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No. 62072-0-I

COURT OF APPEALS OF THE STATE OF WASHINGTON

DIVISION I

IN RE THE DETENTION OF WINSTON MOTLEY

STATE'S RESPONSE BRIEF

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I. INTRODUCTION

Appellant Winston Motley is a sex offender with a long history of assaulting others. Because the State's evidence was overwhelming and the trial court committed no prejudicial error, Motley's commitment as a sexually violent predator should be affirmed.

II. ISSUES

A. Did the trial court err by discussing proposed questions from the jury to a witness at a sidebar held just inside the bailiff's door for the purpose of screening the conversation from the jury?

B. Did the trial court abuse its discretion by instructing the jury on the risk element in accord with the specific language of RCW 71.09.020 and RCW 71.09.060(1)?

III. FACTS

Unless noted otherwise in the course of argument, the State generally accepts appellant's statement of facts. However, appellant overlooks important evidence presented to the jury regarding Motley's sexually assaultive activities in the early 1980s.

While on work release in 1983 for a series of Burglary convictions, Motley sexually assaulted two women. In one incident, he entered uninvited into the room of S.W. Once inside, he pushed her onto her bed and said, "I know you want it and I know you want me." VRP 322. Ms.

W. rebuked Motley and immediately ordered him to leave her room. She told authorities that during this confrontation, Motley attempted to cover her mouth with his hands. Only after repeatedly telling him to leave her room did Motley finally cease his assault. VRP 322

In an interview with Dr. Wheeler, the State's trial expert, Motley explained that he entered Ms. W.'s room because he believed she was "loose". He reasoned that since Ms. W. was engaged in a sexual relationship with someone, he assumed she was available to him for sex. VRP 323

This was not Motley's first attempt at sexual assault while on work release. About ten days prior to his assault of Ms. W. Motley went to A.S.'s room and knocked on her door. Half asleep, Ms. S. cracked open her door to see who was knocking. Motley could tell she was naked. Upon recognizing Motley, Ms. S. told him to leave her alone. Motley asked to be invited in, but Ms. S. refused. He then forced open the door with his body and grabbed her wrists. During the ensuing struggle, Ms. S. fell onto her bed. Seizing this opportunity, Motley climbed on top of Ms. S., pinned her down and then removed his pants. Though he struggled mightily to push apart her legs, he ejaculated before he was able to forcibly penetrate Ms. S. He then got up quickly, apologized, and left. VRP 324.

Ms. S. reported that Motley came back to her room the following night.

There was no confrontation that night.

However, three days later, she found Motley waiting for her outside her room just as she was about to make her way to the showers. Like before, he forced his way into her room. Unable to push him out, Ms. S. ran into the hallway and screamed. Motley left without further incident. Later that night, however, Ms. Strange reported that she awoke to sounds of someone trying to enter her room through the window. Frightened, she told her would-be intruder that she was armed with a knife and would not hesitate to use it. The would-be intruder left. VRP 325.

In his interview with Dr. Wheeler, Motley acknowledged that he forced his way into Ms. S.'s room. He also acknowledged that he grabbed her and pushed her up against a wall. He then put her on the floor in an attempt to perform forced oral sex on her. He denied, however, that this was an attempted rape. He reasoned that since he knew Ms. S., this was not a rape. VRP 326.

Official records indicate that following an administrative hearing by the Department of Corrections, Motley was found to have violated conditions of his probation by attacking Ms. W. and Ms. S. Though lacking details, the records also indicate a third violation involving

Motley's inappropriate entry into another resident's room just a few days after his assault of Ms. S. VRP 328.

In addition to the facts recounted in appellant's brief regarding the April 1987 rape of 15 year old J.A., it should be noted that during the course of this rape Motley demanded to know if Ms. A. had ever "sucked dick." VRP 910. When told she hadn't, he nonetheless forced his penis into her mouth after pushing her down onto her knees. *Id.* Apparently unhappy with the way she was performing oral sex, Motley then ripped off Ms. A.'s clothes and raped her vaginally. VRP 910. During the rape, Motley told Ms. A. that she should be enjoying their encounter. He also shared with her his concern that she had seen his face. This terrified Ms. A. - she assumed this meant he would kill her following the rape. VRP 911.

The jury also heard testimony from L.M. Ms. M. testified that Motley reached up and touched her breast/nipple. VRP 224. During the confrontation, he also told Ms. M. that he thought he could/would change her from being a lesbian to a heterosexual. VRP 227-228

Motley reported that between 1997 and 2001, he engaged in anywhere from 30 to 40 incidents of voyeurism. Motley's favorite voyeurism hangouts included public bathrooms in parks and shopping malls. In particular, he recalled secreting himself among the clothing

racks in Southcenter Mall and masturbating as he spied on unsuspecting women in the changing rooms. Asked to describe his feelings during this period of his life, Motley characterized his behavior as sexually compulsive; that his behavior was interfering with his functioning and keeping him from holding jobs for extended periods. VRP 359

In discussions with his former counselor, Lavonna James, Motley stated that his desire for physical contact was so strong that it led to a progression of sexual offending. He explained that it wasn't so much that his girlfriend at the time didn't want to have sex that drove him, but more his desire to have a variety of women or minor females. VRP 933.

