

64026-7

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No. 64026-7-I
Consolidated with 64148-4-I

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

STATE OF WASHINGTON,

Respondent,

v.

JAMES LOCKREM SR.,

Appellant.

ON APPEAL FROM THE SUPERIOR COURT OF
THE STATE OF WASHINGTON FOR WHATCOM COUNTY

The Honorable Charles R. Snyder

REPLY BRIEF OF APPELLANT

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A. ARGUMENT

1. THE TRIAL COURT CLOSED THE COURTROOM WITHOUT COMPLYING WITH THE *BONE-CLUB* FACTORS

a. The courtroom was closed to the public. In its response brief, the State argues the courtroom was never closed; that the members of the jury who were not being questioned were the only people excluded from the courtroom. Brief of Respondent at 15-18. The State is incorrect in that the courtroom was indeed closed to the public during the individual *voir dire*.

At the very beginning of *voir dire*, the court noted that it would be questioning individual jurors in private and made the following announcement in open court:

The first thing I have to ask is there anyone in this courtroom that has any objection whatsoever to the court conducting questions with counsel, and their clients, conducting questions of these jurors *outside the presence of the public and the remainder of the jury panel?*

6/1/2009(voir dire)RP 3 (emphasis added). Later, in doing its *post hoc Bone-Club* analysis, the court again stated:

The process we've gone through just now was to *essentially close the courtroom* and inquire of this group of jurors individually.

6/1/2009(voir dire)RP 72-73 (emphasis added). Thus, contrary to the State's protestations, the trial court acknowledged it had closed the courtroom to the public for the individual *voir dire*. The State's argument that the trial court never closed the courtroom must be rejected as simply wrong.

b. Senior¹ did not invite or waive the error. The State argues that Senior invited the error by urging the trial court to engage in individual *voir dire*. Brief of Respondent at 18-24. While the State is correct that Senior did seek individual *voir dire*, Senior was very careful to urge the court to do so only *after* the court had engaged in the required *Bone-Club*² analysis. 5/26/2009RP 31-32 ("If there are people in the court who object, but I would say that the *Bone-club* analysis has been looked at by the court and there are ways to do that.").

In addition, the trial court has an *independent duty* to protect both the defendant's right to a public trial and the public's right to open access to the courtroom. *Presley v. Georgia*, ___ U.S. ___,

¹ Mr. Lockrem, Sr. will use the same designation as the State in order to avoid confusion between Mr. Lockrem, Sr., and Mr. Lockrem, Jr. in this consolidated appeal. As the State notes, the designation is made without any disrespect to Mr. Lockrem, Sr., or Mr. Lockrem, Jr.

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

130 S.Ct. 721, 725, 175 L.Ed.2d 675 (2010). As a result, where the trial court does not *sua sponte* consider reasonable alternatives and make the *Bone-Club* findings, the court has erred and reversal is warranted. *Id.*; *State v. Paumier*, 155 Wn.App. 673, 684-85, 230 P.3d 212, *review granted*, 169 Wn.2d 1017 (2010).

Thus, even assuming the trial court merely acquiesced to the parties' request for individual *voir dire*, the court had an *independent duty*, irrespective of the parties, to engage in the *Bone-Club* analysis.³ Its failure was error was must result in the reversal of Senior's conviction.

Further, merely engaging in the questioning during private *voir dire* does not either invite the error or waive any challenge to it. *State v. Strode*, 167 Wn.2d 222, 223-24, 217 P.3d 310 (2010).

c. The trial court had an independent duty to ensure the public's right to the open administration of justice which Senior may raise. The State contends Senior does not have standing to challenge a violation of the public's right to open administration of justice. Brief of Respondent at 24-27. The State's argument

³ Given this expression by the United States Supreme Court of the trial court's *independent* duty to engage in the analysis, it calls into question the *Momah* invited error analysis. *Presley* seems to stand for the proposition that the defendant may invite the Sixth Amendment right to a public trial, but the defendant cannot invite the First Amendment right of the public to open access to the courts. *Presley*, 130 S.Ct. at 725.

should be rejected because it flies in the face of decisions from the Washington Supreme Court.

In *State v. Easterling*, the Supreme Court addressed the failure to engage in the *Bone-Club* analysis under both the defendant's right to a public trial and the public's right to an open courtroom. 157 Wn.2d 167, 176-80, 137 P.3d 825 (2006). The Court noted that the trial court has an independent duty to ensure the public's right is enforced, thus placing the burden irrespective of any actions by the parties on the trial court. *Id.* at *The Easterling* decision makes no sense unless the defendant could raise the public's right to an open courtroom and the trial court's failure to engage in its independent duty to protect that right.

Similarly, in *State v. Momah*, the Court again analyzed the issue under both the defendant's right to a public trial and the public's right to an open courtroom. 167 Wn.2d 140, 147-48, 217 P.3d 321 (2009). *See also Strode*, 167 Wn.2d at 225-27. Again, these decisions make no sense unless the defendant could raise the public's constitutional right an open proceeding. Otherwise the Court's analysis under the public's right to open access is irrelevant.

