

64033-0

64033-0

FILED
COURT OF APPEALS DIV I
STATE OF WASHINGTON
2011 SEP -8 PM 2:23

NO. 64033-0-I

**IN THE WASHINGTON COURT OF APPEALS
DIVISION ONE**

STATE OF WASHINGTON,

Plaintiff-Respondent,

v.

ANDRE FRANKLIN,

Defendant-Appellant.

APPELLANT'S REPLY BRIEF

Appeal from the King County Superior Court
The Hon. James E. Rogers, Superior Court Judge
No. 08-1-13392-0 SEA

Steven Witchley, WSBA 20106
Law Offices of Holmes & Witchley
705 Second Avenue, Suite 401
Seattle, WA 98104
(206) 262-0300
(206) 262-0335 (fax)

ORIGINAL

TABLE OF CONTENTS

I. ARGUMENT IN REPLY	1
<u>Franklin’s Federal and State Constitutional Rights to Compulsory Process and to Due Process Were Violated When the Trial Court Struck the Testimony of Ramon Franklin.</u>	1
<i>Introduction</i>	1
<i>Grant is No Longer Good Law. Nevertheless, Even Grant Supports Reversal of Franklin’s Convictions.</i>	1
<i>The Error Was Not Harmless Beyond a Reasonable Doubt.</i>	5
<u>Franklin’s Federal and State Constitutional Rights to Compulsory Process and to Due Process Were Violated When the Trial Court Prevented Franklin from Presenting Evidence and Argument Suggesting that Rasheena Hibbler Posted the Ads and Sent the Emails which Formed the Basis for All Three of the Charges Against Franklin.</u>	7
<i>State v. Downs is Readily Distinguishable From This Case.</i>	7
<i>The Error Was Not Harmless Beyond a Reasonable Doubt.</i>	11
<u>Franklin’s Federal and State Constitutional Rights to Compulsory Process and to Due Process Were Violated When the Trial Court Granted Rasheena Hibbler a Blanket Fifth Amendment Privilege and Prevented the Defense from Calling Her as a Witness.</u>	12
<i>The State Misapprehends Franklin’s Argument.</i>	12
<i>The Error Was Not Harmless Beyond a Reasonable Doubt.</i>	13
<u>Franklin’s Federal and State Constitutional Rights to an Open and Public Trial Were Violated When the Trial Court Closed the Courtroom Without First Conducting an Adequate Hearing as Required by <i>State v. Bone-Club</i> and its Progeny.</u>	14
<i>The State Proceeds From a False Assumption.</i>	14
<i>The Trial Court Failed to Conduct an Adequate Hearing Prior to Closing the Courtroom. Post-Hoc Analysis of the Bone-Club Factors is Irrelevant to the Court’s Disposition of this Claim of Error.</i>	20

<u>Mr. Franklin’s Federal and State Constitutional Rights to be Present Were Violated When the Trial Court Excluded Franklin from the Closed Hearing at which the Court Examined “Other Suspect” Rasheena Hibbler Under Oath.</u>	23
<i><u>Introduction</u></i>	23
<i><u>Franklin Had a Right to Be Present at the Hearing.</u></i>	24
<i><u>Franklin Neither Waived Nor Invited the Error.</u></i>	27
<i><u>The Error Was Not Harmless Beyond a Reasonable Doubt.</u></i>	29
<u>Cumulative Error Deprived Franklin of a Fair Trial.</u>	29
II. CONCLUSION	30

TABLE OF AUTHORITIES

WASHINGTON CASES

<i>Eastham v. Arndt</i> , 28 Wash. App. 524, 624 P.2d 1159, <i>rev. denied</i> , 95 Wash.2d 1028 (1981)	15-16
<i>In Re PRP of Call</i> , 144 Wash.2d 315, 28 P.3d 709 (2001)	28
<i>In Re PRP of Domingo</i> , 155 Wash.2d 356, 119 P.3d 816 (2005)	19
<i>Seventh Elect Church v. Rogers</i> , 34 Wash. App. 105, 660 P.2d 280, <i>rev. denied</i> , 99 Wash.2d 1019 (1983)	15-16
<i>State v. Berkley</i> , 72 Wash. App. 12, 20, 863 P.2d 133, <i>rev. denied</i> , 124 Wash.2d 1011 (1994)	15-17
<i>State v. Bone-Club</i> , 128 Wn.2d 254, 906 P.2d 325 (1995)	<i>passim</i>
<i>State v. Downs</i> , 168 Wash. 664, 13 P.2d 1 (1932)	7-10
<i>State v. Easterling</i> , 157 Wash.2d 167, 137 P.3d 825 (2006)	27
<i>State v. Grant</i> , 10 Wash. App. 468, 519 P.2d 261 (1974)	1-4
<i>State v. Hobble</i> , 126 Wash.2d 283, 892 P.2d 85 (1995)	15, 17
<i>State v. Hutchinson</i> , 135 Wash.2d 863, 959 P.2d 1061 (1998)	1-3
<i>State v. Irby</i> , 170 Wash.2d 874, 246 P.3d 796 (2011)	26-28
<i>State v. Maupin</i> , 128 Wash.2d 918, 913 P.2d 808 (1996)	6, 9-11
<i>State v. Strode</i> , 167 Wash.2d 222, 217 P.3d 310 (2009)	21, 23
<i>State v. Thomas</i> , 150 Wash.2d 821, 83 P.3d 970 (2004)	28
<i>State v. Venegas</i> , 155 Wash. App. 507, 228 P.3d 813 (2010)	1
<i>State v. White</i> , 152 Wash. App. 173, 215 P.3d 251 (2009), <i>rev. denied</i> , 168 Wash.2d 1015 (2010)	15, 18-19

