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Court of Appeals
Division III
State of Washington

No. 31018-3-III
IN THE COURT OF APPEALS
FOR THE STATE OF WASHINGTON
DIVISION III

STATE OF WASHINGTON,

Plaintiff/Respondent,

vs.

JOEY A. ANDY,

Defendant/Appellant.

Appellant's Reply Brief

DAVID N. GASCH
WSBA No. 18270
P.O. Box 30339
Spokane, WA 99223-3005
(509) 443-9149
Attorney for Appellant

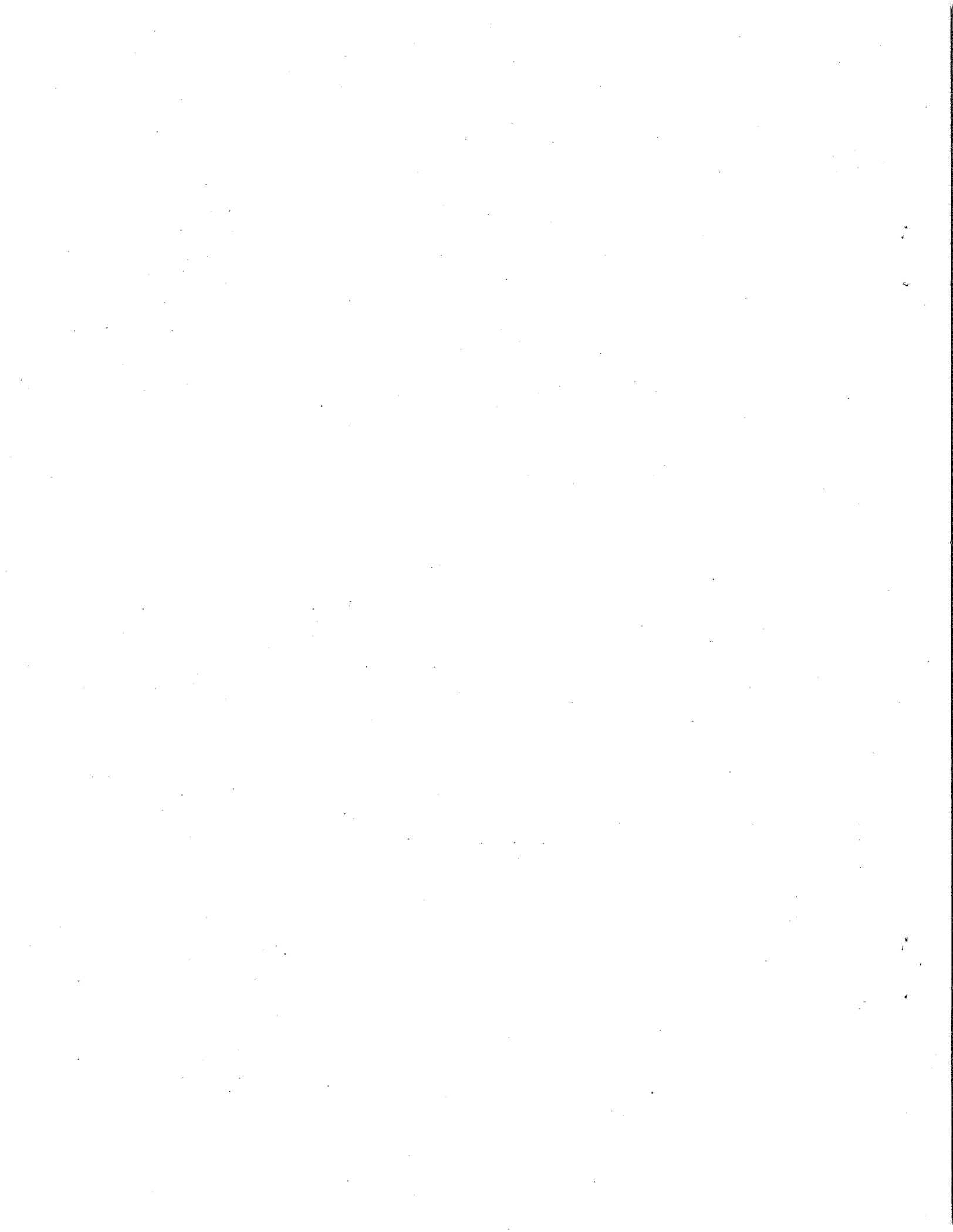


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A. ARGUMENT

The trial court violated Mr. Andy's constitutional right to a public trial by allowing the trial to continue past 4 p.m. on five days during the trial, when a sign on the courthouse door indicated the courthouse closed at 4 p.m., thereby effectively excluding the public from portions of the trial without first doing a *Bone-Club* analysis.

Respondent first asserts that Appellant failed to present any argument or authority to support his assignments of error to the trial court's findings and conclusions. Respondent's Brief pp 6-7. Respondent is mistaken. The trial court's erroneous findings/conclusions are addressed and refuted in both the Statement of the Case and the Argument sections of the initial brief. See e.g. Appellant's Brief: p. 7. lines 7-9, last paragraph; p. 11, first paragraph; p. 12, first paragraph; p. 13. There is only one issue presented in this appeal. Therefore, by default all assignments of error relate to that single issue.

Next, Respondent asserts that substantial evidence supports the trial court's findings that the courthouse was open at all times during Andy's trial, that all members of the public had access to the courtroom, that no member of the public was prevented from attending the trial, and that the sign on the courthouse door did not deter or bar any member of the

public from attending trial. Respondent's Brief pp 7-10. Respondent is incorrect in this assertion.

