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NO. 85809-8
Cowlitz Co. Cause NO. 08-1-00302-4

**SUPREME COURT OF STATE OF
WASHINGTON**

STATE OF WASHINGTON,

Respondent,

v.

WILLIAM GLEN SMITH,

Appellant.

**SUPPLEMENTAL BRIEF TO RESPONSE
TO PETITION FOR REVIEW**

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ORIGINAL

TABLE OF CONTENTS

	PAGE
I. PROCEDURAL HISTORY	1
II. STATEMENT OF FACTS.....	2
III. ISSUES PRESENTED.....	5
IV. SHORT ANSWERS.....	5
V. ARGUMENT.....	5
I. THE TRIAL COURT DID NOT VIOLATE THE PETITIONER’S RIGHT TO A PUBLIC TRIAL.	5
A. ENGAGING IN A SIDEBAR CONFERENCE DOES NOT CONSTITUTE A “CLOSURE” OF THE COURTROOM.....	6
B. IF THERE WAS A CLOSURE, THE PETITIONER INVITED THIS ERROR AND MAY NOT COMPLAIN OF IT ON APPEAL.	13
VI. CONCLUSION	18

TABLE OF AUTHORITIES

	Page
Cases	
<u>Bridges v. State</u> , 207 So.2d 48, 49 (Florida, 1968).....	8
<u>Fuller v. Lemmons</u> , 434 P.2d 145, 146, (Oklahoma, 1967)	8
<u>In re Personal Restraint of Lord</u> , 123 Wn.2d 296, 868 P.2d 835 (1994)	9
<u>Johnson v. State</u> , 61 Tex. Crim. 635, 136 S.W. 259 (Texas, 1911).....	8
<u>Keddington v. State</u> , 1918, 19 Ariz. 457, 172 P. 273, L.R.A.1918D, 1093	17
<u>People v. Dokes</u> , 79 N.Y.2d 656, 584 N.Y.S.2d 761, 595 N.E.2d 836 (1992).....	10
<u>People v. Jelke</u> , 1954, 308 N.Y. 56, 123 N.E.2d 769, 48 A.L.R.2d 1425	16
<u>People v. O'Bryan</u> , 132 Cal. App. 496, 23 P.2d 94 (1933)	8
<u>Popoff v. Mott</u> , 14 Wn.2d 1, 126 P.2d 597 (1942)	8
<u>Press-Enterprise Co. v. Superior Court</u> , 464 U.S. 501, 104 S.Ct. 819, 78 L.Ed.2d 629 (1984)	11
<u>Press-Enterprise Co. v. Superior Court</u> , 478 US. 1, 106 S.Ct. 2735, 92 L.Ed.2d 1 (1986)	6
<u>Richmond Newspapers, Inc. v. Virginia</u> , 448 U.S. 555, 598 n. 23, 100 S.Ct. 2814, 65 L.Ed.2d 973 (1980)	9
<u>Rights to Waters of Stranger Creek</u> , 77 Wn.2d 649, 466 P.2d 508 (1970)17	
<u>Rovinsky v. McKaskle</u> , 722 F.2d 197 (5th Cir. 1984).....	9