FEDERAL CASES

<i>Coy v. Ohio</i> , 487 U.S. 1012 (1988)	26, 29
<i>United States v. Gagnon</i> , 470 U.S. 522 (1985)	26
<i>United States v. Moore</i> , 936 F.2d 1508 (7 th Cir.), <i>cert. denied</i> , 502 U.S. 991 (1991)	23-26

CONSTITUTIONAL PROVISIONS

United States Constitution, Fifth Amendment	<i>passim</i>
---	---------------

STATUTES AND COURT RULES

CrR 4.7	2
RAP 2.5	27
RCW 10.37.033 (former)	1-2

OTHER AUTHORITY

Black's Law Dictionary (9th ed. 2009)	19
---------------------------------------	----

I. ARGUMENT IN REPLY

Franklin's Federal and State Constitutional Rights to Compulsory Process and to Due Process Were Violated When the Trial Court Struck the Testimony of Ramon Franklin.

Introduction

In responding to this claim of error, the State relies almost exclusively on *State v. Grant*, 10 Wash. App. 468, 519 P.2d 261 (1974), a 37-year-old decision from Division Two. *See Response*, at 17-20. In focusing on *Grant*, the State fails to even mention the controlling Washington case on this issue: *State v. Hutchinson*, 135 Wash.2d 863, 959 P.2d 1061 (1998). Nor does the State acknowledge the existence of another, more recent case discussed at length in Franklin's opening brief—Division Two's 2010 decision in *State v. Venegas*, 155 Wash. App. 507, 228 P.3d 813 (2010). *See Opening Brief*, at 22-26 (applying the *Hutchinson* factors to this case and comparing this case to *Venegas*). Neither *Hutchinson* nor *Venegas* support the State's position. Nor, for that matter, does *Grant*.

Grant is No Longer Good Law. Nevertheless, Even Grant Supports Reversal of Franklin's Convictions.

First, it is important to note that *Grant* was interpreting the constitutional scope of a statute no longer in effect—former RCW 10.37.033. That statute specifically authorized the trial court to exclude

defense alibi testimony if the notice provisions of the statute were not complied with. *See Grant*, 10 Wash. App. at 469 n.1. Conversely, CrR 4.7, which superseded RCW 10.37.033, does not explicitly allow for exclusion of testimony as a remedy for violation of its provisions. It was not until the *Hutchinson* decision in 1998 that our Supreme Court decided the circumstances under which the “extraordinary remedy” of exclusion of evidence could be applied to a violation of CrR 4.7. *Hutchinson*, 135 Wash.2d at 882.

Second, to the extent that *Grant* authorizes the exclusion of defense evidence based solely on a finding of “totally inexcusable neglect” or “insufferable dereliction of duty” (*Grant*, 10 Wash. App. at 474-75), it is inconsistent with and has been overruled by *Hutchinson*. *Hutchinson* does not countenance the exclusion of evidence based on a finding of mere negligence. Rather, *Hutchinson* requires the trial court to consider “whether the violation was willful or in bad faith”—a significantly more egregious mental state than negligence. *Hutchinson*, 135 Wash.2d at 883. Moreover, *Hutchinson* requires that the trial court examine not only the state of mind of the party violating CrR 4.7, but also that the court analyze three additional factors not even mentioned in *Grant*:

- (1) the effectiveness of less severe sanctions;
- (2) the impact of witness preclusion on the evidence at trial and the outcome of the

case; (3) the extent to which the [aggrieved party] will be surprised or prejudiced by the witness's testimony. . .

Hutchinson, 135 Wash.2d at 883.

Third, even if *Grant* were an accurate statement of the current law, Franklin would still be entitled to relief. *Grant*—like the Supreme Court's later decision in *Hutchinson*—makes it clear that exclusion of evidence material to the defense is an extraordinary remedy to be employed in only the most extreme circumstances:

[W]e . . . deem it ***imperative that in the absence of totally inexcusable neglect no criminal case should be submitted to the trier of the facts without all available material facts*** being made known to the trier of the facts, not only to the end that substantial justice shall be done, but also because in performing its high function in the best way, justice must satisfy the appearance of justice. . .

We believe . . . that ***the constitutional mandate, which directs the court to compel the attendance of witnesses on behalf of a defendant charged with a crime, is so strong that slight delays in the otherwise orderly presentation of evidence must be tolerated within the judicial system unless they are occasioned by insufferable dereliction of duty*** by those whose function it is to assist the court.

Grant, 10 Wash. App. at 474-75 (emphasis supplied).

Despite this language from *Grant*, the State argues that this standard for exclusion, which the State admits is high, is met here. *See Response*, at 18. But the State's reasoning—to the extent that it is defensible at all in light of *Hutchinson*—is based on an erroneous reading

of the record. The State appears to be laboring under the false assumption that Franklin's counsel did not provide *any* notice of the defense's intent to call Ramon Franklin as a witness. *See Response*, at 19 (referring to the "defense's failure to comply with the applicable notice requirements to disclose this witness prior to trial").