The trial court effectively closed the courtroom on its own motion by conducting portions of the trial after 4 p.m. when the courthouse was formally closed. The fact that the courtroom itself was open or that the courthouse was unlocked with a security officer available to allow entry makes no difference because the sign on the entrance door effectively barred the public from entering the courtroom. The public cannot be expected to know it may enter the courthouse on its own volition contrary to the public posting that the courthouse is closed.

Furthermore, there is no evidence that the security guard followed the implemented policies and was available to admit court attendees. The security officer on duty testified he did not know whether he received any telephone calls from the court to keep the doors open and did not know whether he did a "sweep" during Andy's trial to see if any courts were still in session. He also testified he had no independent recollection of what occurred during Andy's trial. 5/22/13 RP 135-36.

Moreover, even if the security guard was available, the public would not be aware of his presence. The security officer on duty after 4 p.m. does not stand by the entrance doors. Instead, he stands near the

metal detector. A person approaching the entrance doors from the street would only see the closed sign, not the security officer unless that person peered through the door at a certain angle. 5/17/13 RP 64.

Finally, the underlying theme of Respondent's Brief, as well as the trial court's findings and conclusions, is that no public trial violation occurs unless it can be shown that some member of the public attempted entry to the courthouse and was somehow turned away. This has never been the legal inquiry in any jurisdiction for determining whether a public trial violation has occurred. Instead, the proper inquiry is whether a closure occurred and if it did, whether the trial court conducted a proper *Bone-Club* analysis. See Appellant's Initial Brief p. 10; *State v. Bone-Club*, 128 Wn.2d 254, 258-59, 906 P.2d 325 (1995); *In re Personal Restraint of Orange*, 152 Wn.2d 795, 100 P.3d 291 (2004); *Waller v. Georgia*, 467 U.S. 39, 45, 104 S. Ct. 2210, 81 L. Ed. 2d 31 (1984).

Due process guarantees the right to an open and public trial. If the public is not "aware" of the open and public proceedings, this right loses all meaning. *Press-Enter. Co. v. Superior Court*, 464 U.S. 501, 509, 104 S. Ct. 819, 78 L. Ed. 2d 629 (1984). Even if a courthouse is technically unlocked, secret proceedings unfairly diminish or eliminate this public trial right. *Id.* The law requires "reasonable measure to accommodate

public attendance” at court proceedings. *State v. Leyerle*, 158 Wn. App. 474, 478, 242 P.3d 921 (2010); *Presley v. Georgia*, 558 U.S. 209, 130 S.Ct. 721, 175 L.Ed.2d 675 (2010). Moreover, court proceedings must not only be open, but they must be “accessible.” *Leyerle*, 158 Wn. App. at 479-80; *State v. Easterling*, 157 Wn.2d 167, 174, 137 P.3d 825 (2006)

Yakima County’s policy of closing the courthouse at 4:00 p.m. while having a security guard available to admit people during times of trial, with no additional direction to the public that proceedings remain open, is not a reasonable measure to accommodate public attendance. Seeing the sign outside the courthouse that the building is closed, the public is unlikely to be aware of ongoing public proceedings afterhours. The posted internet hours, made public as follows after the courthouse hours changed in 2011, did not improve that awareness:

Superior Court

Location: Yakima County Courthouse, Rm. 323

Hours of Operation: 8:30 - 4:00 pm¹

Phone: (509)574-2710

E-mail

<http://www.yakimacounty.us/departme.asp#S> (Available 9/25/2013)
(emphasis added).

¹ Interestingly, after Appellant’s brief was filed 10/30/2013), the following language was added after these posted hours of operation on the website: “*Exception: Courthouse will remain open for public attending trials/hearings that go past 4:00 p.m.*”
<http://www.yakimacounty.us/departme.asp#S> (Available 1/24/2014) (emphasis added).

Having a security guard available to admit people who wish to attend court proceedings after 4 p.m. when the information disseminated to the public says the courthouse closes at 4:00 p.m., does not constitute “reasonable measures” to “accommodate public attendance.” It is difficult to imagine many members of the general public who would be brave enough to assert the public trial right and enter the courthouse when all posted hours, as well as the posted internet hours, announce the courthouse is in fact closed.

In summation, the measures taken in this case by the Yakima County Superior Court did not make the courthouse sufficiently “accessible,” did not make the public “aware” of the ongoing public trial, and were not “reasonable” to “accommodate public attendance.” The trial court effectively closed the courtroom on its own motion by conducting portions of the trial after 4 p.m. when the courthouse was formally closed. It did not conduct a *Bone-Club* analysis. Therefore, significant portions of Mr. Andy’s trial were improperly closed to the public and his conviction should be reversed in favor of a new and public trial.

B. CONCLUSION

For the reasons stated herein and in Appellant's initial brief, the convictions should be reversed, and the case remanded for a new trial.

Respectfully submitted June 17, 2014,

s/David N. Gasch, WSBA #18270
Attorney for Appellant

PROOF OF SERVICE (RAP 18.5(b))

I, David N. Gasch, do hereby certify under penalty of perjury that on June 17, 2014, I mailed to the following by U.S. Postal Service first class mail, postage prepaid, or e-mailed by prior agreement (as indicated), a true and correct copy of the reply brief of appellant:

Joey Andy
#815956
PO Box 769
Connell WA 99326

jennifer.joseph@kingcounty.gov
Jennifer P. Joseph
Deputy Prosecuting Attorney
WAPA Appellate Resource Attorney
King County Prosecuting Attorney's Office

s/David N. Gasch, WSBA #18270
Gasch Law Office
P.O. Box 30339
Spokane, WA 99223-3005
(509) 443-9149
FAX: None
gaschlaw@msn.com

