

64509-9

64509-9

NO. 64509-9-I

COURT OF APPEALS OF THE STATE OF WASHINGTON

DIVISION I

STATE OF WASHINGTON,

Respondent,

v.

ADAM BRICK,

Appellant.

APPEAL FROM THE SUPERIOR COURT FOR KING COUNTY

THE HONORABLE THERESA DOYLE

BRIEF OF RESPONDENT

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A. ISSUES PRESENTED

1. Whether the trial court properly exercised its discretion in allowing the fearful child victim in this sexual assault case to hold a toy during her testimony, without an evidentiary hearing on the necessity for that support, where the only objection raise by Brick was that it was prejudicial.

2. Whether Brick's claim that the prosecutor committed misconduct by planning or allowing the child victim to hold a toy during her testimony is entirely without factual support in the record, which does not reflect that the prosecutor was even aware of the toy until the victim entered the courtroom with it, and where the trial court found no impropriety in the child holding the toy.

3. Whether the jury instructions adequately conveyed the necessity for unanimity, through use of an instruction specifically approved by this Court.

4. Whether Brick has failed to establish the absence of his agreement or the absence of required findings before the sealing of juror questionnaires relating to sexual abuse.

5. Whether Brick has failed to establish that sealing of juror questionnaires upon completion of the trial is a violation of the

right to an open or public trial that constitutes structural error infecting the entire trial.

B. STATEMENT OF THE CASE

1. PROCEDURAL FACTS

The defendant, Adam Brick, was charged with three counts of rape of a child in the first degree. CP 7-8. Brick was tried in King County Superior Court, the Honorable Theresa Doyle presiding.¹ 1RP 1.² A jury found Brick guilty as charged. CP 67; 11RP 2. The court sentenced Brick to an indeterminate sentence with a minimum term of 216 months in prison, which was the high end of the standard range sentence, and a maximum term of life. CP 67-72; 11RP 14.

¹ The title pages of the trial transcripts of September 29, 2009, and October 8, 2009, refer to another judge - this obviously is in error.

² The verbatim report of proceedings will be referred to in this brief as follows: 1RP - September 28, 2009; 2RP - September 29, 2009; 3RP - October 6, 2009; 4RP - October 7, 2009; 5RP - October 8, 2009; 6RP - October 13, 2009; 7RP - October 14, 2009; 8RP - October 15, 2009; 9RP - October 19, 2009; 10RP - October 20, 2009; 11RP - November 20, 2009. The title pages of transcripts 6RP and 7RP incorrectly state the year as 2008.

2. SUBSTANTIVE FACTS

Brick was the biological father of MW.³ 4RP 87. He moved in with MW and her mother when MW was six years old, in the fall of 2004. 4RP 92-93. Brick became the primary caregiver for MW because he was not working and MW's mother worked very long hours. 4RP 101-02.

Within a month, Brick no longer slept in the bedroom with MW's mother; instead he slept in MW's bedroom, and MW shared her bed with him. 4RP 95-98; 5RP 16-17. Brick was 28 years old when he moved in, over six feet tall and over 250 pounds. 4RP 37; 8RP 77.

Before long, Brick began inflicting cruel physical punishment on MW. 5RP 9-17. Ben Brick, Brick's brother, saw Brick repeatedly physically punish MW inappropriately, including slapping, shaking, spanking and squeezing her. 7RP 109. Ben Brick told his brother to stop, but Adam Brick did not stop the punishment. 5RP 14; 7RP 110.

³ The victim's initials are used in the interest of her privacy.

Brick told MW that if she told anyone about the punishment, he would come back and "get" her. 10RP 15. MW was afraid of Brick and afraid to tell anyone about the abuse. 5RP 11, 14-15.

MW did report to adults in her family that Brick put her in a very cold shower as punishment, and eventually disclosed that he also put her in a cold bath and held her head under water; he made her do wall squats and kicked her when she became exhausted; he punched her; and he made her lay outside on a small balcony in the cold with little or no clothing. 3RP 17, 25-26; 4RP 124-30; 8RP 31-32, 36-38.