Regardless of the public's right to open access of justice, the closed courtroom violated Senior's right to a public trial. See U.S. Const. amend. VI; Wash. Const. art. I, sec. 22; *Bone-Club*, 128 Wn.2d at 258-59. Thus, Senior's constitutional right to a public trial provides an alternative and adequate basis for reversing his conviction.

d. The remedy for a violation is to reverse the conviction and remand for a new trial. The State relies upon the decision in *State v. Momah*, 167 Wn.2d 140, 150-51, 217 P.3d 321 (2009), *cert denied*, 131 S.Ct. 160 (2010), for the proposition that an improper courtroom closure is not a structural error requiring automatic reversal. Brief of Respondent at 27-29. While it appears unclear from the *Momah* decision what the appropriate remedy for a *Bone-Club* violation should be, it is irrelevant because the United States Supreme Court in *Presley*, ruled the remedy is reversal of the defendant's conviction. 130 S.Ct. at 725. See also *Paumier*, 155 Wn.App. at 683-85. Further, the Washington Supreme Court has ruled the remedy for the violation is reversal and remand for a new trial. *Easterling*, 157 Wn.2d at 179-80.

As a result, Mr. Lockrem, Sr. is entitled to reversal of his conviction and remand for a new trial.

2. THE PROSECUTOR'S STATEMENT DURING CLOSING ARGUMENT COMPARING THE LOCKREMS' ACTIONS TO A "PACK OF WOLVES" VIOLATED SENIOR'S RIGHT TO A FAIR TRIAL

While conceding the prosecutor's comment at trial that the Lockrems' actions were akin to a "pack of wolves" was "improper," the State contends the remark was part of its "blood is thicker than water" theme and was a lone comment. Brief of Respondent at 29-35. Contrary to this argument, the remark was extremely degrading and prejudicial to Senior and played to the passions and prejudice of the jury.

A prosecutor's "deliberate appeal to the jury's passion and prejudice" constitutes prosecutorial misconduct. *State v. Belgarde*, 110 Wn.2d 504, 507-08, 755 P.2d 174 (1988). The prosecutor's improper comment was one of the last remarks the prosecutor made in his closing argument. This comment no doubt stuck with the jurors given the fact the three family members were alleged to have all attempted to assault the single deputy.

The State argues that this error is similar to the error in *State v. Barajas*, 143 Wn.App. 24, 177 P.3d 106 (2007), *review denied*, 164 Wn.2d 1022 (2008), which did not reverse a conviction for a similar type argument. *Barajas* differs significantly from Senior's

case. The issue in *Barajas* was premeditation in an attempted first degree murder trial. It makes sense that a passing derogatory remark would be seen as merely a passing reference where the issue concerned the attempted killing of an individual. The same is not true here where the Lockrems' were being tried for assaulting a police officer, a far less serious matter.

Further, in *Barajas*, defense counsel repeated the reference during closing argument and Mr. Barajas did not object to the prosecutor's original remark. *Barajas*, 143 Wn.App. at 39-41. Here, the defense objected to the remark and moved for a mistrial stressing the impropriety of the remark and its resulting prejudice to the Lockrems.

As argued previously by Senior, here, although the prosecutor's argument was not as extensive as that in *State v. Rivers*, 96 Wn.App. 672, 981 P.2d 16 (1999), nevertheless, the impact on the jury and the resulting prejudice to Mr. Lockrem Sr. was the same. The case in *Rivers* rested on the relative credibility of the witnesses. Further, as in *Rivers*, the prosecutor did not focus his arguments on the elements of the offense and the State's burden of proof, but instead resorted to an argument designed to inflame the passion of the jury.

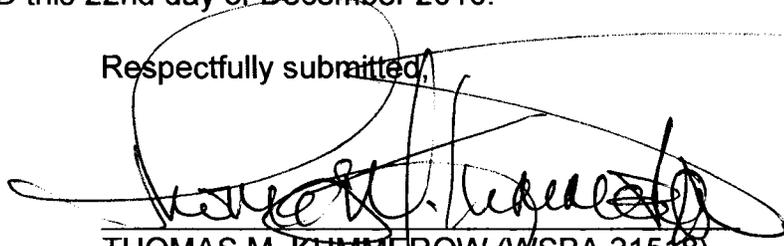
Mr. Lockrem is entitled to have his convictions reversed.

B. CONCLUSION

For the reasons stated in the instant reply brief as well as the previously filed Brief of Appellant, Mr. Lockrem Sr. submits this Court must reverse his conviction and remand for a new trial.

DATED this 22nd day of December 2010.

Respectfully submitted,

A handwritten signature in black ink, appearing to read "Thomas M. Kummerow", is written over a horizontal line. The signature is stylized and somewhat cursive.

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DIVISION ONE**

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 v.)
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 APPELLANT.)

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I, MARIA ARRANZA RILEY, STATE THAT ON THE 23RD DAY OF DECEMBER, 2010, I CAUSED THE ORIGINAL **REPLY BRIEF OF APPELLANT** TO BE FILED IN THE **COURT OF APPEALS - DIVISION ONE** AND A TRUE COPY OF THE SAME TO BE SERVED ON THE FOLLOWING IN THE MANNER INDICATED BELOW:

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