication who was present or why this occurred or any findings on the record regarding the reasons for the in chambers hearing. (RP 271) The trial judge then states that the definition of burglary has been modified to remove the words "or an accomplice." (RP 271 lines 17-22) The prosecution charged the offense as a First Degree Burglary alleging accomplice liability. (CP 1) There was no amendment of the information and the only explanation was that it had been removed based upon the facts of the case. (RP 271 lines 16-21) There is a statement by the court that one instruction was changed at Mr. Collins' request. (RP 271 lines 3-8) Neither the prosecutor or the defense counsel objected to the instructions proposed by the court. (RP 271 lines 8-12)

The court then read the jury the courts instructions. A reasonable doubt is described based upon an abiding belief in the truth of the charge. (RP 310 lines 1-15)(CP47) In the instructions the court defines First Degree Burglary (RP 310 line 16-21)(CP48) and the elements of the First

Degree Burglary are set out in the courts instructions. (RP 310 line 25 to RP 311 line 10)(CP49)

The court instructed the jury that: "A person commits the crime of burglary in the first degree when he or she enters or remains unlawfully in a building with the intent to commit a crime against a person or property therein, and if, in entering or while in the building or in immediate flight therefrom that person in the crime assaults any person." (CP 48) (RP 310 line 16-21)

In instructing the jury as to the elements for first degree burglary the instruction read: "One: That on or about the 1st day of October, 2007, the defendant entered or remained unlawfully in a building.....Three: That in so entering or while in the building, the defendant assaulted a person; and Four: That any of these acts occurred in the State of Washington." (CP 49) (RP 310-311)These instructions were the same as those proposed by the prosecutor in the Plaintiffs' Proposed Instructions. (CP 26&27)

The prosecution gave a closing argument in which he begins by stating: "At the start of this process, the state asked if a person has a fundamental right to be secure in their home and to be free from bodily injury, and it was unanimous that when a person is in their home, they should be secure in their own safety. They should be secure in their own safety. They should be secure that their way of life, our way of life, is not

disturbed by some other person who is not invited to be in there or consents to any type of harmful conduct, and you folks have, basically, been brought here to determine whether or not the defendant violated Katy Jones' right to be secure in her home and free from bodily injury." (RP 317 lines 15-25)

Additionally, the prosecution argued that it was not necessary to prove complete entry. "Also, under Washington law, the State does not have to prove that an individual completely entered into another person's home. It is enough under Washington law to show that a part of that person's body was inserted into another individual's home. It could be a hand through a window. It could be a hand breaching the threshold of a door, as Katy Jones had testified to you in this particular case, for an entry to be made." (RP 318 line 17-24) In this particular case, you have to be convinced that some part of the defendant's body breached the threshold of Katy Jones' front door and struck her in the mouth." (RP 318 line 25 to 319 lines 1-2) The prosecutor then misstates the burden of proof. "Now, when you think of that concept beyond a reasonable doubt. It's okay if there are some questions that are unanswered so long as the information you have before you leads you to believe that the defendant committed this crime." (RP 319 lines 8-12)

Ultimately, the prosecutor requested that they jury hold Mr. Koss accountable for breaching Ms. Katy Jones' security of her home on October 11, 2007 and assaulting her on that particular early morning. (RP 314 and 325) The prosecution argued that the defense witnesses were not credible because they "can't even figure out the ethnicity of the female" (victim). (RP 323 lines 23-25 to 324)

The jury began deliberations and later submitted questions to the court. Question number one was a request for a player to play the 911 call. (CP61) That inquiry was received at 12:00pm on 4/29/09. The next question was "Mr. Drake stated that Tony Cross was DOC can we factor that in? And if so what is the meaning?" The court's response: "Please Re-read your jury instructions." The response was dated April 29, 2009 at 12:20. (CP62) There is no other record of any discussion between counsel or any record of the parties being brought into court. The court made no record to explain the basis for failing to conduct these proceedings in the open court. The jury ultimately delivered a guilty verdict to First Degree Burglary. (RP 347 lines 12-15)(CP63)

The defendant timely filed this appeal with the court.