In April 2007, when MW revealed the extent of this punishment to her grandmother and her mother, MW's mother forced Brick to move out of the apartment. 3RP 22; 4RP 127-33. MW began counseling with Seth Ellner at this time. 8RP 25.

Within weeks, MW began revealing to Ellner that Brick also had been sexually abusing her. 8RP 35-37. She reported that Brick kissed her with his tongue in her mouth and touched her private parts with his hand. 8RP 37. MW had previously revealed Brick's sexual kissing to Ben Brick, apparently saying it happened without thinking when they saw an adult couple kissing on television. 7RP 89-90. MW immediately looked worried and would

not repeat what she had said--Ben Brick did not want to believe it and did not confront Brick. 7RP 90-91.

On May 23, 2007, eight-year-old MW reported to Ellner that Brick sometimes made her sleep naked with him, and whenever he did, he put his finger in her privates, pointing to her vaginal area. 8RP 40-42. Brick would force MW to rub his penis with her hands and to put her mouth on his penis; after awhile it got wet and gross and sometimes she threw up. 8RP 42. MW revealed that sometimes Brick made her roll over and tried to put his penis in her butt and, though she resisted, he was too strong. 8RP 42. Brick told MW that this was her fault. 8RP 42.

MW's grandmother heard MW tell Ellner that Brick would put his fingers "down there" and it hurt "really bad." 4RP 13. MW later privately told her grandmother that Brick also would put his "thing" inside her, all the way, and it hurt. 4RP 14. The next week, she told her grandmother that when Brick put his thing inside her, she bled and wiped herself in the bathroom. 4RP 17-18. MW said "stuff" came out the end of it, sometimes hitting her in the hair or face. 4RP 18. Brick also made her put her mouth on his penis and suck it. 4RP 18. MW was ashamed. 4RP 18.

On May 30, 2007, MW had a videotaped interview with a child interview specialist. 6RP 78; 7RP 24, 31, 35. That recording was played for the jury. 6RP 80, 95;10RP. During that interview, MW disclosed that Brick would put his private area "right into mine." 10RP 16. She said:

he would put it way tight where it would hurt really bad. And when he'd take it out, it would be bleeding.

10RP 16. He moved it around inside her. 10RP 23. MW described that when Brick did this, sometimes his penis would "slobber" or "squirt" on her legs, tummy or face. 10RP 17, 23-24, 41-42. After Brick was done, he would take off the covers and put on a new sheet so MW's mother would not know anything had happened. 10RP 19.

During this interview, MW stated that this sexual abuse began when she was five or six years old and Brick's penis had been in her private at least four or five times. 10RP 21-22. Brick also forced MW to touch his penis and testicles with her hand. 10RP 30-31. MW described Brick also penetrating her from behind with his penis. 10RP 37.

Later the same day as that videotaped interview, MW had a physical examination at Harborview Medical Center. 7RP 24, 31,

35. MW told the doctor that her father would put his private "into mine" and after he pulled it out, it was all red. 7RP 32. She again described her father replacing the sheets so her mother would not know. 7RP 32.

In both interviews on May 30th, MW described that sometimes Brick's penis had unusual colors and markings. 7RP 34; 10RP 25-27. Asked if he might have put something on his penis, MW said that maybe there was some plastic. 7RP 34. The prosecutor in closing argued that this was a description of condoms. 9RP 36.

The doctor observed an abnormality of MW's hymen but could not determine the cause of that abnormality. 7RP 41-48. It was consistent with penetration. 7RP 45-47.

Ben Brick, the defendant's brother, had twice visited MW's home and saw MW naked with Adam Brick in their bedroom in the mid-afternoon. 7RP 92-98. About a dozen other times when Ben Brick came over, MW was crying in the back room. 7RP 101-02.