<u>Snyder v. Massachusetts</u> , 291 U.S. 97, 54 S.Ct. 330, 78 L.Ed. 674, 90 A.L.R. 575 (1934).....	10
<u>State v. Collins</u> , 50 Wn.2d 740, 314 P.2d 660 (1957)	16, 17, 18
<u>State v. Gregory</u> , 158 Wn.2d 759, 147 P.3d 1201 (2006)	12
<u>State v. Koloske</u> , 100 Wn.2d 889, 676 P.2d 456 (1984).....	7
<u>State v. Lormor</u> , 172 Wn.2d 85, 257 P.3d 624 (2011).....	12
<u>State v. Marsh</u> , 1923, 126 Wn. 142, 217 P. 705.	17
<u>State v. Momah</u> , 167 Wn.2d 140, 217 P.3d 321 (2009)	13, 15, 16
<u>State v. Reyes</u> , 99 Ariz. 257, 408 P.2d 400 (Arizona, 1965).....	8
<u>State v. Sadler</u> , 147 Wn. App. 97, 193 P.3d 1108 (2008).....	11
<u>State v. Sublett</u> , 176 Wn.2d 58, 292 P.3d 715 (2012).....	2, 5, 6, 9, 11
<u>State v. Swenson</u> , 62 Wn.2d 259, 382 P.2d 614 (1963)	8
<u>State v. Wolfe</u> , 343 S.W.2d 10, 14 (Missouri, 1961).....	8
<u>Territory of Hawaii v. Pierce</u> , 43 Haw. 287 (Hawaii Territory, 1959)	8
<u>United States v. Bansal</u> , 663 F.3d 634, 661 (3 rd Cir. 2011)	18
<u>United States v. Gagnon</u> , 470 U.S. 522, 105 S.Ct. 1482, 84 L.Ed.2d 486 (1985).....	10
<u>United States v. Smith</u> , 787 P.2d 111 (3rd Cir. 1986)	9
<u>United States v. Williams</u> , 455 F.2d 361 (9th Cir.), <u>cert. denied</u> , 409 U.S. 857 (1972).....	10
<u>Westfall v. State</u> , 243 Md. 413, 221 A.2d 646 (Maryland, 1966)	8
<u>Wilson v. State</u> , 244 Ark. 562, 426 S.W.2d 375 (Arkansas, 1968)	8

Other Authorities

Article 1 § 10 of the Washington Constitution 4, 5
Article 1, § 22 of the Washington Constitution 1, 5
Courtroom Handbook on Washington Evidence, 2009-2010 Ed. at 191. 16
Sixth Amendment of the United States Constitution 5

Rules

ER 404(b)..... 2
RAP 2.5(a)(3)..... 18

I. PROCEDURAL HISTORY

The petitioner was charged by amended information with ten counts of rape in the third degree against A.C., one count of assault in the fourth degree against P.S., and one count of perjury in the second degree. These charges stemmed from several contracts for sex that the petitioner entered into with three women, two of whom were his blood relations.

After various pre-trial proceedings, not germane to this appeal, the petitioner proceeded to jury trial before the Honorable Judge James Warne and was convicted of four counts of rape in the third degree and the perjury charge. The petitioner was acquitted of the remaining counts. At sentencing, the trial court imposed a sentence of sixty months in prison, followed by thirty-six to forty-eight months of community custody. The petitioner then filed a direct appeal of his convictions.

On appeal, the petitioner asserted, inter alia, that the trial court had violated his right to a public trial under Article 1, § 22 of the Washington Constitution by resolving evidentiary objections and procedural matters in a sidebar conference. The Court of Appeals, Division II, issued an unpublished decision in State v. Smith, No. 38868-5-II, holding the petitioner's right to a public trial was not violated. The petitioner sought review of this decision with this Court, and his petition for review was stayed pending the outcome of State v. Sublett, 176 Wn.2d 58, 292 P.3d

715 (2012). Following the issuance of the Sublett opinion, this Court granted review of the petition solely on the public trial issue.

II. STATEMENT OF FACTS

During the trial of this case thirteen sidebar conferences were held between the trial judge and counsel. As the courtroom in which the trial occurred was fairly small, rather than huddle and whisper at the bench the parties and court would step into a hallway immediately outside the courtroom to address evidentiary objections. These sidebars were recorded contemporaneously. Smith, No. 38868-5-II at fn.2.

One of the thirteen sidebar conferences dealt with the timing of when to take a recess. RP 204-205. The remaining sidebar conferences all addressed evidentiary issues:

- 1) clarification of a prior ruling on ER 404(b), RP 218-221;
- 2) argument regarding a relevancy objection, RP 229;
- 3) argument regarding admissibility of opinion testimony on A.C.'s mental state; RP 255-260;
- 4) discussion regarding the proper foundation for impeachment by an inconsistent statement, RP 270-272;
- 5) argument regarding admissibility of opinion testimony on handwriting, RP 294-297;
- 6) argument regarding whether a statement made by the petitioner was hearsay, RP 311-315;

- 7) argument regarding whether a photograph of A.C., taken by the police, was relevant, RP 326-328;
- 8) argument regarding admissibility of the petitioner's written statement, RP 346-347;
- 9) argument regarding admissibility of statements A.C. made to a physician, RP 399-403;
- 10) argument regarding admissibility and relevance of nude photographs of A.C., RP 446-450;
- 11) argument regarding admission of two receipts for sexual items found in the petitioner's residence, RP 451-452;
- 12) argument regarding permissible cross-examination of the petitioner, RP 543-546.

