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No. 90329-8

IN THE SUPREME COURT
OF THE STATE OF WASHINGTON

RJC
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STATE OF WASHINGTON,

Petitioner,

v.

BENITO GOMEZ,

Respondent.

PETITION FOR REVIEW

PETITIONER'S SUPPLEMENTAL BRIEF

Respectfully submitted:

Teresa Chen

by: Teresa Chen, WSBA 31762
Deputy Prosecuting Attorney

P.O. Box 5889
Pasco, Washington 99301
(509) 545-3561



ORIGINAL

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I. SUPPLEMENTAL STATEMENT OF THE CASE

The deputy prosecutor has reviewed the transcripts diligently and has not found a record wherein any member of the public was actually excluded from the courtroom in the trial of Benito Gomez. On the contrary, it is apparent that the public was present in great numbers (RP 150), and that Judge Schacht assisted the public in following the hearings as they moved between courtrooms. RP 140.

II. SUPPLEMENTAL ARGUMENT

On September 25, 2014, following the Court's acceptance of review of this petition, the Court issued several opinions on the open courts issue:

- *State v. Frawley*, -- Wn.2d --, 334 P.3d 1022 (2014),
- *State v. Koss*, -- Wn.2d --, 334 P.3d 1042 (2014),
- *State v. Smith*, -- Wn.2d --, 334 P.3d 1049 (2014),
- *State v. Njonge*, -- Wn.2d --, 334 P.3d 1068 (2014),
- *State v. Shearer*, -- Wn.2d --, 334 P.3d 1078 (2014), and
- *State v. Sliert*, -- Wn.2d --, 334 P.3d 1088 (2014).

In requesting review, the State had anticipated a decision in *State v. Njonge*. Petition for Review at 18. This supplemental brief applies the

recent case law to Mr. Gomez's case.

The application of the rules which emerged in *Koss* and *Njonge* require this Court to reverse the Court of Appeals and affirm the Defendant's convictions.

A. *NJONGE AND KOSS* – THE DEFENDANT HAS NOT MET HIS BURDEN OF ESTABLISHING AN ACTUAL EXCLUSION OF THE PUBLIC.

The decisions in *State v. Njonge* and *State v. Koss* require that the criminal defendant demonstrate an actual, not inferred or presumed, closure. The Defendant Gomez has made no such demonstration. Therefore, the claim on appeal is without merit.

In *State v. Njonge*, the courtroom was so full of the jury venire that the trial judge was not certain whether all attending members of the public would find space. *State v. Njonge*, 334 P.3d at 1071-72. But space limitations alone cannot effect a closure. *State v. Njonge*, 334 P.3d at 1075 (quoting *Estes v. Texas*, 381 U.S. 532, 588-89, 85 S.Ct. 1628, 14 L.Ed.2d 543 (1965) (Harlan, J., concurring)).

“The record does not show any observer being asked to leave the courtroom or any objection to the voir dire procedure by either the parties or any observers. The clerk's minutes reflect no order relating to a

closure.” *State v. Njonge*, 161 Wn. App. 568, 572, 255 P.3d 753 (2011).

We have required a better factual record to find a violation of this magnitude. *Bone-Club*, 128 Wash.2d at 256–57, 906 P.2d 325 (total physical exclusion of spectators); *Orange*, 152 Wash.2d at 802, 100 P.3d 291 (record demonstrated that trial court prohibited all spectators and family members from observing voir dire); *Paumier*, 176 Wash.2d at 32–33, 288 P.3d 1126 (jurors questioned in chambers outside view of any observers); *Wise*, 176 Wash.2d at 7, 288 P.3d 1113 (same).

Where no closure is demonstrated, we analyze the case “as a matter of courtroom operations, where the trial court judge possesses broad discretion.” *State v. Lormor*, 172 Wash.2d 85, 93, 257 P.3d 624 (2011); see *State v. Collins*, 50 Wash.2d 740, 745–46, 314 P.2d 660 (1957) (observing that where members of the public were present during trial, the exclusion of additional spectators was within the trial court’s discretion to manage the courtroom). Here, the trial court acted well within its discretion to regulate overcrowding in the courtroom. We hold that the record does not show the court closed the courtroom to the public during voir dire. Consequently, *Njonge* has not established a public trial violation.