The problem for the State is that the defense *did* disclose Ramon Franklin as a witness prior to trial, and did so *at least* twelve days before Ramon Franklin took the witness stand. The evidence for this notice is contained in the State's own trial memorandum, which lists Ramon Franklin as a defense witness. CP 14. Despite this ample notice, the State never attempted to contact or interview Ramon Franklin. RP 128 (6/30/09). As discussed in Franklin's *Opening Brief*, any prejudice to the State was largely caused by the State's own inaction and negligence. More importantly, at least for purposes of examining the State's reliance on *Grant*, it can hardly be characterized as "totally inexcusable neglect" or "insufferable dereliction of duty" on the part of the defense when the defense gives actual notice of its intent to call a witness and the State—despite ample opportunity to do so—makes no effort to talk to the witness regarding his expected testimony.

For the reasons set forth here and in Franklin's *Opening Brief*, at 16-26, the trial court abused its discretion when it struck the testimony of Ramon Franklin.

The Error Was Not Harmless Beyond a Reasonable Doubt.

The State contends that any error in striking Ramon Franklin's testimony was harmless beyond a reasonable doubt because: (a) Andre Franklin testified that he was with his brother on November 10th, 2008, thereby rendering Ramon's testimony cumulative; (b) Ramon Franklin was an "obvious[ly] bias[ed]" witness because he is the defendant's brother; and (b) "independent documentary evidence" showed that Fuerte repaid Franklin the \$3,000 she owed him on November 10th. *Response*, at 22-23. These claims are meritless.

First, any time a defendant testifies his credibility becomes a central issue in the outcome of the case. By taking the witness stand Andre Franklin placed his credibility before the jury.¹ Ramon Franklin's testimony was critical to corroborate Andre's whereabouts on November

¹ The record is unclear whether and to what extent Andre Franklin was forced to testify when he might not otherwise have done so by the trial court's various errors in excluding defense evidence.

10th. To argue that material evidence is cumulative merely because it corroborates other material evidence is patently absurd.²

Second, Ramon Franklin's bias or lack thereof was a question for the jury to answer. *See State v. Maupin*, 128 Wash.2d 918, 929, 913 P.2d 808 (1996) ("An appellate court ordinarily does not make credibility determinations."). The State cannot simply deem the exclusion of his testimony harmless based on its own opinion of the value of that testimony.

And third, the State vastly overstates the record when it argues that there was "independent documentary evidence" that Fuerte paid Franklin back on November 10th. There was documentary evidence that Fuerte borrowed another \$3,000 from someone other than Franklin on November 10th, but that evidence did not in any way demonstrate that Fuerte went to Franklin's residence that day and repaid him from the proceeds of that second loan. In any case, whether Fuerte saw Franklin in person on November 10th is a classic jury question, one which the trial court required the jury to answer without the benefit of Ramon Franklin's testimony on the issue.

² Indeed, the trial prosecutor expended a great deal of effort during closing and rebuttal arguments disparaging Andre Franklin's testimony and credibility, thereby underscoring the value to the defense of having other evidence to corroborate his testimony. *See, e.g.*, RP 109, 122, 125-27, 133-34, 177-78, 184 (7/1/09).

The error cannot be deemed harmless beyond a reasonable doubt.

This Court should reverse the trial court and order a new trial.

Franklin's Federal and State Constitutional Rights to Compulsory Process and to Due Process Were Violated When the Trial Court Prevented Franklin from Presenting Evidence and Argument Suggesting that Rasheena Hibbler Posted the Ads and Sent the Emails which Formed the Basis for All Three of the Charges Against Franklin.

State v. Downs is Readily Distinguishable From This Case.

Once again, the State relies primarily on an ancient case to support its position—this time *State v. Downs*, 168 Wash. 664, 13 P.2d 1 (1932).

While the general rule stated in *Downs* is still good law, the facts of *Downs* illustrate both the proper application of that rule, and the error in the trial court's exclusion of "other suspect" evidence in Franklin's case.

In *Downs*, the defendants were found in a car at 2:00 a.m. within two miles of a burglary that had been committed three hours earlier. The defendants were counting money that was spread over the back seat. Downs possessed a loaded firearm. The defendants claimed that they had found the money. *Downs*, 168 Wash.2d at 664-65.

At trial the defendants sought to introduce testimony that a well-known burglar named "Madison Jimmy" was in town on the night of the burglary. The Washington Supreme Court upheld the exclusion of the testimony:

While evidence tending to show that another party might have committed the crime would be admissible, before such testimony can be received there must be such proof of connection with it, such a train of facts or circumstances as tend clearly to point out someone besides the prisoner as the guilty party. Remote acts, disconnected and outside of the crime itself, cannot be separately proved for such a purpose.

Downs, 168 Wash. at 667. The Court concluded:

The fact that the so-called ‘Madison Jimmy’ was present in Seattle on the night of the burglary, and may have had opportunity to commit it, does not amount to even a justifiable suspicion that he did so. In the absence of other circumstances tending in some manner to connect him with the commission of the crime, we cannot see how the presence of ‘Madison Jimmy’ in Seattle at the time of the commission of the crime, even if positively identified by some one who had seen him there that night, had any effect upon the question of the guilt or innocence of appellants.

Downs, 168 Wash. at 667-68.

Here, unlike the scenario in *Downs*, Franklin did not seek to introduce testimony that someone with a propensity to commit crimes *may* have had the opportunity to place the Craigslist ads. Rather, Franklin sought to establish that Rasheena Hibbler posted the ads by introducing the following facts into evidence:

- That Hibbler lived with Franklin in November 2008. RP 16-17 (6/22/09).
- That Hibbler’s work laptop was the only computer at the residence during that timeframe. RP 18-19 (6/22/09).
- That Hibbler knew of Franklin’s relationship with Fuerte and was angry about it. RP 20 (6/22/09).
- That Hibbler had expressed her anger by confronting Fuerte in emails and in phone calls. RP 20 (6/22/09).