After Brick moved out, Ben Brick collected Brick's belongings, and police recovered a towel with apparent staining from that property. 7RP 103-04, 136-44. DNA analysis identified sperm found on the towel as Brick's and identified other DNA on the

towel as a mixture consistent with both Brick and MW as possible contributors. 5RP 81-88.

As MW thought about going to court in the fall of 2007, she told Ellner that she was scared of Brick and that she would not say what happened if he was there because he said he would do awful things to her. 8RP 50. In early 2009, when she thought she had to go to court, MW briefly denied the sexual abuse to her mother, then cried and said it had happened but she was afraid to see Brick in court. 4RP 156-58.

MW described the physical abuse by Brick in her testimony at trial. 5RP 9-12, 54-58. She described Brick getting on top of her in bed and him moving, and she described bleeding, she was pretty sure from the front part of her privates. 5RP 18-25. MW said that it hurt really bad. 5RP 23. She said that it happened the same way every time and that Brick touched his private to her privates every night. 5RP 32-33. MW denied that her father's private went inside her or that anything came out of it. 5RP 27, 30, 33. She explained that Brick told her not to tell about abuse and she was afraid to do so. 5RP 11, 15, 31-32. She said that she was afraid of Brick. 5RP 40-41.

C. ARGUMENT

1. THE TRIAL COURT PROPERLY EXERCISED ITS DISCRETION IN ALLOWING THE CHILD VICTIM TO HOLD A STUFFED ANIMAL IN HER LAP WHILE SHE TESTIFIED IN THIS SEXUAL ASSAULT TRIAL.

Brick claims that when his 11-year-old daughter was permitted to hold a stuffed reindeer in her lap during her testimony in this sexual assault case, his constitutional right to a fair trial was violated and claims that the prosecutor must have committed misconduct in allowing it to happen. These arguments are without merit. The claims made regarding prosecutorial misconduct are entirely speculative and the facts suggested are unsupported by the record. Allowing a child witness to hold a stuffed animal during her testimony was within the trial court's discretion and Brick has not established that the court abused that discretion.

- a. Relevant Facts

The alleged victim of the three charged counts of rape of a child was MW, Brick's daughter. CP 1-4. MW was between six and eight years old during the period the charged crimes occurred. CP 7-8; 4RP 92-93, 98. At the time of trial, MW was 11 years old. 5RP 4.

Very shortly after MW took the witness stand on October 8, 2009, defense counsel requested a side bar, which occurred, and then testimony resumed. 5RP 3. On October 13, defense counsel made a record that MW came into the courtroom with a reindeer and had it "cradled in her lap" during her testimony. 6RP 13-14. Defense counsel stated, "our objection was to that." 6RP 14.

The court agreed that had been the objection, saying the issue was whether the stuffed animal prejudiced Brick. 6RP 14. The court continued, "And I frankly don't really see that that's the case." 6RP 14. Neither party responded to this statement; defense counsel moved on to another subject. 6RP 14.

There was no reference to any toy or stuffed animal being held by MW either during her testimony, 5RP 3-76, or at any other time during trial. Neither attorney mentioned the stuffed animal during closing arguments. 9RP 20-68.

There was not even a suggestion at trial that the prosecutor was aware before MW entered the courtroom that day that MW would bring a stuffed animal to the witness stand. 6RP 13-14.

- b. The Claim Of Prosecutorial Misconduct Is Based On Allegations That Are Without Any Support In The Record, And Lacks Any Legal Authority.

Brick relies on only one fact that appears in the record to support his claim of prosecutorial misconduct: that the prosecutor did not take the stuffed animal away from the victim when the prosecutor became aware that the victim was holding it. However, it was not the responsibility of the prosecutor to object to this alleged impropriety.

A party who objects to unexpected events during trial has the obligation to raise any claim of error, as defense counsel did in this case. Brick offers no authority for the proposition that a prosecutor who observes an event in open court that the defendant believes is unfair, commits misconduct by not preemptively interrupting the event.