Motley conceded that his sex offending didn't really bother him because he believed that if he didn't get caught, he wasn't really committing a crime. He felt superior and dominant over women and minor females, and lacked respect for them. VRP 934

Motley admitted that in addition to voyeurism, he engaged in approximately 20 acts of frottage. His sexual offending, he explained, usually began with him spotting a beautiful woman or girl. This would then lead to him having thoughts of being sexual with them, believing that the women and girls were there for his sexual enjoyment. Society, he said, was there to offer him a supply of victims. VRP 893

Urged to discuss his typical fantasies, Motley described being in a rape scenario during which the victim would at some point start enjoying the rape and become desirous of engaging in the sexual assault with him. Another fantasy would arise while he visited peep shows. Once aroused, he would view the performers as rape victims and imagine them in a rape fantasy with him. VRP 895.

The jury also heard significant facts regarding Motley's 1998 Attempted Burglary charge. On the evening of April 21, 1998, two young women were at home when one of them was startled by someone trying to break into their home. A man, later identified as Motley by fingerprints left on the window of the home, was observed standing outside the home. When apprehended, Motley denied trying to enter the women's home, but acknowledged he had visited the apartment complex previously. VRP 365-366.

With regard to the 2001 CMIP conviction, in late October 2001, Motley was walking on the street when he observed two young girls (14 and 11). Finding them attractive, he followed them for several minutes, despite the girls' best efforts to get away from him. Motley reported that he liked girls in this age group because they were neither "soiled" nor "used". VRP 337. Pretending to be concerned for their well being, Motley approached the girls and attempted to start a conversation with them by

extending his hand out to the older girl. When she politely reached out to shake his hand, Motley grabbed her buttocks then slid his hand to her front vaginal area. He concluded by grabbing and fondling her breasts.

IV. MOTLEY RECEIVED A PUBLIC TRIAL

Motley argues that he was denied a right to public trial because the court and counsel discussed questions from the jury in chambers, out of the presence of the jury. Motley made no objections to this procedure and benefited from a more efficient trial. As with any sidebar, all parties had the ability and right to place the proceeding on the record. There is no allegation that this process altered the trial result in any way. The court should reject Motley's arguments because sidebar conferences are fully consistent with public trials and a necessary component of an efficient trial system.

A. Motley Lacks Standing To Claim That The Public's Right To Open Administration Of Justice Was Violated

Because this is a civil case, Motley lacks standing to challenge conversations between the court and the parties in chambers. Even if he did have standing, he waived his right to raise such a claim by waiving his presence during the proceedings.

In *criminal* cases, the source for a public trial derives from both the Sixth Amendment to the United States Constitution and Article I, section 22 of the Washington Constitution. *State v. Easterling*, 157 Wn.2d 167,

174, 137 P.3d 825 (2006). Because the source for a public trial in civil matters does not implicate the Sixth Amendment or Article I, section 22, Motley's continued citation to criminal cases for his supposed public trial right is in error.

The Sixth Amendment does not support a public trial right in civil commitment cases. By its terms, the Sixth Amendment is limited to *criminal* prosecutions: "In all *criminal prosecutions*, the accused shall enjoy the right to a speedy and public trial" Because the civil commitment of sexually violent predators is civil in nature, SVP respondent's enjoy no *Sixth Amendment* right to a public trial. The Washington Supreme Court, has noted that "although SVP commitment proceedings include many of the same protections as a criminal trial, SVP commitment proceedings are *not* criminal proceedings." *In re Det. of Stout*, 159 Wash.2d 357, 369, 150 P.3d 86 (2007). As a result, the Sixth Amendment is no applicable to SVP proceedings and "the rights afforded under the Fifth and Sixth Amendments do not attach to SVP petitioners." *In re the Detention of Strand*, 167 Wn.2d 180, 191, 217 P.3d 1159 (2009). *See also Stout*, 159 Wash.2d at 369 ("It is well-settled that the Sixth Amendment right to confrontation is available only to criminal defendants."); *In re Detention of Boynton*, 152 Wash.App. 442, 455, 216

P.3d 1089, 1096 (2009) (Sixth Amendment-based *Apprendi* doctrine does not apply to SVP cases).

Similarly, Article I, Section 22 of the Washington Constitution is limited, by its terms, to criminal prosecutions. Entitled "rights of the accused," Article I, Section 22, establishes rights for defendants in "criminal prosecutions," including the right "to have a speedy public trial." Because the terms of Article I, Section 22 are limited to "criminal prosecutions," this constitutional provision does not apply to SVP proceedings. *See In re Detention of Brock*, 126 Wash.App. 957, 963, 110 P.3d 791, 794 (2005)(rejecting application of Article I, Section 22 right to confront witnesses); *In re Grove*. 127 Wash.2d 221, 237, 897 P.2d 1252, 1260 (1995)(noting that right to counsel in civil cases does not derive from Article I, Section 22 of Washington constitution).