State v. Njonge, 334 P.3d at 1075.

The rule that emerges in *Njonge* is that the appellant must demonstrate an actual closure. In the instant case, as in *Njonge*, there is no such record or demonstration of actual exclusion.

The Defendant has pointed to a comment by Judge Schacht which appears in the middle of a lengthy explanation of his ruling on a change of venue motion. RP 147-58. He explained that the security precautions,

which the Defendant claimed to be prejudicial, were based on actual current and local security concerns, were minimally intrusive, and were not unlike standard courtroom protocols. RP 153, 155, 156. The Defendant would not be shackled or otherwise visibly restrained and he would be provided a writing instrument and paper. RP 154. Other incarcerated witnesses also would not be shackled and would be provided street clothes. RP 154-55. The judge then went on to explain standard courtroom protocol. RP 153. Spectators are instructed to leave their weapons, cell phones, and other electronic devices in their cars. *Id.* There is a courtroom dress code. *Id.* Parties are expected to arrive on time. *Id.* And spectators are expected not to disrupt testimony by entering and exiting. *Id.* (“We do not allow people to come into the courtroom after the court is in session for not only security reasons but as well as the distraction that that causes when people come in.”)

This is the only record. It does not demonstrate that any person was actually excluded as a result of a brief comment within the context of lengthy ruling on venue. The Defendant’s family was most definitely present at the trial to support him. RP 682-90. His mother protested and took it upon herself to “inform[] the people of what happened during the whole case.” RP 689. One might expect any denial of entry to have

resulted in a record. None exists. The reasonable inference is that there was no denial of entry.

The State has asked whether a judge's comment could effect a closure. Petition for Review at 12-13. In *Njonge*, the supreme court held that the court of appeals properly concluded that "a court need not *order* a closure to violate the public trial guaranty." *State v. Njonge*, 334 P.3d at 1074. But it must be clear from the record that spectators were in fact excluded. *Id.*

This discussion of Judge Schacht's role in security does not demonstrate that any actual person was prevented from entering the courtroom in this trial. There is no indication that any person arrived late and was asked to wait briefly until entry would be less intrusive.

The State has asked whether the Defendant has demonstrated manifest error as required under RAP 2.5(a)(3). Petition for Review at 13-15. While an alleged violation of the public trial right may be raised for the first time on appeal (*State v. Koss*, 334 P.3d at 1045; *State v. Njonge*, 334 P.3d at 1073-74; *State v. Shearer*, 334 P.3d at 1082-83), the appellant must still demonstrate manifest error by providing a record demonstrating an actual closure. *State v. Koss*, 334 P.3d at 1046-47.

In *Koss*, the court held that while the right to a public trial right did

not attach to in-chambers jury instruction conferences, Koss also failed to show that any such discussion occurred at all. *State v. Koss*, 334 P.3d at 1046. There was no record or “any indication that the judge consulted with counsel regarding the jury questions either privately or publicly.” *Id.* “Koss therefore hangs his entire argument [] on the *lack* of a record.” *State v. Koss*, 334 P.3d at 1047. The error is not “manifest” under RAP 2.5(a)(3) where the facts necessary for its adjudication are not in the record. *Id.* “[T]he appellant bears the responsibility to provide a record showing that such a closure occurred in the first place.” *Id.*

Mr. Gomez has not provided any record demonstrating the actual exclusion of any member of the public.

The State has asked whether the court of appeals improperly shifted the burden by requiring the State to prove that there had been no closure. Petition for Review at 15-17. The Court has answered this question in the decisions of *Njonge* and *Koss*. There the supreme court has explained that the burden of proving closure is not on the State, but on the defendant/appellant. *State v. Njonge*, 334 P.3d at 1075; *State v. Koss*, 334 P.3d at 1047. Therefore, the court of appeals erred in requiring the State disprove the Defendant’s allegation of a closure. Unpublished Opinion at 6 (holding the state must prove no person was actually

excluded). The court of appeals also erred in presuming a closure where the record does not demonstrate any actual closure. The decision of the court of appeals must be reversed.