At no point during the proceedings did the trial court announce that the courtroom was being closed, exclude any persons, or in any way deny access to the courtroom. Furthermore, the petitioner never objected to conducting sidebar conferences in the hallway or expressed any concern with the process that was employed. In fact, the petitioner affirmatively suggested or agreed with using the sidebar conferences on numerous occasions:

MR. LADOUCEUR: Your Honor, objection. May we approach.

COURT: Do you want to do this in the hall?

MR. LADOUCEUR: Yes.

RP 218.

MR. SMITH: Your Honor, I object as to relevancy and beyond the scope.

MR. LADOUCEUR: Hallway, if we need to.

COURT: Let's go out in the hall for just a minute.

RP 229.

MR. LADOUCEUR: Your Honor, I'll object and ask for a sidebar.

RP 294.

MR. LADOUCEUR: I would register an objection. We might want to discuss this.

RP 346.

MR. LADOUCEUR: Maybe we should --

COURT: Let's go out in the hall.

....

MR. LADOUCEUR: ... I wanted to avoid a speaking objection out there...

RP 399.

MR. LADOUCEUR: If we could have a conference?

RP 446.

MR. LADOUCEUR: Objection. Your Honor, may we step outside.

RP 543.

At no point in the trial did any member of the press or public object to the use of the sidebar conferences, and the trial court never stated that the public or press were excluded. Id.

III. ISSUES PRESENTED

1. Did the Trial Court Violate the Petitioner's Right to a Public Trial?

IV. SHORT ANSWERS

1. No.

V. ARGUMENT

I. **The Trial Court Did Not Violate the Petitioner's Right to a Public Trial.**

The petitioner argues that the trial court closed the courtroom to the public by, on thirteen occasions during the trial, engaging in sidebar discussions with the attorneys outside the courtroom. The petitioner alleges this practice violated Article 1, section 22 of the Washington Constitution as well as the Sixth Amendment of the United States Constitution.¹ However, the practice complained of did not amount to a closure of the courtroom, under the standard announced in State v. Sublett, 176 Wn.2d 58, 292 P.3d 715 (2012), and was invited and acquiesced to by the petitioner. As such, this Court should reject any claim of error.

¹ The petitioner did not argue the applicability of the decree of Article 1 § 10 of the Washington Constitution that "Justice in all cases shall be administered openly."

**a. Engaging in a Sidebar Conference Does Not
Constitute a “Closure” of the Courtroom.**

Where a public trial violation is asserted, the reviewing court must first consider whether (1) the proceeding at issue implicates the public trial right and (2) did a closure actually occur. State v. Sublett, 176 Wn.2d 58, 71, 292 P.3d 715 (2012). This Court has observed that “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.” Sublett, 176 Wn.2d at 71.

In Sublett, this Court announced a new test under Washington law for whether a particular proceeding implicates the public trial right, rejecting the prior test employed by the Court of Appeals. Id. at 71-72; citing to Press-Enterprise Co. v. Superior Court, 478 US. 1, 106 S.Ct. 2735, 92 L.Ed.2d 1 (1986). The new test uses experience and logic to determine if the public trial right attaches to a specific proceeding. The experience prong asks “whether the place and process have historically been open to the press and general public” while the logic prong asks “whether public access plays a significant positive role in the functioning of the particular process in question.” Sublett, 176 Wn.2d at 73. The answer to both questions must be “yes” for the public trial right to attach.

Id. The party asserting the violation of public trial right bears the burden of proof on this issue. Id. at 75.