C. Summary of Argument

The trial court and the Court of Appeals erred in failing to require an on record analysis under the *Bone-Club* guidelines and specific findings

on the record to justify the closure of the courtroom. The court conducted argument regarding jury instructions and took questions from the jury and responded without any record of the questions being taken in open court or that the defendant was even present. Most importantly, the court failed to make any record required by *State v. Strode*, 167 Wn.2d 222, 217 P.3d 310 (2009); *State v. Bone-Club*, 128 Wash.2d 254, 261, 906 P.2d 325 (1995); and *State v. Bowen*, No. 39096-5-II prior to conducting proceedings outside of the open court.

The Appellate Court erred by failing to apply the constitutional standard of harmless error required by *State v. Fleming*, 83 Wash. App. 209, 216, 92 P.2d 1076 (1996). The harmless beyond a reasonable doubt standard is required where in closing the prosecution misstated the law, misrepresented the role of the jury, and the burden of proof.

D. Argument

Issue 1: The court erred and its decision conflicts with several Court of Appeals and Supreme Court decisions which requires the trial court apply *Bone-Club* guidelines and make specific findings on the record to justify a closure of the court.

The Court of Appeals Division III, addressed the defendants argument that the court hearing jury instructions in chambers by ruling that "ministerial" proceedings are exempt from the Article 1 § 10 and 22 requirements of a right to

public trial. (A 6-7) The Supreme Court in *State v. Strode*, 167 Wn.2d 222, 217 P.3d 310, 314 (2009) held:

> "To assure careful case-by-case analysis of a closure motion, a trial court faced with the question of whether a portion of a trial should be closed must ensure that the five criteria are satisfied:
> 1. The proponent of closure must make some showing [of a compelling interest],.....
> 5. The order must be no broader in its application or duration than necessary to serve its purpose."
>
> citing *Bone-Club*, 128 Wash.2d at 258-59, 906 P.2d 325"

The Supreme Court in *Strode* writes, "This court, however, has never found a public trial right violation to be [trivial or] de minimmis citing *Easterling*, 157 Wash.2d at 180, 137 P.3d 825." The court then further explains in *Strode* at 316, "the denial of the constitutional right to a public trial is one of the limited classes of fundamental rights not subject to harmless error analysis citing *Easterling*, 157 Wash.2d at 167, 137 P.3d 825 (2006) citing *Neder v. United States*, 527 U.S. 1, 8, 119 S. Ct. 1827, 144 L.Ed.2d 35 (1999). The denial of the public trial right is deemed to be a structural error and prejudice is necessarily presumed." *Strode* at 316

Ultimately the decision in *Strode* was: "By conducting a portion of the trial (jury voir dire) in chambers without first weighing the factors that must be considered prior to closure, prejudice to *Strode* is presumed. This error cannot be considered harmless and therefore, *Strode's* convictions are reversed, and the case remanded for a new trial." *Strode* at 316

Division II of the Appellate Court held in *State v. Bowen*, 39096-5-II "To protect the public trial right to a public trial and determine whether circumstances warrant a closure, Washington Court's must apply the *Bone-Club* guidelines and make specific findings on the record to justify a closure citing *State v. Momah*, 167 Wn.2d 140, 148, 217 P.3d 321 (2009)." Division III of the Appellate Court ruled contrary to the finding made in *Bowen* supra by not requiring the trial court to conduct a *Bone-Club* analysis on the record and to determine whether the circumstances warrant closure of the court.

The trial court in the Koss case made no record of any analysis of the *Bone-Club* guidelines and failed to make any findings on the record to justify the closure of the court and hearing matters outside of the open court. The failure to follow this procedure is structural error and prejudice is presumed, reversal is required with remand for a new trial. The defendant requests that discretionary review is appropriate based upon RAP 13.4(b). The decision of the Court of Appeals in the Koss case is appropriate for discretionary review by the Supreme Court because the decision here is contrary to the holdings of the Washington Supreme Court in *State v. Strode* 167 Wn.2d 222, 217 P.3d 310 (2009); *State v. Bone-Club*, 128 Wash.2d 254, 261, 906 P.2d 325 (1995); *State v. Easterling*, 157 Wash.2d 167, 137 P.3d 825 (2006). Pursuant to RAP 13.4(b) (1) discretionary review is therefore appropriate based upon the contrary holdings.

The Supreme Court should also grant review pursuant to RAP 13.4(b)(2) because the decision in Koss is contrary to the ruling of Division II in *State v. Bowen*, No. 39096-5-II. The Court of Appeals in *Bowen* supra upheld a decision consistent with *Strode* supra that "To protect the public trial right to a public trial and determine whether circumstances warrant a closure, Washington Court's must apply the *Bone-Club* guidelines and make specific findings on the record to justify a closure."