In civil cases, the right to a public trial proceedings derives exclusively from Article I, Section 10 of the Washington constitution. *Dreiling v. Jain*, 151 Wn.2d 900, 93 P.2d 861 (2004). Article 1, section 10 of the Washington Constitution that provides that "justice in all cases shall be administered openly." Whereas the Sixth Amendment provides an open trial right that is personal to the defendant, Article 1, section 10 grants "the public and the press a right of access to judicial proceedings and court documents in both civil and criminal cases." *Dreiling*, 151

Wn.2d at 908; accord *Seattle Times Co. v. Ishikawa*, 97 Wn.2d 30, 36, 640 P.2d 716 (1982). “This ‘separate, clear and specific provision entitles the public, and ... the press is part of that public, to openly administered justice.’ ” *Ishikawa*, 97 Wash.2d at 36 (quotation omitted).

The public's right to an open trial exists separately from a criminal defendant's right. *State v. Easterling*, 157 Wn.2d 167, 174, 137 P.3d 825 (2006). Only a criminal defendant has the right to an open and accessible court through both article 1, §22 and article 1, § 10 of the Washington State Constitution. The Washington Supreme Court has held that where a courtroom is ordered closed during significant portions of trial a defendant's constitutional rights have been violated.¹ *Id.*

In civil proceedings, the right to open and accessible court proceedings under article 1, § 10 is held by the public and the press, not a

¹ The Washington Supreme Court has held that where a courtroom is closed during significant portions of criminal trial, a defendant's constitutional rights are violated. *State v. Marsh*, 126 Wash. 142, 145, 217 P. 705 (1923) (closing court to try an adult as a juvenile); *State v. Bone-Club*, 128 Wn.2d 254, 256-57, 906 P.2d 325 (1995) (closing court at State's request for the pretrial testimony of an undercover detective); *State v. Brightman*, 155 Wn.2d 506, 511, 122 P.3d 150 (2005) (closing court for the entire 2 ½ days of voir dire, excluding the defendant's family and friends); *In re Pers. Restraint of Orange*, 152 Wn.2d 795, 100 P.3d 291 (2004) (excluding the defendant's family and friends excluded from all voir dire proceedings); *State v. Easterling*, 157 Wn.2d 167, 172-73, 137 P.3d 825 (2006) (excluding the defendant and his attorney excluded from pretrial motions regarding the co-defendant); *State v. Strode*, 167 Wn.2d 222, 217 P.3d 310 (2009) (private questioning of a subset of jurors violated the right to a public trial where the court failed to balance the Bone-Club factors before holding voir dire in chambers. *State v. Momah*, 167 Wn.2d 140, 217 P.3d 321 (2009) (invited error does not entitle a defendant to a new trial.

party to the proceedings. *Dreiling v. Jain*, 151 Wn.2d 900, 93 P.2d 861 (2004). Certain pretrial discovery procedures, such as depositions and interrogatories, are not public components of a civil trial. *King v. Olympic Pipeline Co.*, 104 Wn. App. 338, 369, 16 P.3d 45 (2001). They were not open to the public at common law, and in general, are conducted in private as a matter of modern practice. *Id* at 370. Information disclosed as a result of the depositions and/or interrogatories is not open to the public unless it is later used in a court proceeding. *Id*. Any restraints placed on discovered information that has not been admitted into evidence is not considered a restriction on a traditionally public source of information. *Id* at 370.

A sexually violent predator trial is a civil proceeding, not criminal. *In re Young*, 122 Wn.2d 1, 15-52 (1993). The Washington State Supreme Court has made it abundantly clear that, unlike criminal defendants, individuals subject to civil commitment under RCW 71.09 do not have a Sixth Amendment right to confront witnesses at trial and do not have a blanket Fifth Amendment right to remain silent. *Id*. Without a Sixth or Fifth Amendment right, the requirement that SVP cases be tried in a public forum flows primarily, if not exclusively, from article 1 §10 of the Washington Constitution.

Because SVP proceedings are civil in nature, there is no right to a public trial under article 1 section 22, which is limited to criminal cases by its express terms. *In re Detention of Campbell*, 139 Wn.2d 341, 986 P.2d 771 (1999). As such, the right to a public SVP trial is held by the public and/or press, not the SVP respondent.

The public has an undeniably serious interest in maintaining current and thorough information about convicted sex offenders. The specific modus operandi of sex offenders, preying on vulnerable strangers or grooming potential victims, is markedly different from the behavior of other types of persons civilly committed and such dangerous behavior creates a need for disclosure of information about convicted sex offenders to the public. Grave public safety interests are involved whenever a known sex offender's tendency to recommit predatory sexual aggressiveness in the community is being evaluated. This substantial public safety interest outweighs the truncated privacy interests of the convicted sex offender.

Campbell, 139 Wn.2d at 356

When the differences between the criminal and civil rights to a public trial are correctly understood, Motley's assertion that the court violated *his* constitutional right to a trial is fundamentally flawed. Motley does not have a constitutional right to a public trial in civil sexually violent predator proceedings. Because the criminal and civil public trial rights arise from different sources, Motley's effort to reverse his trial on this point should be denied.