- That Hibbler had looked up Fuerte's address on Google and had gone to that address on more than one occasion in search of Franklin. RP 20-21 (6/22/09).
- That Hibbler had previously gained access to Franklin's work and personal email. RP 21 (6/22/09).
- That Hibbler—pretending to be Franklin—had sent emails to another person or persons from Franklin's email address. RP 22 (6/22/09).
- That Hibbler learned in late October 2008 that Franklin had loaned Fuerte money. RP 22 (6/22/09).
- That Hibbler had seen sexually explicit photos of Fuerte when she had accessed Franklin's email. RP 23 (6/22/09).
- That Hibbler had never revealed to Franklin that she had seen the photos. RP 23 (6/22/09).

In other words, Hibbler had a demonstrated animus towards Fuerte and thus a clear motive for placing the Craigslist ads. She also had both the means and the opportunity to do so in a manner which would implicate Franklin. In fact, based on the available evidence it is fair to say that Franklin and Hibbler were the *only* two people on earth who realistically could have posted the ads. This is a far cry from the facts presented in *Downs*. The State's reliance on *Downs* is misplaced.

Maupin, a case not cited by the State, is instructive. Maupin was accused of abducting and killing a six year old girl. At trial the court relied on *Downs* to prohibit Maupin from calling a witness named Brittain to testify that the day after the child disappeared he saw two other men carrying the child wrapped in a blanket. Without the excluded evidence,

Maupin was convicted of first degree murder. *Maupin*, 128 Wash.2d at 921-23.

The Washington Supreme Court found that it was error to exclude Brittain's testimony:

Unlike any of the *Downs* line of cases, and contrary to the State's argument, ***Brittain's testimony was neither evidence of another's motive nor mere speculation about the possibility that someone else might have committed the crime.*** Instead, Brittain would have testified he saw the kidnapped girl with someone other than the defendant after the time of kidnapping. ***Although the State correctly notes this testimony would not necessarily have exculpated Maupin, as he may have been acting in concert with the persons Brittain claimed to have seen, it at least would have brought into question the State's version of the events of the kidnapping.*** An eyewitness account of the kidnapped girl in the company of someone other than Maupin after the time of the kidnapping certainly does point directly to someone else as the guilty party, as *Downs* requires.

Maupin, 128 Wash.2d at 929 (emphasis supplied).

This case is far more similar to *Maupin* than it is to *Downs*.

Franklin did not seek to introduce evidence of a third person's mere propensity to commit crimes, or mere motive to do so. The jury would not have been asked to speculate regarding another's potential involvement.

Rather, Franklin sought to introduce both direct and circumstantial evidence of Hibbler's guilt—combined with highly relevant evidence of her motive. Yet Franklin was prohibited—in violation of his federal and state constitutional rights to present a defense—from introducing evidence

and argument implicating Hibbard as the poster of the Craigslist ads. It was an abuse of discretion for the trial court to exclude this evidence.

The Error Was Not Harmless Beyond a Reasonable Doubt.

The State argues that any error was harmless because the evidence against Franklin “was very strong.” *Response*, at 28. Of course, the whole point is how persuasive the evidence against Franklin would have been had the jury been allowed to hear the evidence against Hibbler. This was not primarily a case about “what happened.” It was a case about “who did it.” Given that the identity of the Craigslist poster was the central question that the jury had to answer, it is difficult to conceive how the erroneous exclusion of evidence implicating someone other than Franklin as the poster could ever be deemed harmless beyond a reasonable doubt.

Once again, *Maupin* is instructive:

We must take Brittain's testimony here as true, and evaluate its likely effect on the outcome of the trial. A reading of that testimony casts substantial doubt on the State's version of the crime. Brittain places [the child] in the hands of two men other than Maupin on the day after the State argued [the child] was murdered. Under those circumstances, it is impossible to conclude a reasonable jury would have reached the same result beyond a reasonable doubt had Brittain's testimony been given. The State has not carried its burden of showing harmless error.

Maupin, 128 Wash.2d at 930.

The same reasoning applies here. This Court should reverse Franklin's convictions and order a new trial.

Franklin's Federal and State Constitutional Rights to Compulsory Process and to Due Process Were Violated When the Trial Court Granted Rasheena Hibbler a Blanket Fifth Amendment Privilege and Prevented the Defense from Calling Her as a Witness.

The State Misapprehends Franklin's Argument.

The State appears to misunderstand Franklin's argument regarding this claim of error. The State accuses Franklin of "suggesting" that Hibbler should have been "required to assert the privilege in response to questioning *in the presence of the jury.*" *Response*, at 34 (emphasis in original). Franklin "suggests" no such thing. Rather, Franklin contends that the trial court erred in prohibiting the defense from calling Hibbler to answer *any* questions when there were numerous relevant questions which Hibbler—who had the benefit of the assistance of counsel—was perfectly willing to answer. Indeed, it is telling that the State altogether ignores the substantial list of relevant questions Hibbler voluntarily answered in the pretrial hearing—a hearing whose sole purpose was to determine the scope of Hibbler's privilege. *See Opening Brief*, at 34.

Contrary to the State's straw man argument, Franklin is not arguing that Hibbler had no privilege, or that she should have been forced to invoke it in the presence of the jury. Rather, Franklin contends that

instead of ignoring Franklin's right to compulsory process and affording Hibbler a blanket privilege to avoid testifying altogether, the trial court could have—and should have—fashioned a remedy which balanced Franklin's right to put on a defense with Hibbler's right to avoid answering certain questions. For example, it would have been well within the trial court's discretion to limit the scope of direct and cross-examination questions to those relevant areas about which Hibbler was willing to testify.