B. *SLERT AND SMITH* – UNDER THE EXPERIENCE AND LOGIC TEST, A TRIAL JUDGE’S REASONABLE PRACTICE TO LIMIT DISRUPTION OF TRIAL PROCEEDINGS DOES NOT IMPLICATE THE PUBLIC TRIAL RIGHT.

In *Slert*, the court applied the experience and logic test to the in-chambers examination of jury questionnaires. In *Smith*, the court applied the experience and logic test to recorded sidebar conferences that, due to the peculiar layout of the Cowlitz County courtroom, occurred in the hallway to make sure the jury does not hear. In each case, the court found such matters do not implicate the public trial right. *State v. Slert*, 334 P.3d at 1092-93; *State v. Smith*, 334 P.3d 1055-56.

In Mr. Gomez’s case, the allegation is that the trial may have been temporarily closed to late-arriving members of the public. The State has argued that under the experience and logic test, a trial judge’s reasonable control of public access in order to limit disruption of the trial does not implicate the public trial right. Petition for Review at 7-10.

“It is essential to the proper administration of criminal justice that dignity, order, and decorum be the hallmarks of

all court proceedings in our country.” *Illinois v. Allen*, 397 U.S. 337, 343, 90 S.Ct. 1057, 25 L.Ed.2d 353 (1970). The failure to preserve and maintain the decorum of the courtroom, according to legal procedures, may jeopardize a defendant’s right to an impartial jury and warrant the granting of a mistrial. *State v. Crawford*, 21 Wash.App. 146, 150, 584 P.2d 442 (1978). These important values of due process and respect for the rule of law are safeguarded by Washington courts’ historic authority, both inherent and as recognized by statute since 1909, to preserve and enforce order in the courtroom and to provide for the orderly conduct of proceedings. See RCW 2.28.010; *Lormor*, 172 Wash.2d at 93–94, 257 P.3d 624.

....

I am more concerned with a trial court’s ability to ensure a fair trial for the parties and respect for the court when faced with courtroom observers who are intentionally or unintentionally disruptive. Distracting or disruptive behavior can be exhibited in a number of situations: for example, by family, friends, or gang associates of criminal defendants or their victims; by partisans in contentious litigation; or by citizens passionately interested in a politically or emotionally charged high profile case. I am continually impressed by the patience and dignity shown by our trial courts in dealing with such behavior. Ultimately, however, when faced with disruption or the risk of disruption, the way that a trial court makes sure that spectators will continue to “respect the robe as a source of authority” (to quote my colleague) is by exercising authority—even if it makes some of those in attendance feel unwelcome. Dissent at 1204.

Analyzing the trial court’s request in this case as courtroom management rather than as a closure, as *Lormor* says we should, see 172 Wash.2d at 96, 257 P.3d 624, does not immunize the court’s actions from review. As explained in *Lormor*, a trial court’s requests that courtroom observers behave in particular ways is subject to review for abuse of discretion.

State v. Stark, 334 P.3d 1196, 1202-03 (Wash. Ct. App. 2014) (Siddoway, C.J., concurring) (explaining the court's ruling that there was no closure where the judge requested spectators not enter or leave once closing arguments had begun).

This Court should find that under the experience and logic test, a trial judge's reasonable action to prevent the disruption of a trial does not implicate the public trial right.

C. *STARK* – THE COURT OF APPEALS HAS RECONSIDERED.

A more recent decision by Division Three last month reveals a change of opinion. In *State v. Stark*, the court of appeals has found no closure where the trial judge advised spectators:

I don't really want people coming or going during closings, so if you don't think you can last the morning, you might want to rethink being in here, unless you really need to. It's just very disruptive.