First, Motley lacks standing to assert that the public's right to access his trial was violated on appeal. Generally, a civil litigant does not

have standing to vindicate the constitutional rights of a third party, such as a right to a public trial. *Mearns v. Scharbach*, 103 Wn. App. 498, 511, 12 P.3d 1048 (2000). The U.S. Supreme Court has held that a plaintiff generally must assert his own legal rights and interests, and cannot rest his claim to relief on the legal rights or interest of third parties. *Worth v. Seldin*, 422 U.S. 490, 499, 95 S.Ct. 2197 (1975).

In order to establish standing and raise the rights of another, the litigant must show (1) the litigant has suffered an injury-in-fact, giving him a sufficiently concrete interest in the outcome of the disputed issue; (2) the litigant has a close relationship to the third party; *and* (3) there exists some hindrance to the third party's ability to protect his or her own interests. *United States v. De Gross*, 960 F.2d 1433, 1437 (9th Cir., 1992); *In re Wise*, 148 Wn. App. 425, 200 P.3d 266 (2009); *Ludwig v. Dep't of Retirement Sys.*, 131 Wn. App. 379, 385, 127 P.3d 781 (2006); *Mearns*, 103 Wn. App. at 512, 12 P.3d 1048 (2000); .

Here, Motley does not have standing to raise the public's constitutional right. Following the *Ludwig* analysis: Motley did not suffer an injury as a result of the informal chambers conference. Motley actually benefited from any informal chamber conference because it allowed the trial to proceed without dismissing the jury at the end of each witness to discuss potential jury questions. Moreover, Motley makes no

representation that he is asserting a violation on behalf of a particular member of the public and that that person cannot protect his/her own interest. Motley's interests on appeal are different than the interest of the public.

Second, Motley cannot forward this issue on appeal because he waived any public right that he might have by participating in any chambers proceedings. See *Momah*, 167 Wn.2d at 153 (applying invited error doctrine). Under RAP 2.5, Motley's argument should be foreclosed because it was not raised in the trial court. It is also error, if any, that Motley invited by participating, through counsel, in the conference. Motley cannot complain now when he remained silent before the trial court. *In re the Detention of Audett*, 158 Wash.2d 712, 725, 147 P.3d 982 (2006).

This court's opinion in *In re DFF*, 144 Wn.App. 214, 183 P.3d 302 (2008) cannot be read to confer standing on Motley to raise the Article I, Section 10, right of the public and the press to an open proceeding. The *DFF* decision addressed a facial challenge to the court closure requirements of MPR 1.3. In dicta, the *DFF* opinion states that "we note that DFF's right to challenge MPR 1.3's constitutionality is not contingent on her having challenged the closure in the trial court." 144 Wn. App. at 218. The opinion cites two criminal cases decided under the Sixth

Amendment and Article I, section 22 to support this proposition. This language from *DFF* does not foreclose the State's standing and waiver arguments.

First, the language is *dicta* and has no precedential value. There is no indication in the opinion that failure to object was a factual issue before the court in *DFF* or that the State challenged DFF's position on this basis.

Second, the DFF case is distinguishable. Unlike *DFF*, the State is challenging Motley's standing to raise rights that belong to the public and the press. Whereas an appellate court has discretion to consider an issue that was improperly preserved, there is no similar discretion to hear arguments from a party that lacks standing to raise the argument. Moreover, *DFF* involved a facial challenge to a court rule, rather than a supposed "closure" through a sidebar conference. The *DFF* court ruled MPR 1.3 unconstitutional because the rule "does not allow for *any* circumstances in which a trial judge" may perform a *Ishikawa* analysis. 144 Wn.2d at 226. In a facial challenge, the decision of the civil committee to acquiesce to the procedure does not raise the same concerns because the procedure is unconstitutional in all instances. Here, Motley waived any rights he had by choosing to participate in the sidebar without objection.

Finally, if the "no objection" passage from *DFP* applies, it was wrongly decided. As noted above, the open trial rights of criminal defendants derive from constitutional sources with no application to civil commitment respondents. Although it may be difficult for criminal defendant's to waive open trial rights through a failure to object, an SVP respondent has no such right to waive. The citation in *DFP* to the criminal case law on the objection/waiver issue is therefore wholly unpersuasive. Moreover, it conflicts with the case law cited above, which holds that criminal rights granted under the Sixth Amendment and Article I, Section 22 do not apply in civil commitment cases. The *DFP* decision does not appear to be aware of this issue and does not address the limited source of open trials in civil matters. The *DFP* decision also conflicts with the more recent authority in *State v. Momah*, 167 Wn.2d 140, 157, 217 P.3d 321 (2009), where the court applied the invited error doctrine to preclude reversal of Momah's conviction.

Motley's claim that the court violated his right to a public trial is without merit and should be dismissed. He cannot raise the public's right and he waived any objections.