The Supreme Court should also grant review because under RAP 13.4(b)(3) the case presents a significant issue of law under the constitution of the State of Washington under Article 1 § 10 and 22. The case highlights the problems that arise when the trial court fails to make a record prior to conducting proceedings off the record and in chambers. Here the Court of Appeals in Koss points to the "lack of record" as a basis to deny the petitioner relief on appeal for a violation of the right to an open and public trial under Article 1 § 10 and 22. (A-1 p. 9)

Issue 2: The failure of the Appellate Court to apply the constitutional harmless error analysis is contrary to the requirements of several Supreme Court and Appellate Court decisions.

The prosecution in the Koss case during closing argument violated his duty "to seek verdicts free from appeals to passion or prejudice." *State v. Belgrade*, 110 Wn.2d 504, 507, 755 P.2d 174 (1988); *State v.*

Echevarria, 71 Wn. App. 595, 598, 860 P.2d 420 (1993) Accordingly, a prosecutor engages in misconduct when making an argument that appeals to jurors' fear and repudiation of criminal groups or invokes racial, ethnic, or religious prejudice as a reason to convict. *Belgrade*, 110 Wn.2d 504 Likewise, inflammatory remarks, incitements to vengeance, exhortations to join a war against crime on drugs, or appeals to prejudice or patriotism are forbidden. *State v. Neidigh*, 78 Wn. App. 71, 79, 895 P.2d 423 (1995)

The Washington State Constitution grants criminal defendants substantial rights. Article 1 § 21 an inviolate right to a jury trial, § 22 guarantees many rights to a criminal defendant including a copy of accusation against him, to have a speedy public trial by an impartial jury, and a right to appeal in all cases.

Prosecutorial misconduct is grounds for reversal where there is a substantial likelihood the misconduct affected the verdict. *State v. Pirthe, 127 Wash 2d 628, 672, 904 P. 2d 245(1995)* When the prosecutor's misconduct affects a constitutional rights, such as a right against self-incrimination, the court undertakes a separate analysis: the constitutional harmless error analysis. *State v. Easter, 130 Wash 2d. 228, 242-43, 922 P. 2d 1285(1996); State v. Davenport, 100 Wash 2d. 757, 761-62, 675 P. 2d 1213(1984)* Under this review the error is harmless if the court is convinced beyond a reasonable doubt that they jury would have reached the same result. *Easter, 130 Wash 2d at 242, 922 P. 2d 1285; see*

also State v. Fleming, 83 Wash App. 209, 216, 921 P. 2d 1076(1996) (Utilizing the constitutional harmless error analysis where prosecutor improperly shifted the burden of proof, misstated the nature of reasonable doubt and the role of the jury, and infringed on the defendant's right to remain silent.)

In the Anthony Koss case the prosecutor argues that beyond a reasonable doubt is where "there are some questions that are unanswered so long as the information you have before you leads you to believe the defendant committed the crime." (RP 319 lines 8-12) Based upon this analysis where a person is led to believe the defendant committed the crime the jury could determine there was evidence beyond a reasonable doubt. The standard stated by the prosecutor was a burden below that of beyond a reasonable doubt and is actually much closer to a probable cause standard.

Next, the prosecutor urged the jury to make their decision based upon the fundamental right of a person to be secure in their own safety in their own home. (RP 317 lines 15-25) He told the jury they were brought here "to determine whether or not the defendant violated Katy Jones' right to be secure in her home and free from bodily injury." (RP 317 lines 15-25) Once more the prosecution took the focus from determining if the government proved the case beyond a reasonable doubt. The prosecutor focused the jury on their duty to protect Katy Jones' "fundamental right to be secure in their home." (RP 317) The prosecution was making a plea to the jury appealing to the jurors' passions and extolling them

to protect the fundamental rights of the alleged victim. The prosecutor was misstating the role of the jury by asking them to focus on protecting victims rights.