Brick also claims that the prosecutor committed misconduct based on his allegation on appeal that the prosecutor did not inform the defense of the use of the stuffed animal ahead of time, and that the animal was a prop designed to invoke sympathy. App. Br. at 10-11. The record includes no information about whether the prosecutor knew the toy would be brought to court or whether the

prosecutor did know and did inform defense counsel, who chose for tactical reasons to wait to object until MW began her testimony. There simply are no facts to support any claim of prosecutorial misconduct based on speculation about events that may have occurred.

- c. Brick Waived His Claim That A Hearing And A Finding Of Necessity Was Required By Failing To Make That Objection Below.

Brick claims that a hearing to determine the propriety of the child witness holding an animal was required although Brick did not request one, he claims that the State must establish that MW was incapable of testifying without the toy, and he claims that safeguards⁴ were required if the child held the toy during her testimony. All of these arguments have been waived by failure to raise them in the trial court.

Brick did not request a hearing, did not dispute MW's need for the toy, and did not request a limiting instruction as to the inferences the jury should or should not draw. Therefore, RAP 2.5(a) bars consideration of these issues. A claim of error may be

⁴ The safeguards required apparently are "stringent voir dire" or limiting instructions to the jury, as suggested in the previous section of Appellant's Brief, at 11.

raised for the first time on appeal only if it is a "manifest error affecting a constitutional right." RAP 2.5(a)(3); State v. McFarland, 127 Wn.2d 322, 333, 899 P.2d 1251 (1995).

Not every constitutional error falls within this exception; the defendant must show that the error occurred and caused actual prejudice to his rights. Id. It is the showing of actual prejudice that makes the error manifest, allowing appellate review. State v. Kirkman, 159 Wn.2d 918, 926-27, 155 P.3d 125 (2007). Brick has not established that the lack of a hearing, a finding as to MW's need for the toy, or the lack of a limiting instruction was an error of constitutional magnitude or caused actual prejudice to him.

Brick admitted repeatedly physically disciplining MW in an inappropriate fashion. 9RP 40-41, 44-45. His brother testified to that inappropriate discipline: Brick's brother saw him squeezing, shaking, yelling, grabbing, spanking, and slapping MW on the face. 7RP 109. MW testified that she was afraid of Brick and Brick argued in closing that MW fabricated the sexual abuse because of the physical abuse that she suffered and her consequent desire to get him out of the house. 5RP 15, 31-32, 40-41; 9RP 49-50. Brick emphasized MW's youth and fear in arguing her lack of credibility.

9RP 41, 45, 53-54. Under these circumstances, any emphasis upon MW's youth that was conferred by the toy did not prejudice Brick. As a result, he has not established manifest constitutional error and these claims have been waived.

d. The Stuffed Animal Held By MW Did Not Deprive Brick Of A Fair Trial.

The trial court did not abuse its discretion in allowing Brick's frightened 11-year-old daughter to hold a stuffed animal while she testified about Brick's repeated physical and sexual assaults. The court properly overruled Brick's objection that it was prejudicial.

A trial court has broad discretion to conduct a trial, exercising reasonable control over the manner of interrogation of witnesses and presentation of evidence. ER 611; State v. Hakimi, 124 Wn. App. 15, 19, 98 P.3d 809 (2004), rev. denied, 154 Wn.2d 1004 (2005). ER 611(a) provides:

(a) Control by Court. The court shall exercise reasonable control over the mode and order of interrogating witnesses and presenting evidence so as to (1) make the interrogation and presentation effective for the ascertainment of the truth, (2) avoid needless consumption of time, and (3) protect witnesses from harassment or undue embarrassment.

ER 611(a) governs the question of whether a witness may be allowed to hold a toy. Hakimi, 124 Wn. App. at 19.

The standard of review of a court's alleged violation of ER 611 is manifest abuse of discretion. Hakimi, 124 Wn. App. at 19. A court abuses its discretion when its decision is exercised on untenable grounds or for untenable reasons. State v. Blackwell, 120 Wn.2d 822, 830, 845 P.2d 1017 (1993).