Using this test, this Court found that the public trial right does not attach to counsel meeting with the trial judge in chambers to answer a question from a deliberating jury. Id. Notably, such proceedings have not historically been conducted in an open courtroom. Id. at 75. Also, the court's answer to the jury was recorded in writing, thus becoming part of the public record and reminding the court and counsel of their duties. Id. at 77. Given this, the experience and logic test was not satisfied and the defendant failed to establish a public trial violation.

In the instant case, the Court should find there is no showing under the experience and logic test that sidebar conferences the right to a public. The State is unaware of any authority to support a claim that a sidebar between the judge and attorneys, which cannot be heard by the jury or the public, violates the right to a public trial. Indeed, the process employed at trial here enjoys an advantage of many sidebars, namely that the conferences were on the record and preserved for public and appellate review. See State v. Koloske, 100 Wn.2d 889, 896, 676 P.2d 456 (1984) (noting the danger that unrecorded sidebar conferences may preclude appellate review).

When examining the experience prong, it is apparent that the use of sidebar conferences, outside the hearing of the jury and public, to resolve evidentiary objections, housekeeping matters, and other issues, is a longstanding practice in Washington and the United States. In State v. Swenson, 62 Wn.2d 259, 272, 382 P.2d 614 (1963), the trial record included a sidebar conference to address concerns about a witness' comfort while testifying. Similarly, in Popoff v. Mott, 14 Wn.2d 1, 9, 126 P.2d 597 (1942), the trial record describes a sidebar during voir dire on whether to excuse a juror for cause. Such proceedings are regularly described in trials from other States as well. See People v. O'Bryan, 132 Cal. App. 496, 501, 23 P.2d 94 (1933) (California, evidentiary objection); Johnson v. State, 61 Tex. Crim. 635, 637, 136 S.W. 259 (Texas, 1911) (scope of cross examination of defendant); Bridges v. State, 207 So.2d 48, 49 (Florida, 1968) (jury instructions); Wilson v. State, 244 Ark. 562, 565, 426 S.W.2d 375 (Arkansas, 1968) (defense mistrial motion); Fuller v. Lemmons, 434 P.2d 145, 146, (Oklahoma, 1967) (motion to strike testimony); Westfall v. State, 243 Md. 413, 423, 221 A.2d 646 (Maryland, 1966) (evidentiary objection); State v. Reyes, 99 Ariz. 257, 263, 408 P.2d 400 (Arizona, 1965) (scope of impeachment); State v. Wolfe, 343 S.W.2d 10, 14 (Missouri, 1961) (objection during voir dire); Territory of Hawaii v. Pierce, 43 Haw. 287 (Hawaii Territory, 1959).

The federal courts have recognized that the public has no right to attend or listen to sidebar conferences. In Richmond Newspapers, Inc. v. Virginia, 448 U.S. 555, 598 n. 23, 100 S.Ct. 2814, 65 L.Ed.2d 973 (1980); Justice Brennan recognized in his concurrence that “when engaging in interchanges at the bench, the trial judge is not required to allow public or press intrusion upon the huddle.” See also United States v. Smith, 787 P.2d 111 (3rd Cir. 1986); Rovinsky v. McKaskle, 722 F.2d 197 (5th Cir. 1984).

Indeed, this Court has long recognized that sidebars are not proceedings to which the defendant or the public must be granted access. For example, in In re Personal Restraint of Lord, 123 Wn.2d 296, 306, 868 P.2d 835 (1994), this Court considered an argument that the defendant had a right to be present at numerous conferences between the lawyers and the judge, including a pretrial hearing in which the court deferred ruling on an ER 609 motion, granted a motion to allow a haircut and trial clothing for the defendant, settled on the wording of the jury questionnaires and the pretrial instructions, and set a time limit on the testing of certain evidence. Lord, 123 Wn.2d at 306; see also Sublett, 176 Wn.2d at 140 J. Stephens concurring (approving use of sidebars to address matters outside the jury’s presence.)