B. Even Assuming The Criminal Cases Cited By Motley Applied, The Informal Chamber Conference In This Case Was A Preliminary Discussion Not A Substantive Proceeding That Rose To The Level That Violated The Open Administration Of Justice

Motley cites to a number of cases where a trial court in a criminal proceeding affirmatively closed the courtroom during business hours with court staff present to record proceedings. In contrast, the informal chamber conference at issue here is not a "proceeding" that implicates the public trial right. In the cases cited in Motley's brief, all or part of an important substantive criminal proceeding was shielded from public view.² In this case, at most, informal conversations occurred in chambers between the court and the lawyers. The informal chamber conference does not qualify as "proceedings" or "hearings" that can fairly be characterized as part of Motley's trial. Such matters do not trigger analysis under *Bone-Club*, nor should *Bone-Club* be extended to cover every off-the-record conversation between attorneys and judges.

In similar contexts, the Washington Supreme Court has recognized that sidebars and the like are not truly trial 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), the

² *Bone-Club* (pretrial testimony); *Orange*, (voir dire); *Brightman* (voir dire); *Easterling* (pretrial hearing); *Strode* (voir dire of selected jurors); *Momah* (voir dire of selected jurors).

supreme 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 for funds to get Lord a haircut and clothing for trial, 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. It also considered whether Lord 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.*

The Supreme Court held that Lord had a right to be present at none of these purely legal discussions between the court and counsel.

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 fullness 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.

Similarly, in *In re Personal Restraint of Pirtle*, 136 Wn.2d 467, 484, 965 P.2d 593 (1998), the court held that the defendant need not be present for discussions about the wording of jury instructions, ministerial matters, and whether the jury should be sequestered. In *Pirtle* the court held that, although the defendant should have been present for a hearing where juror misconduct was discussed, his absence was immaterial where the motion was later argued and decided in his presence. *Pirtle*, 136 Wn.2d at 484.

More recently, in *In re Woods*, 154 Wn.2d 400, 432, 114 P.3d 607 (2005), the Supreme Court rejected an argument that the defendant "was denied his right to a public trial and to due process because certain proceedings were held in chambers and at sidebar without him being present." The court noted that in-chambers and sidebar conferences typically are permitted without the presence of the defendant. *Id.*

Decisions from the Court of Appeals are similar. In a recent criminal case, the court 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. . . . A defendant does not, however, have a right to a public hearing on

purely ministerial or legal issues that do not require the resolution of disputed facts.

State v. Sadler, 147 Wn. App. 97, 114, 193 P.3d 1108 (2008) (citations and internal quotations omitted). In *State v. Rivera*, 108 Wn. App. 645, 32 P.3d 292 (2001), the court held that the defendant had no right to be present at a chambers conference where jurors complained about the hygiene of another juror, because the matter was purely ministerial. In *State v. Bremer*, 98 Wn. App. 832, 835, 991 P.2d 118 (2000), the court held that a defendant had no right to be present at a chambers conference between the court and counsel regarding proposed jury instructions because the inquiry was legal and did not involve resolution of questions of fact. In *State v. Walker*, 13 Wn. App. 545, 536 P.2d 657 (1975), the court held that *Walker* had a right to be present at a post-trial motion to determine his competency because factual matters were determined. However, the court also noted that the defendant “need not be present during deliberations between court and counsel or during arguments on questions of law.” *Walker*, 13 Wn. App. at 557 (cited with approval in *Lord*, 123 Wn.2d at 306 n.3).

Finally, the Framers never believed that the open administration of justice required that every judicial act be performed in a public courtroom. Rather, it has always been understood that some judicial business could occur in chambers without violating the principle that justice be

administered openly. For example, when the state constitution was adopted, it was understood that judges "at chambers" had broad powers to entertain, try, hear and determine all actions, causes, motions, demurrers, and other matters not requiring a trial by jury, all of which could occur in the judge's chambers. *Peterson v. Dillon*, 27 Wash. 78, 84, 67 P. 397 (1901) (citing Section 2138, Code of 1881 -- legislature had power to authorize counties to have commissioner who exercise duties of judge at chambers). See also *Meisenheimer v. Meisenheimer*, 55 Wash. 32, 42-43, 104 P. 159 (1909) (order is valid even though judge exercised authority in chambers rather than in open courtroom).

The informal chambers discussions at issue in this case are similar to the cases discussed above. Such conferences are helpful to the administration of justice because they allow court's to streamline the issues that are necessary for a public hearing.

It should also be noted that Motley's attorneys never objected to any the informal chamber conference and were given the opportunity not to participate. When a criminal defendant, who has a fundamental right to a public trial (unlike a civil litigant), fails to object to a discretionary courtroom closure, the issue need not be reviewed on appeal. *State v. Collins*, 50 Wn.2d 740, 314 P.2d 660 (1957). In *State v. Collins*, the trial court locked the courtroom door to prevent spectators' filing in and out of

the courtroom during closing arguments from disrupting the jury. *Collins*, 50 Wn.2d at 746. People in the courtroom were permitted to remain but those outside could not enter. *Id.* Collins did not object at trial but on appeal he claimed a violation of article 1, section 10 of the state constitution. *Id.*

The Washington Supreme Court refused to consider Collins' 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. *Collins*, 50 Wn.2d 747-48. 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. 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 (bold added).

So, too, any ruling "closing" the proceedings in this case -- if such a ruling had ever been made -- would have been discretionary and, thus, an objection was needed to preserve a claim of error. Even in criminal proceedings, had the issue been raised, the trial judge could have exercised discretion in balancing five factors to determine whether a chambers conference jeopardized the public trial right, and whether a closure analysis was needed. Thus, under *Collins*, a simple failure to object and /or to seek a discretionary ruling from the trial court bars the claim on appeal.