In Hakimi, the trial court permitted two girls, who were nine years old at the time of a child molestation trial, to testify while holding a doll. Hakimi, 124 Wn. App. 20. The trial court prohibited questioning about the dolls, unless defense counsel initiated it. Id. The trial court concluded that children have a special need to find some security in court, and that if it was prejudicial at all, it was not unduly prejudicial. Id.

This Court affirmed the trial court's decision to allow the girls to hold a doll, noting that "[t]estifying as to a defendant's sexual acts in his presence and in the presence of a jury and other individuals in the courtroom must surely have been more difficult" than privately answering the questions of a child interview specialist. Id. at 21. This Court observed that the trial court had heard argument by both parties and weighed the interests of the victims and any potential prejudice to the defendant. Id. The Court held that the trial court had not abused its discretion. Id. at 22.

The Court in Hakimi rejected the defendant's reliance on State v. Harper, 35 Wn. App. 855, 670 P.2d 296 (1983), rev. denied, 100 Wn.2d 1035 (1984), noting that the opinion in that case expressed concern over an 11-year-old holding a teddy bear while on the stand, but that the statement was dictum. Hakimi, 124 Wn. App. at 20. The Harper decision also was more than 20 years prior to Hakimi.

Recent cases in other jurisdictions also have affirmed trial courts' exercise of discretion in permitting a child to hold a toy while testifying at trial. Earlier this year, a Missouri Court of Appeals rejected a challenge to a trial court's decision to allow two witnesses, one eleven and one sixteen years old, to testify holding teddy bears. State v. Powell, 318 S.W.3d 297, 303-04 (Mo. App. 2010). The court explained that courts often allow nonstandard procedures in examining minors about sexual abuse. Id. at 303. It noted that wide latitude should be granted to trial courts "so that such victims can recount their experiences without being overwhelmed by crippling emotional strain." Id. (quoting State v. Pollard, 719 S.W.2d 38, 42 (Mo. App. 1986)). On the other hand, behavior designed only to appeal to jurors' sympathy for a witness is improper. Powell, 318 S.W.3d at 303.

A Texas Court of Appeals rejected a challenge to a trial court's decision to allow a witness of about seven to testify holding a teddy bear. Sperling v. State, 924 S.W.2d 722, 726 (Tex. App. 1996). The court held that a general objection did not establish that the toy engendered sympathy or validated the child's credibility. Id. The court noted that the same argument could be made as to carefully chosen attire of any witness. Id.

Connecticut courts also have concluded that allowing a child to hold a toy is within a trial court's discretion. State v. McPhee, 58 Conn. App. 501, 508, 755 A.2d 893 (Conn. App.), cert. denied, 254 Conn. 920 (2000) (large stuffed animal); see also State v. Aponte, 249 Conn. 735, 740-56, 738 A.2d 117, 122-28 (1999) (prosecutor giving victim a gift of a stuffed animal combined with limit on cross-examination on that point was error, child holding own toy would not be grounds to object). A concurrence in Aponte recognized the number of stresses on a child witness and the soothing effect a stuffed animal may have. Aponte, 738 P.2d at 133 (J. McDonald, concurring).

Brick relies on State v. Palabay, 9 Haw. App. 414, 844 P.2d 1 (1993), cert. denied, 74 Haw. 652 (1993), for the proposition that a court must find that use of the toy is necessary. No other case

adopts that standard. The court in Palabay relied upon State v. Cliff, 116 Idaho 921, 782 P.2d 44 (Idaho App. 1989), which approved use of a toy after a balancing of interests, and State v. Gevrez, 61 Ariz. 296, 148 P.2d 829 (1944), which reversed a conviction after concluding that the prosecutor staged the victim's appearance with her murdered mother's doll. These cases do not support the conclusion that unless the use of a toy is a necessity, it is error. That standard is inconsistent with Washington law and should not be adopted.