By adopting an all-or-nothing approach to Hibbler's testimony, the trial court abused its discretion and violated Franklin's rights to compulsory and due process.

The Error Was Not Harmless Beyond a Reasonable Doubt.

The State argues that any error was harmless because the evidence Franklin sought to admit through Hibbler was “largely admitted through other witnesses”—namely, Franklin and Fuerte. *Response*, at 35. Once again, the State is wrong.

First, the State's use of the qualifier “largely” speaks volumes, and constitutes an admission by the State that there was in fact evidence Franklin sought to adduce through Hibbler which only she could provide. For example, only Hibbler could testify that she had secretly gained access to sexually explicit photos of Fuerte and that she hid this fact from

Franklin. RP 23 (6/22/09). This was highly relevant, since the Craigslist ads included those sexually explicit photos. This is but one example. *Compare Opening Brief*, at 34 (list of relevant topics which Hibbler was willing to testify about) *with Response*, at 35 (describing Hibbler proposed testimony that was “largely admitted through other witnesses”).

And second, as discussed above, Andre Franklin placed his credibility before the jury by taking the witness stand. Given Franklin’s status as the defendant on trial, his assertions that Hibbler had accessed his email accounts without permission, or that Hibbler’s work computer was the sole computer used in their home, were far less persuasive than they would have been had Hibbler also taken the stand and corroborated his testimony.³

The error in excluding all relevant testimony from Hibbler was not harmless beyond a reasonable doubt. Franklin is entitled to a new trial.

Franklin’s Federal and State Constitutional Rights to an Open and Public Trial Were Violated When the Trial Court Closed the Courtroom Without First Conducting an Adequate Hearing as Required by *State v. Bone-Club* and its Progeny.

The State Proceeds From a False Assumption.

The State cites several cases for the proposition that an *in camera* hearing is the appropriate vehicle for determining whether a witness has a

³ See footnote 2, *supra*.

valid Fifth Amendment claim of privilege. *Response*, at 38. The State goes on to contend that analysis of the *Bone-Club*⁴ factors is unnecessary in any case in which *in camera* proceedings are appropriate. *Response*, at 38, citing *State v. White*, 152 Wash. App. 173, 182, 215 P.3d 251 (2009), *rev. denied*, 168 Wash.2d 1015 (2010). The State is incorrect on both counts.

The State cites four cases for its first proposition—that “an *in camera* hearing is the appropriate method for determining whether a witness has a factual basis to assert her privilege against self-incrimination” (*Response*, at 38): *Eastham v. Arndt*, 28 Wash. App. 524, 533-34, 624 P.2d 1159, *rev. denied*, 95 Wash.2d 1028 (1981); *Seventh Elect Church v. Rogers*, 34 Wash. App. 105, 114-15, 660 P.2d 280, *rev. denied*, 99 Wash.2d 1019 (1983); *State v. Berkley*, 72 Wash. App. 12, 20, 863 P.2d 133, *rev. denied*, 124 Wash.2d 1011 (1994); and *State v. Hobble*, 126 Wash.2d 283, 892 P.2d 85 (1995). These cases do not support the State’s suggestion that an *in camera* hearing is the only permissible method for determining the existence of a witness’s Fifth Amendment privilege.

Preliminarily, it is important to note that *none* of these four cases deal with the issue before this Court—the failure to engage in an adequate

⁴ *State v. Bone-Club*, 128 Wn.2d 254, 906 P.2d 325 (1995).

Bone-Club analysis prior to conducting an *in camera* hearing. Indeed, all four of the cases pre-date *Bone-Club*.

Eastham is a civil case whose sole discussion of the *in camera* review issue is contained in a footnote:

The use of an *in camera* proceeding is appropriate, as is a sealed record. However, an *in camera* hearing is not required if the external circumstances support the privilege claim:
A proper use for an *in camera* hearing is to allow a witness to impart sufficient facts in confidence to the judge to verify the privilege claim where external circumstances do not afford adequate verification.

Eastham, 28 Wash. App. at 533 n.2 (citation omitted).

Seventh Elect Church—another civil case—approved the use of an *in camera* proceeding in that case, but noted that:

the standards for permitting [an *in camera* hearing] should be ***exacting***. Certain initial or ***threshold showings of need must be required*** and ***the burden of convincing the court that such need exists should be a substantial one***.

Seventh Elect Church, 34 Wash. App. at 115 (quotations and citation omitted) (emphasis supplied).

Berkley involved the consolidated appeals of two defendants who had been convicted of driving while intoxicated. The issue at pre-trial suppression hearings in both cases was the defendants' ability to pay for an independent blood-alcohol test. At the suppression hearings the defendants refused to testify regarding their financial circumstances. In

both cases the trial court denied the motion to suppress based on the defendant's refusal to testify. *Berkley*, 72 Wash. App. at 14-16.

This Court reversed the convictions and remanded for new suppression hearings in both cases. The Court's only discussion of an *in camera* hearing occurred in a brief passage at the end of the opinion regarding the procedure to be followed on remand:

If necessary to protect the witness from disclosing potentially incriminating evidence in the course of examining the basis for the claim of privilege, *in-camera* examination by the court *may* be appropriate.

Berkley, 72 Wash. App. at 20 (emphasis supplied).