The prosecution in this case also argued that the defense witnesses were not credible because they could not identify the victims' ethnic background. (RP 323 lines 23-25 to 324) Once more the prosecution abandoned his duty to seek a verdict free from appeals to passion or prejudices required under *State v. Belgrade, 110 Wn. 2d. 504, 507, 755 P. 2d. 174(1988)* The violations here were constitutional in scope misstating the law and misrepresented the role of the jury and the burden of proof. In a case which is strikingly similar to what has occurred in the Koss case the Court of Appeals found manifest constitutional error. *State v. Fleming, 83 Wn. App. 209, 216, 921 P. 2d 1076(1996)*

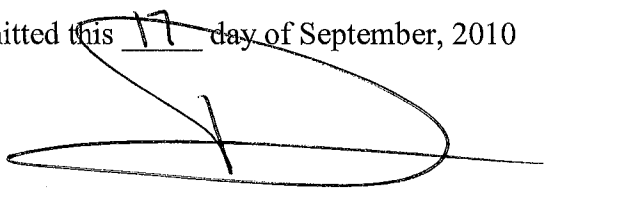
The decision of the Court of Appeals here at A-1, 11-14 is contrary to the findings is *State v. Fleming*, 83 Wn. App. 209, 921 P.2d 1076 (Div. I 1991) where the court applied the constitutional harmless error analysis. That same analysis is called for in *State v. Easter*, 130 Wash.2d 228, 242-43, 922 P.2d 1285 (1996); *State v. Davenport*, 100 Wash.2d 757, 761-62, 675 P.2d 1213 (1984) Review is proper pursuant to both RAP 13.4(b)(1) and (2). Additionally, review is proper under RAP 13.4(b)(3) because it involves a significant question of law under the constitution of the State of Washington because the prosecution improperly

argued for the jury to weigh the rights of the victim as their role (RP 317 lines 15-25) contrary to the defendants constitutional rights.

E. Conclusion

Review by the Supreme Court is proper in this case because under RAP 13.4(b)(1) and 13.4(b)(2) the decision of Division III are contrary to decisions of the State Supreme Court and other divisions of the Court of Appeals. The issues presented are also significant questions of constitutional law under RAP 13.4(b)(3) requiring review.

Respectfully submitted this 17 day of September, 2010



Attorney for Appellant Anthony D. Koss:
Douglas D. Phelps, WSBA #22620
Phelps & Associates
N. 2903 Stout Rd.
Spokane, WA 99206
(509) 892-0467

APPENDIX – A1

State v. Koss, ___ Wn. App. ___, ___ P.3d ___ (8/19/2010, No. 28185-0-III)

FILED

OCT 14 2010

COURT OF APPEALS
DIVISION III
STATE OF WASHINGTON

COURT OF APPEALS, DIVISION III, STATE OF WASHINGTON

STATE OF WASHINGTON,	)	
	)	**No. 28185-0-III**
Respondent,	)	
	)	
v.	)	
	)	**ORDER GRANTING**
ANTHONY DAVID KOSS,	)	**MOTION TO PUBLISH**
	)	
Appellant.	)	

THE COURT has considered the respondent's motion to publish the court's opinion of August 19, 2010, and the record and file herein, and is of the opinion the motion to publish should be granted. Therefore,

IT IS ORDERED, the motion to publish is granted. The opinion filed by the court on August 19, 2010, shall be modified on page 1 to designate it is a published opinion and on page 14 by deletion of the following language:

> A majority of the panel has determined that this opinion will not be printed in the Washington Appellate Reports but it will be filed for public record pursuant to RCW 2.06.040.

DATED: October 14, 2010

FOR THE COURT:

Korsmo, ACJ

KEVIN M. KORSMO
Acting Chief Judge

FILED

AUG 19 2010

In the Office of the Clerk of Court
WA State Court of Appeals, Division III

IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON

STATE OF WASHINGTON,	)	**No. 28185-0-III**
	)	
Respondent,	)	
	)	**Division Three**
v.	)	
	)	
ANTHONY DAVID KOSS,	)	
	)	**UNPUBLISHED OPINION**
Appellant.	)	

SWEENEY, J.—This is a prosecution for first degree burglary. The defendant stood at an open door and punched the victim, who was in her house. We conclude that this supports the necessary elements for first degree burglary. We also conclude that the defendant's right to a public trial was not violated by an instruction conference held in chambers. Nor were the court's instructions to the jury flawed. The defendant also assigns error to a number of the court's discretionary rulings and urges that the prosecutor committed misconduct during the course of the trial; conduct that we should characterize as flagrant and review in the first instance here on appeal. We conclude the court's decisions were well within its discretionary authority and we conclude that the

prosecutor's comments did not amount to misconduct. We therefore affirm the conviction.