Other decisions of the Washington Supreme Court can be reconciled with *Collins*. In all other open courtroom decisions by the court in criminal proceedings, the courtroom closure reviewed on appeal clearly violated the right to public trial. In *State v. Marsh*, 126 Wash. 142, 145, 217 P. 705 (1923), the superior court tried an adult as if he were a juvenile,

closing the entire proceeding and failing to provide counsel. In *State v. Bone-Club*, 128 Wn.2d 254, 256-57, 906 P.2d (1995), the trial court summarily granted the State's request to clear the courtroom for the pretrial testimony of an undercover detective. In *State v. Brightman*, 155 Wn.2d 506, 511, 122 P.3d 150 (2005) the trial court ordered -- sua sponte -- that the courtroom be closed for the entire 2 ½ days of voir dire, excluding the defendant's family and friends. Likewise, in *In re Pers. Restraint of Orange*, 152 Wn.2d 795, 100 P.3d 291 (2004), the trial court summarily ordered the defendant's family and friends excluded from *all* voir dire proceedings. And, in *State v. Easterling*, 157 Wn.2d 167, 172-73, 137 P.3d 825 (2006), the trial court ordered the defendant and his attorney excluded from pretrial motions regarding the co-defendant.

All of these cases were criminal proceedings and not civil. Only a criminal defendant has a fundamental right to a public trial. In each of these cases, the constitutional violation was clear because there was no colorable basis upon which to close the courtroom. The errors in these cases were "manifest" and would have been reviewable under *Collins*, even absent an objection in the trial court. *Collins* has never been abrogated.³ Nor has it been established that *Collins* should be overruled because it is incorrect and harmful. *In re Rights to Waters of Stranger*

³ Despite being cited and argued by the State, *Collins* was not cited or discussed

Creek, 77 Wn.2d 649, 653, 466 P.2d 508 (1970). For these reasons, even if Motley has standing to assert a violation, or has the right of a criminal defendant in these proceedings, this Court should hold that Motley, like Collins, failed to preserve a claim of error as to the trial court's discretionary ruling.

C. **Even If The Court Finds Motley Has A Fundamental Right To An Open Trial In SVP Cases, The Court Closure Was De Minimis And Did Not Infringe Upon His Constitutional Rights**

Even if this court finds that Motley has standing or has the rights of a criminal defendant who somehow preserved his claim of error, and that the court actually closed court to the public, the closure was for such a short period of time it was too trivial to cause a constitutional deprivation. When this occurs the error may be considered de minimis. *State v. Easterling*, 157 Wn.2d 167, 181-182, 183-185, 137 P.3d 825 (2006).

A brief court closure whether intentional or inadvertent is deemed de minimis when weighing the closure against the values advanced by the right. *Easterling* at 184. The court should ask whether the closure implicates any of values advanced by the public trial guarantee: 1) to ensure a fair trial; 2) remind the prosecutor and judge of their responsibility to the accused and the importance of their functions; 3) to encourage witnesses to come forward; 4) to discourage perjury. *Carson v.*

in the recent Momah or Strode opinions.

Fischer, 421 F.3d 83, 92 (2d Cir. 2005). The Supreme Court has determined that this analysis will safeguard the right at stake without requiring a new trial where these values have not been infringed by trivial closure.

Under this analysis the courts have found that an inadvertent courtroom closure of 30 to 40 minutes when the defendant took the stand was considered trivial because most of the defendant's testimony that was relevant was repeated in summation. *Peterson v. Williams*, 85 F.3d 39, 42 (2d Cir. 1996). A deputy sheriff's erroneous closure of a court room during summation to keep the courtroom quiet was only for a short portion of the trial was deemed trivial. *Snyder v. Coiner*, 365 F.Supp. 321 (N.D.W. Va. 1973).

Even deliberate closure has been found to be de minimis. A court's exclusion of a defendant's mother-in-law from the courtroom during the testimony of a confidential informant was deemed trivial. *Carson v. Fischer*, 421 F.3d 83, 92 (2d Cir. 2005). A trial court's exclusion of spectators from courtroom during the questioning of a jury about safety concerns was considered de minimis. *State's v. Ivester*, 316 F.3d 955, 906 (9th Cir. 2003).

In this case, any informal chambers conference with both parties was trivial at best and did not touch upon Motley's alleged right to a

public trial. Even if considered a "closure,"⁴ it was for a short period of time, no testimony was taken, the discussions were likely placed on the record in open court during later sessions, and the court heard argument from both parties. Clearly, no values upon which public trial is based were infringed upon.

For these reasons, this Court should hold even if Motley has a fundamental right to an open trial in SVP cases, an informal chambers conference was de minimis and did not infringe upon Motley's constitutional rights. The sound and efficient administration of justice is supported by the use of sidebar conferences. Here, the fact that the conference was held just inside the chamber door was of little moment because the purpose was to shield the jury from the conversation. Absence a theoretical "cone of silence," a closed door is the best way to ensure that the court's discussions with counsel are not overheard by the jury. Motley benefited from this procedure and cannot now complain.