Finally, in *State v. Hobble*, the last case cited by the State regarding the "appropriateness" of an *in camera* hearing, the Court simply noted in passing that an *in camera* hearing was held by the trial court to determine whether a witness had a Fifth Amendment privilege. *Hobble*, 126 Wash.2d at 286. *Hobble* contains no discussion of the propriety of the *in camera* hearing.

In short, the State vastly overstates the truth when it contends that an *in camera* hearing is *the* appropriate method for determining whether a witness has a Fifth Amendment privilege. At most, an *in camera* hearing *may* be the proper procedure depending on the facts and circumstances surrounding the claim of privilege.

From its first faulty proposition the State leaps to the conclusion that a *Bone-Club* hearing is unnecessary in any case in which *in camera* proceedings are properly held. *Response*, at 38, citing *White*, 152 Wash. App. at 182. The problem with the State's argument is that the passage it cites from *White* is pure *dictum*.

In *White*, the trial court closed the courtroom and excluded the defendant with the intention of holding an *in camera* hearing to determine the validity of a claim of privilege advanced by the alleged victim. However, once the courtroom was closed the witness withdrew the claim and no *in camera* hearing took place. *White*, 152 Wash. App. at 177-78.

On appeal, the defendant claimed his right to a public trial was violated because the trial court failed to hold a *Bone-Club* hearing prior to closing the courtroom. This Court affirmed based on one simple fact: no closed proceeding occurred:

Here, the closure occurred without consideration of the [*Bone-Club*] factors. The court convened counsel for a hearing, but ***no hearing occurred***. [The witness] had conferred with appointed counsel and immediately withdrew her claimed Fifth Amendment privilege, ***thus eliminating the need for the in camera proceeding***. In the present case, ***the courtroom was reopened without any proceeding that could have violated the defendant's rights and trial resumed***.

White, 152 Wash. App. at 182 (emphasis supplied).

Having already announced its holding, the Court nevertheless continued, observing that “[a]pplying the five [*Bone-Club*] factors before an *in camera* review would serve little purpose, because proper *in camera* proceedings would always satisfy them.” *White*, 152 Wash. App. at 182.

“Obiter dictum” is “[a] judicial comment made while delivering a judicial opinion, but *one that is unnecessary to the decision in the case and therefore not precedential.*” BLACK’S LAW DICTIONARY (9th Ed. 2009) (emphasis supplied). *See also In Re PRP of Domingo*, 155 Wash.2d 356, 366, 119 P.3d 816 (2005) (“Statements in a case that do not relate to an issue before the court and are *unnecessary to decide the case* constitute *obiter dictum*, and need not be followed.”) (quotations and citation omitted) (emphasis supplied). The fact that no closed proceedings occurred in the trial court was dispositive in *White*. The Court’s subsequent musings are classic *dictum*.

The reality is that no Washington case holds that there are circumstances where the trial court may close the courtroom without first holding a *Bone-Club* hearing. The State’s diversionary tactics notwithstanding, this is the issue before this Court.

The Trial Court Failed to Conduct an Adequate Hearing Prior to Closing the Courtroom. Post-Hoc Analysis of the Bone-Club Factors is Irrelevant to the Court's Disposition of this Claim of Error.

When all is said and done, the State does acknowledge that a *Bone-Club* hearing was required *prior* to the trial court's closure of the courtroom. *Response*, at 36-37. However, rather than addressing what the trial court actually did in this case, the State instead reframes the issue and argues that proper application of the *Bone-Club* factors would have justified the closure that occurred. *Response*, at 38-41. The State then devotes exactly one paragraph to the issue actually before this Court—whether the trial court in fact held an adequate *Bone-Club* hearing prior to closing the courtroom. *Response*, at 41-42.

This Court should—indeed it must—decline the State's invitation to conduct its own “retroactive” *Bone-Club* analysis:

Notwithstanding the lack of *Bone-Club* analysis by the trial court, the State urges this court to consider the *Bone-Club* factors on appeal and hold that the record demonstrates [that the closure] was justified. The presumption that trials should be open may be overcome only by an overriding interest based on findings that closure is essential to preserve higher values and is narrowly tailored to serve that interest. ***The interest is to be articulated along with findings specific enough that a reviewing court can determine whether the closure order was properly entered. . .***

Thus, in order to support full courtroom closure during [trial], ***a trial court must engage in the Bone-Club analysis; failure to do so results in a violation of the defendant's public trial rights. . .***

[T]here is no indication in the record that the trial judge engaged in the required *Bone-Club* analysis or made the ***required formal findings of fact and conclusions of law relevant to the Bone-Club criteria***. Although the trial judge mentioned several times that juror interviews were being conducted in private either for “obvious” reasons to ensure confidentiality, or so that the inquiry would not be “broadcast” in front of the whole jury panel, ***the record is devoid of any showing that the trial court engaged in the detailed review that is required in order to protect the public trial right.***

The determination of a compelling interest for courtroom closure is the affirmative duty of the trial court, not the court of appeals. Nor is it the responsibility of this court to speculate on the justification for closure. Moreover, even if the trial court concluded that there was a compelling interest favoring closure, it must still perform the remaining four Bone-Club steps to thoroughly weigh the competing interests. As far as we can tell, the trial court did not consider whether there were less restrictive alternatives to closure available. Unfortunately, the absence of any record showing that the trial court gave any consideration to the Bone-Club closure test prevents us from determining whether conducting part of the trial in chambers was warranted.