FACTS

Anthony D. Koss punched Katy Jones in the mouth after she opened the door to her home. She was in her house; Mr. Koss was on the porch. She did not know him before the assault. She called police and described Mr. Koss and his companion. Police investigated and found the men in a home across the street from Ms. Jones. Ms. Jones identified both Mr. Koss and his companion.

The State charged Mr. Koss with first degree burglary.

The court instructed the jury that to convict Mr. Koss for first degree burglary it had to find that he (1) entered or remained unlawfully in a building; (2) that the entering or remaining was with intent to commit a crime against a person or property therein; (3) that in so entering or while in the building or in immediate flight from the building he assaulted a person; and (4) that any of these acts occurred in the state of Washington. Clerk's Papers (CP) at 49 (Instruction 5).

The jury found Mr. Koss guilty of first degree burglary.

DISCUSSION

UNANIMITY INSTRUCTION—FIRST DEGREE BURGLARY

Mr. Koss contends that he was entitled to an instruction that required the jury to be unanimous on whether he assaulted Ms. Jones while she was inside her house or outside as he fled from the building. *State v. Gilbert*, 68 Wn. App. 379, 842 P.2d 1029 (1993).

The jury, of course, had to unanimously conclude that the criminal act charged in the information had been committed. *State v. Petrich*, 101 Wn.2d 566, 569, 683 P.2d 173 (1984), *modified on other grounds by State v. Kitchen*, 110 Wn.2d 403, 405-06, 756 P.2d 105 (1988); *State v. Williams*, 136 Wn. App. 486, 496, 150 P.3d 111 (2007). And here it did so.

To convict Mr. Koss of first degree burglary, the State had to show, and the jury had to be convinced, that he entered Ms. Jones's house unlawfully and assaulted her. RCW 9A.52.020(1). That statute provides two alternative means by which the crime can be committed—either by being armed with a deadly weapon or by assaulting any person. *See Williams*, 136 Wn. App. at 498.

A unanimity instruction would be required if the State charged a single first degree burglary based upon two distinct criminal acts that are not alternative means of committing that crime, for example if there were two assaults. *Id.* But here, the burglary charge was based on a single assault. The question for the jury was whether the assault

occurred inside Ms. Jones's house or outside. The jury concluded that it occurred inside and that finding is easily supported by Ms. Jones's testimony. Mr. Koss says he punched her outside of her home. The jury did not believe him. That was its prerogative. *State v. Walton*, 64 Wn. App. 410, 415-16, 824 P.2d 533 (1992). The court properly instructed the jury on the elements of first degree burglary. CP at 48, 49. There was no need for a separate unanimity instruction.

Mr. Koss relies on *Gilbert* for the proposition that the finding that he committed first degree burglary required a unanimity instruction because he testified that the assault occurred outside. *Gilbert*, 68 Wn. App. at 381. His reliance is misplaced. There, Mr. Gilbert, the defendant, burglarized a home and was confronted outside by a man; Mr. Gilbert assaulted that man. He was convicted of first degree burglary. *Id.* At that time, the first degree burglary statute provided:

> (1) A person is guilty of burglary in the first degree if, with intent to commit a crime against a person or property *therein*, he enters or remains unlawfully in a dwelling and if, in entering or while in the dwelling or in immediate flight therefrom, the actor or another participant in the crime (a) is armed with a deadly weapon, or (b) assaults any person *therein*.

Former RCW 9A.52.020 (1975) (emphasis added). The court of appeals read the statute to require an assault "therein," and concluded that the assault outside did not elevate a residential burglary to first degree and reversed. *Gilbert*, 68 Wn. App. at 383-84. The

State failed to prove the element, "assaults any person therein," and so the evidence did not support a first degree burglary conviction. *Id.* at 384.

The State's theory and proof here was that Mr. Koss assaulted Ms. Jones in her home. And so his conviction turned on whether the State successfully showed that. The jury said the State proved the necessary elements. Moreover, RCW 9A.52.020(1) was amended in 1996 to remove the word "therein" from subsection (b). LAWS OF 1996, ch. 15, § 1. So the strict statutory construction necessary in *Gilbert* is of no moment in Mr. Koss's case. We then reject this assignment of error.

SUFFICIENT EVIDENCE

Mr. Koss next contends that the State failed to prove that he entered the building intending to commit an assault. He argues that the assault either occurred outside the house without any intent to enter, or alternatively, as the men left the front porch without any intent to enter the house. Under either scenario, he urges that there was only a fourth degree assault and no burglary.