State v. Stark, -- Wn. App. --, 334 P.3d 1196, 1200-01 (2014). The court of appeals noted that previously found closures regarded incidences when the public was "fully excluded" and not when a single disruptive person was excluded. *State v. Stark*, 334 P.3d at 1201, (comparing *Lormor* with *Bone-Club*, *Orange*, *Brightman*, *Easterling*, and *Momah*). This is the

same argument the State made in this case. *See* Petition for Review at 5-9. The court of appeals found that the trial judge in *Stark* did not completely and purposefully close the proceedings. “[A] request to minimize disruptive behavior is not a closure.” *Id.*

The *Stark* case is not persuasively distinguishable from the instant case. One might say that the judge in *Stark* only made a request which the public could ignore, where the judge in *Gomez* indicated in reasoning on a change of venue motion that there was a practice against interruptions of testimony. But the facts are not sufficiently unlike to result in such drastically different outcomes. In fact, in the instant case, the judge did not even direct his speech to the spectators. His comment took place in the middle of a legal opinion during a pretrial hearing. The comment in *Stark* took place at the close of testimony immediately before closing arguments. If anything, the comment in this case had far less likelihood of affecting the public’s behavior than the judge’s comment in *Stark*.

D. *SHEARER AND FRAWLEY* – THE COURT’S RECENT ANALYSIS OF STRUCTURAL ERROR DOES NOT REGARD CASES WHERE THE PUBLIC WAS PRESENT DURING THE ALLEGED CLOSURE.

In *Shearer* and *Grisby*, the alleged violations regarded in-chambers

discussions with potential jurors during voir dire. *State v. Shearer*, 334 P.3d at 1081. The state admitted these were closures, but argued they were de minimis. *State v. Shearer*, 334 P.3d at 1083. The court disagreed, finding that the structural error standard “forecloses the possibility of de minimis violations.” *State v. Shearer*, 334 P.3d at 1083-84.

Frawley and *Applegate* also regarded in chambers questioning of prospective jurors, but where defendants had articulated some kind of waiver. *State v. Frawley*, 334 P.3d at 1025. The court found the waivers were inadequate. *Id.* at 1028. The court also held that there was no requirement for a contemporaneous objection and that such error was not de minimis. *Id.* at 1029.

In these cases, the Washington Supreme Court maintains its rule that a closure is a structural error and cannot be de minimis.

However, the facts in *Gomez* are not like those in the trials of *Frawley*, *Applegate*, *Shearer* and *Grisby*. First, the state admitted there were closures, albeit de minimis closures, in each of the four cases. The State is not admitting to any closure here. A closure is defined as the “complete” and “purposeful” exclusion of all spectators from the courtroom. *State v. Sublett*, 176 Wn.2d 58, 71, 292 P.3d 715 (2012) (quoting *State v. Lormor*, 172 Wn.2d 85, 93, 257 P.3d 624 (2011)). That

did not occur here. Even were we to infer that something took place that was not made part of the record, that inference is not that *all* spectators were excluded from the courtroom.

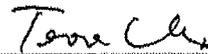
In the trials of Frawley, Applegate, Shearer and Grisby, a portion of jury selection was conducted *in chambers* where *no* public could attend. Here in Mr. Gomez's trial, there is no allegation that a portion of the trial was conducted in chambers, but only that late attendees, if any, *may* have been *delayed* in entering a courtroom that was *already well populated with public spectators*. The State has asked whether there could be a closure where a courtroom full of spectators is present at the trial. Petition for Review at 5-12. This question has not yet been answered. These facts are more similar to those of *State v. Njonge*, -- Wn.2d --, 334 P.3d 1068 (2014). There the court concluded there was no demonstrated closure. The Court should conclude the same here.

III. CONCLUSION

Based upon the forgoing, the State respectfully requests this Court reverse the Court of Appeals and affirm the Defendant's convictions.

DATED: November 3, 2014.

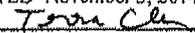
Respectfully submitted:



Teresa Chen, WSBA#31762
Deputy Prosecuting Attorney

Jill S. Reuter
<jill@gemberlaw.com>
<admin@gemberlaw.com>

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Cedar Street, Spokane, WA 99201

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Subject: 90329-8

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Teresa Chen

Teresa Chen
Deputy Prosecuting Attorney
Franklin County Prosecutor's Office
1016 North 4th Avenue
Pasco, WA 99301
509-545-3561

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