V. THERE WAS NO INSTRUCTIONAL ERROR

Motley offers an overly pedantic reading of the court's instructions to claim that the defense case was not considered by the jury. Motley claims that Instruction No. 7, which was based on the prior WPIC, somehow "prevented Motley from presenting a complete defense to the

⁴ There is no indication on the record that the court would have excluded others

allegations against him." Opening Brief at 18. Motley claims that the instruction prevented the jury from considering any of the defense evidence. There is no indication in the record, however, that the instruction was read or argued in this manner.⁵

**A. THE INVITED ERROR DOCTRINE PRECLUDES
MOTLEY'S CHALLENGE TO INSTRUCTION
NUMBER 7**

As an initial matter, Motley acknowledges that he failed to object to Instruction No. 7 (CP 190), which he now challenges. Opening Brief at 27. However, Motley's actions went beyond a mere failure to object. He accepted the court's final court instructions that contained the language he now challenges. VRP 1305. He cannot challenge error that his actions invited below.

First, the rules applicable to civil cases preclude a party from challenging a jury instruction for the first time on appeal. It is well established that RCW 71.09 proceedings are civil in nature and subject to the rules of civil procedure. *In re Detention of Young*, 163 Wash.2d 684,

from this conference if anyone had wished to attend.

⁵ Indeed, the best indication that the instruction was not read in this pedantic manner is the fact of Motley's commitment. If the jury had read the instruction to exclude all but a narrow class of evidence, it also would have disregarded most of the State's case and Motley would have been released. The court is not required to presume that the jury read the instructions in the most narrow and absurd manner possible.

689, 185 P.3d 1180, 1183 (2008). Because this is a civil case, a claim of instructional error cannot be raised for the first time on appeal:

CR 51(f) requires the party objecting to an instruction to "state distinctly the matter to which he objects and the grounds of his objection, ..." The purpose of this rule is "to clarify ... the exact points of law and reasons upon which counsel argues the court is committing error about a particular instruction." *Stewart v. State*, 92 Wash.2d 285, 298, 597 P.2d 101 (1979). "The pertinent inquiry on review is whether the exception was sufficient to apprise the trial judge of the nature and substance of the objection." *Crossen v. Skagit Cy.*, 100 Wash.2d 355, 358, 669 P.2d 1244 (1983). If an exception is inadequate to apprise the judge of certain points of law, " 'those points will not be considered on appeal.' " *Crossen* at 359, 669 P.2d 1244 (quoting *Stewart*, 92 Wash.2d at 298, 597 P.2d 101).

Walker v. State, 121 Wash.2d 214, 217, 848 P.2d 721, 723 (1993).

Because Motley failed to lodge any objection to this instruction, it would be error on appeal to consider his claim that the jury should have been instructed on unanimity. *Id.* ("This court therefore will not consider Ms. Walker's contention that instruction 18 misstated the law, nor should the Court of Appeals have done so.").

A second independent means for refusing to address Motley's new claim of instructional error is found in RAP 2.5 (a). This rule of appellate procedure provides that "the appellate court may refuse to review any claim of error not raised in the trial court." The basic policy behind this rule is simple: a litigant cannot remain silent as to claimed error during trial and later, for the first time, urge objections thereto on appeal.

State v. Guloy, 104 Wash.2d 412, 421, 705 P.2d 1182 (1985), *cert. denied*, 475 U.S. 1020, 106 S. Ct 1208, 89 L. Ed. 2d 321 (1986).

Finally, the court should refuse to review this issue under the invited error doctrine. When a defendant has proposed the instruction he now claims to be defective, the doctrine of invited error precludes review. *State v. Henderson*, 114 Wash.2d 867, 868, 792 P.2d 514 (1990). The invited error doctrine applies even where an alleged error is of constitutional magnitude. *Henderson*, 114 Wash.2d at 871, 792 P.2d 514 (quoting *State v. Alger*, 31 Wash.App. 244, 249, 640 P.2d 44, *review denied*, 97 Wash.2d 1018 (1982)).

Here, Motley has not preserved his current claim of error and invited any error by both proposing the instruction and accepting the court's final instruction with the challenged language. The Washington Supreme Court has applied preservation of error doctrine to sexually violent predator cases because, among other reasons:

[O]pposing parties should have an opportunity at trial to respond to possible claims of error, and to shape their cases to issues and theories, at the trial level, rather than facing newly-asserted errors or new theories and issues for the first time on appeal.

In re the Detention of Audett, 158 Wash.2d 712, 725, 147 P.3d 982 (2006) (citing 2A Karl B. Teglund, *Washington Practice: Rules Practice RAP* 2.5(1), at 192 (6th ed. 2004)). This court should not allow Motley to take

opposing positions on the instruction before the trial court and before this court. Any error was clearly invited.