The Court also considered whether defendant had the right to be present during a proceeding where the court announced its rulings on

evidentiary matters which had previously been argued, ruled that the jurors could take notes, and directed the State to provide the defense with summaries of its witnesses' testimony. Id. In rejected the claim a criminal defendant had a right to be present at these purely legal discussions between the court and counsel, this Court held:

The core of the constitutional right to be present is the right to be present when evidence is being presented. United States v. Gagnon, 470 U.S. 522, 526, 105 S.Ct. 1482, 84 L.Ed.2d 486 (1985) (per curiam). Beyond that, the defendant has a "right to be present at a proceeding 'whenever his presence has a relation, reasonably substantial, to the fulness of his opportunity to defend against the charge....' " Gagnon, 470 U.S. at 526 (quoting Snyder v. Massachusetts, 291 U.S. 97, 54 S.Ct. 330, 78 L.Ed. 674, 90 A.L.R. 575 (1934)). The defendant therefore does not have a right to be present during in-chambers or bench conferences between the court and counsel on legal matters, United States v. Williams, 455 F.2d 361 (9th Cir.), cert. denied, 409 U.S. 857 (1972), at least where those matters do not require a resolution of disputed facts. People v. Dokes, 79 N.Y.2d 656, 584 N.Y.S.2d 761, 595 N.E.2d 836 (1992) (right to be present during hearing on admissibility of prior conviction).

Id.

The public's right to be present is directly tied to the defendant's right to be present, as the Court of Appeals has observed:

The public trial right applies to the evidentiary phases of the trial, and to other adversary proceedings. . . . The right to public trial is linked to the defendant's constitutional right to be present during the critical phases of trial; thus, a defendant has a right to an open court

whenever evidence is taken, during a suppression hearing,
... during voir dire, and during the jury selection process. . .

State v. Sadler, 147 Wn. App. 97, 114, 193 P.3d 1108 (2008) (citations and internal quotations omitted). Notably, the United States Supreme Court has also noted the connection between the rights of defendants and the public to be present. Press-Enterprise Co. v. Superior Court, 464 U.S. 501, 508, 104 S.Ct. 819, 78 L.Ed.2d 629 (1984). See also Sublett, 176 Wn.2d at 95, C.J. Madsen concurring.

Thus, sidebar conferences have long been used to resolve evidentiary objections and other issues at trial. The long held understanding is that the public and press have no right to be present at such proceedings. See Richmond, 448 U.S. at 598. Given this, the petitioner cannot establish that experience shows sidebars “have historically been open to the press and general public.” Sublett, 176 Wn.2d at 73. As failure on either prong is fatal to the petitioner’s claim, he cannot establish the public trial right attaches in this situation. Id.

Addressing, for the purposes of argument, the logic prong, the question is whether public access “plays a significant positive role in the functioning of the particular process in question.” Id. at 73. Here, as with jury questions, it is unclear how the public being present during sidebar conferences would play any positive role. The public would clearly play

no role in the evidentiary arguments advanced to the court. The sidebars at issue here were recorded and included as part of the trial transcript and record, thus removing any concern about collusion, bias, or obfuscation of the decision making process used by the trial court. Thus, the petitioner cannot show under the logic prong that the public trial right attaches to these proceedings. Since neither prong of the test can be met, there is no public trial violation and the appellant's convictions should stand.

Finally, the State disputes the petitioner's claim that the courtroom was closed by the trial judge and the attorneys engaging in sidebar conferences out of the hearing of the jury. Indeed, the actual courtroom remained open to the public. If there was no closure of the courtroom, right a public trial is not implicated. Here, even if the public trial right were to attach to sidebar conferences, despite the wealth of authority and tradition otherwise, such a process does not amount to a closure of the courtroom that would require a Boneclub analysis. A closure occurs "when the courtroom is completely and purposefully closed to spectators so that no one may enter and no one may leave." State v. Lormor, 172 Wn.2d 85, 93, 257 P.3d 624 (2011). Conducting a sidebar conference plainly does not qualify as a closure under this standard. See also State v. Gregory, 158 Wn.2d 759, 147 P.3d 1201 (2006) (distinction between full closures of a courtroom and acts not amounting to a full closure).

b. If There Was a Closure, The Petitioner Invited This Error and May Not Complain of It on Appeal.