We view the evidence and all reasonable inferences in a light most favorable to the State to determine whether any rational trier of fact could have found the essential elements of the charged crime beyond a reasonable doubt. *State v. Green*, 94 Wn.2d 216, 221, 616 P.2d 628 (1980). We consider circumstantial evidence as reliable as direct

evidence. *State v. Delmarter*, 94 Wn.2d 634, 638, 618 P.2d 99 (1980). We defer to the trier of fact on the persuasiveness of the evidence. *Walton*, 64 Wn. App. at 415-16.

Ms. Jones never left her house. She stood a couple of feet inside the door when Mr. Koss punched her. She did not invite Mr. Koss into the home. He breached the doorway with his fist and punched her in the mouth. This is a sufficient showing that Mr. Koss entered the home with the intent to assault. The term "enter" includes the insertion of any part of the person's body. *See* RCW 9A.52.010(2). Ultimately, a rational trier of fact could find each element of first degree burglary beyond a reasonable doubt based upon Ms. Jones's testimony. *Green*, 94 Wn.2d at 221; RCW 9A.52.020(1).

RIGHT TO PUBLIC TRIAL

Mr. Koss next contends that he was denied his right to a public trial during critical stages of the proceedings because (1) the court conducted a jury instruction conference in chambers without "receiving assent from the defendant" or "allowing observation by the public," and (2) the court responded to two written questions from the jury without making a record to show that the questions were discussed in open court or that the defendant was present. Br. of Appellant at 22.

A defendant's constitutional right to a public trial requires that the court be open during "adversary proceedings" including evidentiary phases of the trial, suppression hearings, voir dire, and jury selection. *State v. Sadler*, 147 Wn. App. 97, 114, 193 P.3d

1108 (2008); *State v. Rivera*, 108 Wn. App. 645, 32 P.3d 292 (2001). But "[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." *Sadler*, 147 Wn. App. at 114.

Here, counsel and the court met off the record in chambers and everyone agreed to remove accomplice language from the first degree burglary elements instruction. Report of Proceedings (RP) at 271. The court and counsel then went on the record in open court (with Mr. Koss now present) to address any objections or exceptions to the instructions. No one objected to the instruction or to the procedure.

The in-chambers conference was a ministerial legal matter. It did not involve disputed facts. *Sadler*, 147 Wn. App. at 114. And ultimately it did not then implicate Mr. Koss's right to a public trial. Nor was it a critical stage that required Mr. Koss's presence. *In re Pers. Restraint of Lord*, 123 Wn.2d 296, 306, 868 P.2d 835 (1994) (in-chambers conferences between court and counsel on legal matters are not critical stages except when the issues involve disputed facts).

The jury made two written inquiries during deliberations. First, it asked, "Mr. Drake stated that Tony Coss [sic] was DOC [Department of Corrections] can we factor that in? And if so what is the meaning?" CP at 61. The court responded, "Please re-read your jury instructions." *Id.* It also asked for a CD player, "Need CD player to play 911 call." *Id.* at 62. The court noted as its response "(given one time—computer play back)."

Id. The record contains no further information about the jury inquiries, including whether the court consulted with counsel before communicating its answers.

Recently, in *State v. Sublett*,[1] the court rejected arguments that an in-chambers conference to address a jury question on one of the trial court's instructions implicated the defendants' right to a public trial. Citing *Sadler*, the court reasoned that the jury inquiry involved a purely legal issue that arose during deliberations and did not require the resolution of disputed facts. *Sublett*, 156 Wn. App. at 181. And "questions from the jury to the trial court regarding the trial court's instructions are part of jury deliberations and, as such, are not historically a public part of the trial." *Id.* at 182. The court held that because "the public trial right does not apply to the trial court's conference with counsel on how to resolve a purely legal question which the jury submitted during its deliberations, . . . the trial court did not violate the appellants' public trial right by responding to the jury's question in writing as CrR 6.15(f) provided." *Id.* We agree.

The same rationale applies here to Mr. Koss's claim that his right to a public trial was violated. However, nothing here suggests that the court held an in-chambers conference or even contacted counsel.