State v. Strode, 167 Wash.2d 222, 227-29, 217 P.3d 310 (2009)

(quotations and citations omitted) (emphasis supplied). Thus, the issue before this Court is not whether the closure of the courtroom during Franklin’s trial *could* have been justified had there been a proper *Bone-Club* hearing, but whether the trial court conducted a proper hearing in the first instance.

The simple answer is “no.”

Reciting the *Bone-Club* factors is not the same as analyzing and applying them. Other than simply listing the five factors, here is the trial court's entire analysis:

Here the State, and actually, I think, the defense is not objecting to this either, are not objecting to the *in camera* questioning of Ms. Hibbler, which would be limited to me questioning her about whether or not certainly the questions posed by the State, and by the defense about whether or not she is, in fact, the person who created, participated in emailing under Time4gamez@Yahoo.com. Sent the emails to Nanette Fuerte, and posted the explicit photos that were discussed. And so for those reasons—and she does have a Fifth Amendment privilege as any citizen does. Actually any noncitizen as well. She has that privilege, and I believe that closure is proper for this limited purpose simply to ask her these questions for me to make the determination of whether or not the Fifth Amendment applies in this particular case. So having considered the factors under *State v. Bone-Club*, I will close that limited proceedings, which will only be a few minutes long.

RP 37-38 (6/22/09).

The trial court did not make a finding that there was a “compelling interest” mandating closure, or that there was a “serious and imminent” threat to Hibbler’s Fifth Amendment privilege in the absence of closure (*Bone-Club* factor number one). The trial court failed to give anyone present in the courtroom an affirmative, contemporaneous opportunity to object (*Bone-Club* factor number two).⁵ The court also failed to consider

⁵ Incredibly, the State asserts on appeal that the “record shows” that the parties were the only people in the court room when the closure occurred. *Response*, at 41 n. 6. Unfortunately for the State, the record shows no such thing, and the State’s assertion to the contrary is invented from whole cloth.

any less restrictive means for protecting the interests at stake (*Bone-Club* factor number three). And finally, the court did not engage in any weighing of the competing interests—indeed, the trial court did not even identify what the competing interests were (*Bone-Club* factor number four). The court’s brief comments simply do not rise to the level of “the detailed review that is required in order to protect the public trial right.” *Strode*, 167 Wash.2d at 228.

The trial court’s failure to conduct a proper *Bone-Club* hearing prior to closing the courtroom constitutes a structural error. This Court should reverse and remand for a new trial.

Mr. Franklin’s Federal and State Constitutional Rights to be Present Were Violated When the Trial Court Excluded Franklin from the Closed Hearing at which the Court Examined “Other Suspect” Rasheena Hibbler Under Oath.

Introduction

In its Response, the State offers three arguments regarding this claim of error. First, the State argues—without so much as mentioning the state constitution—that Franklin had no constitutional right to be present at the hearing to determine whether Hibbler had a Fifth Amendment privilege. *Response*, at 44-45, citing *United States v. Moore*, 936 F.2d 1508, 1523 (7th Cir.), *cert. denied*, 502 U.S. 991 (1991). Next, the State appears to suggest that Franklin waived this error by not objecting in the

trial court, and that he therefore cannot raise it for the first time on appeal. *Response*, at 45-46. Finally, the State asserts that Franklin invited any error by “acquiescing” to being excluded from the *in camera* hearing. *Response*, at 45.

Once again, the State is wrong on all points.

Franklin Had a Right to Be Present at the Hearing.

Citing the Seventh Circuit’s (non-binding) decision in *Moore*, the State asserts that “a hearing addressing whether a witness has a Fifth Amendment privilege has been held not to be a critical stage, and thus, the defendant’s presence is not constitutionally required.” *Response*, at 44. In making this assertion the State misstates the holding of *Moore* and neglects to discuss those facts in *Moore* which render it far different from Franklin’s case.

In *Moore*, the trial court held a conference outside the presence of the jury to determine whether a witness had a Fifth Amendment privilege. Present at the conference were the witness, the witness’s attorney, the prosecutor, and *Moore’s attorney*. *Moore* was not present. It is unclear from the opinion to what extent—if any—the witness was questioned regarding the substantive facts of the case. *Moore*, 936 F.2d at 1522.

On appeal, *Moore* contended that his due process right to be present was violated by his absence from the conference. The Seventh

Circuit disagreed for three reasons. First, the court noted that Moore's presence would not have assisted the trial court in making the legal determination of whether the witness had a Fifth Amendment privilege. *Moore*, 936 F.2d at 1523. Second, the court found that Moore's rights were not violated because his attorney was present at the conference. *Id.* And finally, the court concluded that the witness's "assertion of his privilege against self-incrimination had no bearing on the central issue of Moore's guilt or innocence." *Id.*

Franklin's case is substantially different from *Moore*. Most significantly, Moore's counsel was present at the conference, while both Franklin *and* his attorney were excluded from the *in camera* hearing. The importance of this distinction cannot be overstated. With counsel present at a proceeding, an absent defendant at least has a representative in the room whose job it is to advocate for the defendant's interests. This did not occur in Franklin's case.

Next, it cannot seriously be argued that Hibbler's "assertion of [her] privilege against self-incrimination had no bearing on the central issue of [Franklin's] guilt or innocence." *Moore*, 952 F.2d at 1523. As discussed above and in Franklin's *Opening Brief*, Franklin and Hibbler were the *only* two people on earth who realistically could have posted the Craigslist ads.