B. INSTRUCTION NO. 7 WAS NOT ERRONEOUS

Even if preserved, Motley fails to demonstrate error. Jury instructions are sufficient when they allow parties to argue their case theories, do not mislead the jury, and, when taken as a whole, properly inform the jury of the law to be applied. *Cox v. Spangler*, 141 Wn.2d 431, 442, 5 P.3d 1265 (2000). Whether an instruction which accurately states the law should not be given to avoid confusion is a matter within the trial court's discretion, not to be disturbed absent abuse.

Griffin v. West RS, Inc., 143 Wn.2d 81, 91, 18 P.3d 558 (2001) citing *Douglas v. Freeman*, 117 Wn.2d 242, 256-57, 814 P.2d 1160 (1991).

Even if an instruction is misleading, the party asserting error still bears the burden to establish consequential prejudice. *Goodman v. Boeing Co.*, 75 Wn. App. 60, 68, 877 P.2d 703 (1994), *aff'd*, 127 Wn.2d 401, 899 P.2d 1265 (1995). *See also Keller v. City of Spokane*, 146 Wn.2d 237, 249, 44 P.3d 845 (2002).

Motley offers an overly literal reading of Instruction No. 7.

Despite Instruction Number One, which requires the jury to consider all the evidence, CP 181, Motley claims that the jury read Instruction No. 7 to exclude relevant evidence on risk. Read in this pedantic manner, the

instruction would allow the jury to evaluate risk considering only the SVP respondent's placement conditions and voluntary treatment options. CP 190. If Motley is correct in this narrow reading, then he has no ground to complain because the jury would have no means to consider the State's evidence and would limit its consideration to the SVP respondent's placement evidence. It is entirely unlikely that the jury read the instruction in this overly narrow manner, especially when both sides argued the correct meaning in closing arguments and the jury committed Motley after considering the State's broader evidence. *See* VRP 1343 *et seq.* (closing arguments).

As given by the court, Instruction No. 7 mirror's the statutory language in RCW 71.09.060(1):

In determining whether or not the person would be likely to engage in predatory acts of sexual violence if not confined in a secure facility, *the fact finder may consider only placement conditions and voluntary treatment options that would exist for the person if unconditionally released from detention on the sexually violent predator petition.*

(Emphasis added). An instruction which follows the words of a statute is proper unless the statutory language is not reasonably clear or is misleading. *Borromeo v. Shea*, 138 Wn. App. 290, 294, 156 P.3d 946 (2007).

The placement of “only” in both the former pattern instruction and the current statute is reasonably read as limiting the fact finder to consider

placement conditions and voluntary treatment options only if they would really exist in the community rather than directing the fact finder to ignore all other evidence in deciding whether the defendant is likely to engage in predatory acts. Certainly, Instruction Number One supports this notion by requiring jurors to decide the case "based upon the evidence presented to you during this trial." CP 181.

Although the revised version of WPI 365.14 provides a clearer statement of the law, the prior version was not in error. Indeed, the amendment was preventative to avoid a situation where a party might argue that the instruction should be read to eliminate the evidence. In comments to the amendment, it is noted that the prior version could be error, but only if incorrectly interpreted:

The original version of this instruction, published in 2004, has since been revised. **The original version could have been interpreted as permitting the jury to consider only placement conditions and voluntary treatment options when determining whether the respondent is likely to engage in predatory acts of sexual violence if not confined to a secure facility, even if other evidence relevant to the question has been admitted.** The current instruction makes clear that the jury is not prohibited from considering such evidence when it has been admitted by the trial court.

WPIC 365.14 (emphasis added). Importantly, the comment does not condemn the prior version as a misstatement of the law or label the prior version as misleading.

Although the old version of WPIC 365.14 was arguably subject to misinterpretation, there is no indication that it was misinterpreted in the current case. The closing arguments offered by both sides did not misinterpret the instruction. VRP 1343 *et seq.* To the contrary, both sides noted all the relevant evidence in urging the jury on the risk element. There is no hint in the record that either party tried to convince the jury to ignore any of the evidence beyond placement conditions and treatment options. Both parties vigorously emphasized the testimony of the experts and Motley's existing placement conditions. Other instructions clearly direct the jury to consider all of the evidence. Rather than presuming that the jury rejected the other instructions, it is reasonable to presume that they read and applied the instructions as a whole.

Motley also fails to demonstrate a reasonable possibility that the outcome of the trial would have been different if the current version of the WPIC instruction had been given. *See Goodman v. Boeing Co.*, 75 Wash.App. 60, 68, 877 P.2d 703 (1994) (error must be prejudicial). The prior version of the WPIC instruction given by the trial court does not misstate the law. The jury was clearly instructed on the elements required to be proven beyond a reasonable doubt from all of the evidence. The instructions read as a whole clearly direct the jurors to consider all of the evidence admitted at trial.

Both counsel argued the impact of all the evidence on the question whether Motley was “likely to engage in predatory acts of sexual violence if not confined in a secure facility” focusing primarily upon evidence other than conditions of placement and voluntary treatment options. No one offered any direct or implied argument that the jury was restricted to evidence of placement conditions and voluntary treatment options. Motley's attorney was clearly able to argue his theory of the case under the instructions given by the court.

VII. CONCLUSION

For the foregoing reasons, the jury's decision and the Order of Commitment should be affirmed.

DATED this 9th day of June 2010.

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