The jury's first written inquiry was part of deliberations and it did not require the resolution of any factual questions. The court gave an appropriate neutral response,

---

[1] *State v. Sublett*, 156 Wn. App. 160, 181, 231 P.3d 231 (2010).

simply telling the jury to reread the instructions. *See State v. Allen*, 50 Wn. App. 412, 420, 749 P.2d 702 (1988). The second inquiry and response by the court was also neutral; it simply involved giving the jury access to an audio player during deliberations. The trial court followed CrR 6.15(f)(1); it provided written responses. Mr. Koss's right to a public trial was not violated by the court's response.

Mr. Koss specifically claims only that his right to a public trial was violated. But he is correct that the discussion of a jury inquiry is a critical stage of the trial at which the defendant has a right to meaningful representation by counsel. *Rogers v. United States*, 422 U.S. 35, 39, 95 S. Ct. 2091, 45 L. Ed. 2d 1 (1975); *see* CrR 6.15(f)(1) (court shall respond to jury inquiries in the presence of or after notice to the parties or their counsel). Communications between the judge and jury without the defendant's presence are error, and the State must prove the communications harmless beyond a reasonable doubt. *State v. Caliguri*, 99 Wn.2d 501, 509, 664 P.2d 466 (1983); *State v. Russell*, 25 Wn. App. 933, 948, 611 P.2d 1320 (1980).

Mr. Koss has not, however, supplied an adequate record to permit further review of his claim that he was denied his right to be present. *See State v. Rienks*, 46 Wn. App. 537, 544, 731 P.2d 1116 (1987). Even assuming the court's responses were ex parte communications with the jury, they were clearly neutral and, for us, harmless beyond a

reasonable doubt. *Allen*, 50 Wn. App. at 420 (harmless error when neutral instruction conveyed no affirmative information).

INSTRUCTION—DOC STATUS

Mr. Koss next argues that the reference to him being on DOC status was evidence of prior misconduct and prejudicial, and the court therefore erred by failing to instruct the jury to disregard it.

Defense witness Mr. Drake testified on direct examination that he was the one who hit Ms. Jones. He said he then ran down the street and into Delanzo Pleasant's house. Defense counsel asked if he saw where Mr. Koss went. Mr. Drake responded, "Yeah, he ran with me. He wasn't, you know, we were both freaking out. He was on DOC at the time, and we didn't want to be anything [sic] involved in that, so." RP at 240. On cross-examination, Mr. Drake responded to the prosecutor's questions about why he ran. The prosecutor asked if Mr. Koss ran, and Mr. Drake responded, "Yes." *Id.* at 252. The prosecutor then asked, "And was it your testimony because something about DOC?" *Id.* at 253. Mr. Drake responded, "Yeah." *Id.* Defense counsel objected. The court then refused to allow any further inquiry about DOC status. The jury asked about it during deliberations.

First of all, the State had a right to ask about the DOC status during cross-examination because Mr. Koss's witness raised the subject on direct. *State v. Gefeller*, 76

Wn.2d 449, 455, 458 P.2d 17 (1969). Second, the court had ample discretionary authority to handle the jury inquiry the way it did—by instructing the jury to reread the instructions. *State v. Studebaker*, 67 Wn.2d 980, 987, 410 P.2d 913 (1966).

PROSECUTORIAL MISCONDUCT

Mr. Koss next argues that the prosecutor committed prejudicial misconduct when he (1) appealed to the jurors' passions by extolling them to focus on protecting Ms. Jones's fundamental right to be secure in her home instead of requiring that the State prove the elements of the crime it charged, (2) suggested the State's burden of persuasion was less than beyond a reasonable doubt, and (3) argued that defense witnesses were not credible because they could not identify the victim's ethnicity.

Mr. Koss had to show both that the comment was improper and that it was prejudicial. *State v. Brown*, 132 Wn.2d 529, 561, 940 P.2d 546 (1997). Mr. Koss did not object to any of the prosecutor's closing comments at trial. So he has the added burden to show that the conduct was so flagrant and ill intentioned that it caused an enduring and resulting prejudice that could not have been remedied by a curative instruction. *State v. McKenzie*, 157 Wn.2d 44, 52, 134 P.3d 221 (2006). And the absence of an objection "strongly suggests . . . that the argument or event in question did not appear critically prejudicial to [him] in the context of the trial." *Id.* at 53 n.2 (emphasis omitted) (quoting *State v. Swan*, 114 Wn.2d 613, 661, 790 P.2d 610 (1990)).