If the Court should find there was a closure of the courtroom on matters that implicate the right to a public trial, the petitioner is still not entitled to a new trial as he invited the error. Under this doctrine, a party who sets up or contributes to an error in the trial court cannot use this mistake on appeal to obtain a new trial. State v. Momah, 167 Wn.2d 140, 153, 217 P.3d 321 (2009). In Momah, this Court found the defendant had waived the right to a public trial under the following circumstances:

From the outset of trial, we presume Momah made tactical choices to achieve what he perceived as the fairest result. Before in-chambers voir dire began, defense counsel, the prosecution, and the judge discussed numerous proposals concerning the juror selection. Although Momah was provided the opportunity to object to the in-chambers proposal, he never objected. Further, he gave no indication that a closed voir dire might violate his right to public trial. To the contrary, defense counsel made a deliberate choice to pursue in-chambers voir dire to avoid “contamination” of the jury pool by jurors with prior knowledge of Momah's case. Defense counsel affirmatively assented to, participated in, and even argued for the expansion of in-chambers questioning. As a result of this closure and defense counsel's active participation in the questioning, Momah was able

to exercise numerous challenges for cause, removing biased and partial jurors from the venire.

167 Wn.2d at 155 (internal citations to record removed).

Here, the petitioner never objected to conducting sidebar conferences in the hallway, and in fact affirmatively suggested or agreed with the idea on several occasions:

MR. LADOUCEUR: Your Honor, objection. May we approach.

COURT: Do you want to do this in the hall?

MR. LADOUCEUR: Yes.

RP 218.

MR. SMITH: Your Honor, I object as to relevancy and beyond the scope.

MR. LADOUCEUR: Hallway, if we need to.

COURT: Let's go out in the hall for just a minute.

RP 229.

MR. LADOUCEUR: Your Honor, I'll object and ask for a sidebar.

RP 294.

MR. LADOUCEUR: I would register an objection. We might to discuss this.

RP 346.

MR. LADOUCEUR: Maybe we should --

COURT: Let's go out in the hall.

....

MR. LADOUCEUR: ... I wanted to avoid a speaking objection out there...

RP 399.

MR. LADOUCEUR: If we could have a conference?

RP 446.

MR. LADOUCEUR: Objection. Your Honor, may we step outside.

RP 543.

This record makes clear that, not only did the petitioner not object to this procedure, he affirmatively requested and invited it. As in Momah, this Court should presume that trial counsel made these choices in order to achieve the best result for his client. 167 Wn.2d at 155. At trial, the petitioner clearly chose to engage in the hallway sidebars in order to more effectively press his objections upon the trial court, and to avoid needlessly irritating the jury by requiring them to march in and out of the courtroom repeatedly. The petitioner's trial counsel also wisely recognized that the hallway sidebars allowed him to avoid making disfavored "speaking objections" that would expose him to the wrath of the trial court and potentially indicate broadly to the jury an attempt to hide or conceal evidence. See Tegland, Courtroom Handbook on Washington Evidence,

2009-2010 Ed. at 191. As the petitioner invited whatever error there may be, he cannot now use the procedure he suggested to obtain a new trial. See Momah.

The Momah court's decision that a violation of the right to a public trial may be invited error is in accord with an earlier decision by the Supreme Court in State v. Collins, 50 Wn.2d 740, 314 P.2d 660 (1957). In Collins, the trial court locked the courtroom door to prevent spectators' distracting the jury during closing arguments by filing in and out of the courtroom. 50 Wn.2d at 746. The defendant did not object at trial but on appeal he claimed a violation of his right to a public trial. Id.