And finally, while it is true that a defendant's presence does not necessarily assist the trial court in making a strictly legal determination, it is equally true that a defendant's presence is presumed to have an effect on a witness's propensity to tell the truth. Indeed, this presumption is one of the core purposes underlying the confrontation clause. *See, e.g., Coy v. Ohio*, 487 U.S. 1012, 1019-20 (1988) ("It is always more difficult to tell a lie about a person 'to his face' than 'behind his back'. . . That face-to-face presence may, unfortunately, upset the truthful rape victim or abused child; but by the same token it may confound and undo the false accuser, or reveal the child coached by a malevolent adult."). Put another way, it is difficult to imagine a scenario in which a material witness testifies and the defendant's presence would not bear a "relation, reasonably substantial, to the fulness of his opportunity to defend against the charge." *United States v. Gagnon*, 470 U.S. 522, 526 (1985).

In its misplaced reliance on *Moore*, the State relegates the Washington Supreme Court's recent decision in *Irby* to one passing mention in a footnote. *Response*, at 46 n.8; *State v. Irby*, 170 Wash.2d 874, 246 P.3d 796 (2011). As discussed in Franklin's *Opening Brief*, a defendant's state constitutional right to be present applies "at every stage of the trial when [the defendant's] substantial rights may be affected." *Irby*, 170 Wash.2d at 885 (emphasis in original). The State does not

contend—nor could it—that the *in camera* hearing which resulted in the wholesale exclusion of Hibbler’s testimony did not affect Franklin’s substantial rights.

Under both the state and federal constitutions, Franklin’s right to be present was violated when the trial court held an *in camera* hearing and questioned Hibbler regarding the substance of the case

Franklin Neither Waived Nor Invited the Error.

The State makes passing reference to the “manifest constitutional error” standard set forth in RAP 2.5, and thus appears to be arguing—at least implicitly—that Franklin waived this error by not objecting in the trial court to his exclusion from the *in camera* hearing. However, a defendant’s right “to be present at his criminal trial [is an issue] of constitutional magnitude that may be raised for the first time on appeal.” *State v. Easterling*, 157 Wash.2d 167, 173 n.2, 137 P.3d 825 (2006); *see also Irby, supra* (addressing merits of claim despite fact that defense counsel failed to object to excusal jurors via email). The State’s waiver argument is meritless.

The State also contends that Franklin invited the error by “defer[ing] to the court” regarding the *in camera* hearing. *Response*, at

45, citing RP 33 (6/22/09).⁶ The State misunderstands the doctrine of invited error.

The invited error doctrine prohibits a party from “*setting up an error* at trial and then complaining of it on appeal.” *In Re PRP of Call*, 144 Wash.2d 315, 328, 28 P.3d 709 (2001) (emphasis in original). Application of the doctrine requires “affirmative actions by the defendant in which the defendant took knowing and voluntary actions to set up the error.” *Id.* (quotations omitted). Mere acquiescence in the trial court’s action or failure to object do not rise to the level of invited error. *See State v. Thomas*, 150 Wash.2d 821, 844, 83 P.3d 970 (2004) (“we characterize defense counsel’s action as a failure to object rather than inviting error”); *see also Irby, supra* (addressing merits of “right to be present” claim despite fact that defense counsel agreed to and participated in excusal of jurors via email). Here, Franklin’s counsel acquiesced in and failed to object to the exclusion of his client from the hearing involving Hibbler. It is clear, however, that counsel did not engage in any affirmative conduct to “set up” the error.

“The State bears the burden of proof on invited error.” *Thomas*, 150 Wash.2d at 844. The State fails to meet that burden here.

⁶ Regarding whether the trial court should hold the *in camera* hearing, trial counsel actually stated, “If your Honor wants to do that, I will defer to the Court.” RP 33 (6/22/09).

The Error Was Not Harmless Beyond a Reasonable Doubt.

The State claims that any error was harmless because Franklin's counsel was given the opportunity to provide input regarding the questions which would be asked at the *in camera* hearing. *Response*, at 45-46. But there is simply no way to know whether Hibbler would have answered questions differently had she been required to do so in the presence of Franklin. *See Coy*, 487 U.S. at 1019-20. The State cannot meet its burden of proving harmlessness beyond a reasonable doubt.

Cumulative Error Deprived Franklin of a Fair Trial.

The State's sole response to Franklin's cumulative error claim is that there are no errors to cumulate. *Response*, at 47. For the reasons discussed above, as well as in Franklin's *Opening Brief*, the State is gravely mistaken. Moreover, the errors in Franklin's case interlocked in such a manner as to effectively deprive Franklin of a defense. *See Opening Brief*, at 43-44. The Court should reverse on this ground as well.

II. CONCLUSION

For the foregoing reasons, as well as those set forth in *Appellant's Opening Brief*, this Court should reverse Franklin's convictions and remand for a new trial.

DATED this 8th day of September, 2011.

Respectfully Submitted:



Steven Witchley, WSBA #20106
Law Offices of Holmes & Witchley, PLLC
705 Second Avenue, Suite 401
Seattle, WA 98104
(206) 262-0300
(206) 262-0335 (fax)
steve@ehwlawyers.com

CERTIFICATE OF SERVICE

I, Steven Witchley, hereby certify that on September 8, 2011,
2011, I served a copy of the attached brief on counsel for the State of
Washington and on the appellant by causing the same to be ~~mailed, first-~~ ^{hand-delivered} *SW*
~~class postage prepaid~~, to: *the office of:*

Andrea Vitalich
King County Prosecuting Attorney's Office
516 3rd Avenue, Room W554
Seattle, WA 98104

And by emailing it to:

andre.franklin1@yahoo.com



Steven Witchley