Mr. Koss's claims are based in part on this statement in the State's closing argument:

> At the start of this process, the State asked if a person has a *fundamental right to be secure in their home* and to be free from bodily injury, and it was unanimous that when a person is in their home, they should be secure in their own safety. They should be secure that their way of life . . . is not disturbed by some other person who is not invited to be in there or consents to any type of harmful conduct, and you folks have, basically, been brought here *to determine whether or not the defendant violated Katy Jones' right to be secure in her home and free from bodily injury.*

RP at 317 (emphasis added). He contends the italicized portions shifted the State's burden of proof from proving the elements of the crime beyond a reasonable doubt to protecting the rights of the victim. But after making these statements, the prosecutor discussed the elements of first degree burglary and the State's burden of proving each element beyond a reasonable doubt. The comments were not improper.

Mr. Koss also claims misconduct based on this statement:

> As the State has indicated, the critical issue for you folks to decide is whether the defendant committed the crime of First Degree Burglary, and it's the State's responsibility to prove each and every element of the charge beyond a reasonable doubt.
>
> Now, when you think of that concept beyond a reasonable doubt, it's not beyond all possible doubt. It's okay if *there are some questions that are unanswered so long as the information you have before you leads you to believe that the defendant committed this crime.*

Id. at 319 (emphasis added).

He now argues that the italicized portion lessens the State's burden of persuasion. We disagree. The prosecutor's statement can be fairly read as explaining that reasonable doubt is not all possible doubt—a concept consistent with the court's instruction that beyond a reasonable doubt means an "abiding belief in the truth of the charge." CP at 47 (Instruction 3). Moreover, the prosecutor's statement is consistent with the court's general instruction to decide the case based upon the evidence presented during trial. *Id.* at 43 (Instruction 1). We presume the jury followed the court's instructions. *State v. Kirkman*, 159 Wn.2d 918, 937, 155 P.3d 125 (2007). In any event, we conclude that the prosecutor's comments hardly meet the required showing of flagrant or ill-intentioned.

Finally, Mr. Koss contends this comment by the prosecutor amounted to misconduct:

> Well, Delanzo Pleasant can't even figure out the ethnicity of the female nor can Andrew Drake nor can Jon Boltz, and, of course, the defendant knows what ethnicity she is because he saw her testify.

RP at 323-24.

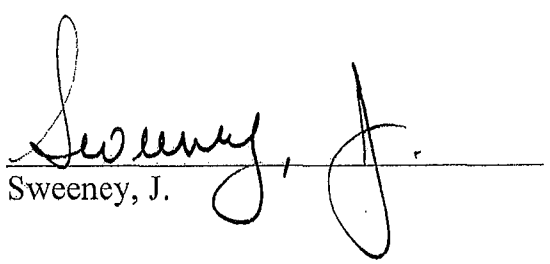
He contends the comments were an inflammatory attack on the defense witness's credibility. They were not. And a prosecutor is afforded wide latitude in closing argument to draw and express reasonable inferences, including arguing the credibility of witnesses based on the evidence. *State v. Millante*, 80 Wn. App. 237, 250, 908 P.2d 374 (1995). That is what occurred here. The prosecutor argued reasonable inferences, that

the defense witnesses were not credible, as further evidenced by their inability to correctly identify the victim's ethnicity.

This is not a case of improper burden shifting like *State v. Fleming*.[2] There, the prosecutor told the jury it could acquit only if it found the complaining witness had lied or was confused. That was misconduct. Further, the prosecutor argued there was no reasonable doubt because there was no evidence the witness was lying or confused, and if there had been such evidence, the defendants would have presented it. *Fleming*, 83 Wn. App. at 214-16.

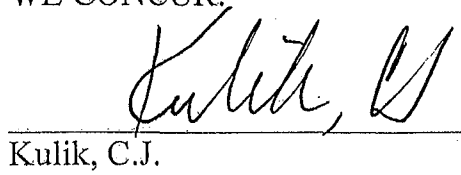
We affirm the conviction.

A majority of the panel has determined that this opinion will not be printed in the Washington Appellate Reports but it will be filed for public record pursuant to RCW 2.06.040.

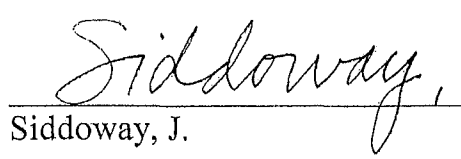


Sweeney, J.

WE CONCUR:



Kulik, C.J.



Siddoway, J.

[2] *State v. Fleming*, 83 Wn. App. 209, 921 P.2d 1076 (1996).