The court refused to consider this argument for the first time on appeal. In doing so, the court distinguished between rulings that clearly violate the right to an open trial versus those rulings that involve the exercise of discretion. Id. at 747-748. The court held that a discretionary ruling on courtroom closure must be objected to, whereas an order that clearly violates the right to a public trial can be reviewed absent an objection. The Collins decision is still binding precedent in Washington, as it was not mentioned or overruled in either Momah or Strode. The holding is reproduced below in its entirety:

If an order of a trial court clearly deprives a defendant of his right to a public trial, as in People v. Jelke, 1954, 308 N.Y. 56, 123 N.E.2d 769, 48 A.L.R.2d 1425 [where both the public and the

press were excluded from the whole trial], it is unnecessary for the defendant to raise the question by objection at the time of trial. State v. Marsh, 1923, 126 Wn. 142, 145-146, 217 P. 705.

However, if, as in the present case, a reasonable number of people are in attendance and there has been no partiality or favoritism in their admission, an order excluding the admittance of others may be entered if justification exists. The issue then becomes whether the trial court abused its discretion in so ordering, i. e., whether the order complained of was necessary to prevent interference with the orderly procedure of the trial. *Where the ruling is discretionary, a defendant who does not object when the ruling is made waives his right to raise the issue thereafter.* Keddington v. State, 1918, 19 Ariz. 457, 462, 172 P. 273, L.R.A.1918D, 1093. A trial court is entitled to know that its exercise of discretion is being challenged; otherwise, it may well believe that both sides have acquiesced in its ruling. (We would add that this is a discretion that should be sparingly exercised; even the suspicion of an invasion of a defendant's constitutional right to a public trial should be avoided.)

There is here no claim of actual prejudice; there was no objection to the discretionary ruling. We are satisfied that the defendant did have a public trial within the purview of our constitutional provisions.

Id. at 747-48 (italics added).

Collins has never been abrogated. Nor has it been established that Collins should be overruled because it is incorrect and harmful. See In re Rights to Waters of Stranger Creek, 77 Wn.2d 649, 653, 466 P.2d 508 (1970). Here, where it is not at all clear that the courtroom was actually closed, it cannot be said that that the sidebars “clearly deprive[d] a defendant of his right to a public trial” such that no objection would be necessary. For these reasons, this Court should hold that the petitioner,

like the defendant in Collins, failed to preserve a claim of error as to the trial court's discretionary ruling.

Furthermore, allowing the petitioner to advance this claim on appeal, after having requested and enjoyed the sidebars at trial, is plainly contrary to RAP 2.5(a)(3). Not only is there no showing of prejudice to the petitioner in this case, but he actively sought out the sidebar conferences during the trial. To allow the petitioner to suggest a process at trial, actively participate and seek the benefits it affords him, and then seize upon this very practice to win a new trial is illogical, inefficient, and unjust. See United States v. Bansal, 663 F.3d 634, 661 (3rd Cir. 2011) (allowing defendant to raise public trial violation for the first time on appeal described as “classic sandbagging of the trial judge.”) Based on these precedents and the record of this case, the Court should find that the petitioner failed to preserve whatever error may have occurred at trial.

VI. CONCLUSION

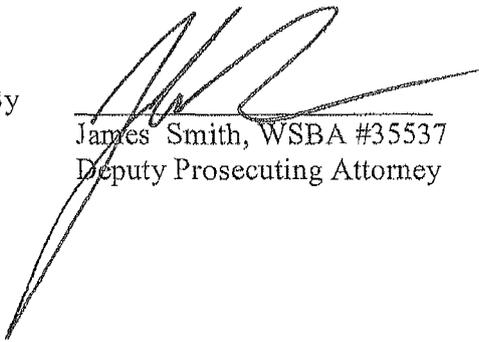
Based on the preceding argument, the State respectfully requests the Court to deny the instant appeal and uphold the petitioner's

convictions for rape and perjury. The petitioner's public trial violation claim is not supported by the law and the record, and in any event was not preserved for appeal. As such, the Court should affirm the decision of the Court of Appeals.

Respectfully submitted this 24th day of June, 2013.

Susan I. Baur
Prosecuting Attorney
Cowlitz County, Washington

By



James Smith, WSBA #35537
Deputy Prosecuting Attorney

CERTIFICATE OF SERVICE

Michelle Sasser, certifies the Supplemental Brief to Response to Petitioner for Review was served electronically via e-mail to the following:

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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 June ^{24th} 27, 2013.


Michelle Sasser