The New Mexico Court of Appeals addressed the issue in 1997 and state that it could not see that the jury would be prejudiced by a twelve-year-old victim holding a teddy bear. State v. Marquez, 124 N.M. 409, 413, 951 P.2d 1070, 1074 (N.M. App. 1997), cert. denied, 124 N.M. 311 (1998). The appellate court concluded that the trial court's finding that the victim would be comforted by the bear was sufficient to outweigh any prejudice. Id.

The trial court did not abuse its discretion in concluding that MW's holding a toy during her testimony was not prejudicial to Brick. There was no reference to the toy during her testimony or during closing arguments. Brick admitted repeatedly physically disciplining MW in an inappropriate fashion. 9RP 40-41, 44-45.

Brick's brother saw him squeezing, shaking, yelling, grabbing, spanking, and slapping MW on the face. 7RP 109. MW testified that she was afraid of Brick. 5RP 15, 31-32, 40-41. Under these circumstances, the trial court did not err in concluding that any emphasis upon MW's youth that was conferred by the toy did not prejudice Brick.

2. THE UNANIMITY INSTRUCTION PROVIDED TO THE JURY HAS BEEN SPECIFICALLY APPROVED BY THIS COURT AND ADEQUATELY CONVEYED THE REQUIREMENT OF UNANIMITY.

Brick claims for the first time on appeal that the trial court's instructions did not adequately inform the jury of the unanimity requirement of State v. Petrich, 101 Wn.2d 566, 683 P.2d 173 (1984). The instruction given by the trial court is the standard Washington Pattern Jury Instruction (WPIC) 4.25 (2008), which has been specifically approved by this Court. It adequately conveyed to the average juror the requirement of unanimity.

a. Relevant Facts

The trial court's instructions to the jury included the following instructions:

A separate crime is charged in each count. You must decide each count separately. Your verdict on one count should not control your verdict on any other count.

CP 33 (Instruction 6).

The State alleges that the defendant committed acts of Rape of a Child on multiple occasions. To convict the defendant on any count of Rape of a Child, one particular act of Rape of a Child must be proved beyond a reasonable doubt, and you must unanimously agree as to which act has been proved. You need not unanimously agree that the defendant committed all the acts of Rape of a Child.

CP 37 (Instruction 10).

As to each charged count, the court provided a separate elements instruction, also known as the "to-convict" instruction.

The first element of Instruction 11, relating to Count 1, provided:

(1) That on or about a period of time intervening between June 13, 2002 through April 26, 2007, but an act separate and distinct from Counts II and III, the defendant had sexual intercourse with [MW];

CP 38. The first element of Instruction 12, relating to Count 2, provided:

(1) That on or about a period of time intervening between June 13, 2002 through April 26, 2007, but an act separate and distinct from Counts I and III, the defendant had sexual intercourse with [MW];

CP 39. The first element of Instruction 13, relating to Count 3,
provided:

(1) That on or about a period of time intervening
between June 13, 2002 through April 26, 2007, but an act
separate and distinct from Counts I and II, the defendant had
sexual intercourse with [MW];

CP 40.

The defendant did not object to these instructions at trial.

9RP 15. During her closing argument, the prosecutor explained the
unanimity requirement as follows:

For each of these counts, I, II, and III, you need to
pick a single act. A single act to support Count I, move to a
different act. A single act for Count II, move on to a different
act. A single act for Count III. And you've got to be
unanimous.

And what I mean by that, is this. If you all are talking
about, for instance, just to pick an act out. When Seth Ellner
testified last Thursday you will recall [MW] told him that she
had to put her mouth on the defendant's penis. That is an
act of rape. That could support Count I. But you have to
be unanimous when you talk as jurors to say, hey, we're
going to talk about the disclosure to Seth Ellner in which she
recounted that she had to perform oral sex on her dad. That
is our discussion point for Count I. Once you finish that,
move on to the second count. And you're going to pick an
act.

9RP 27-28.

b. The Instructions Properly Explained The Unanimity Requirement

When the State alleges multiple acts, any of which would be sufficient to prove a crime charged in a specific count, the State must either elect the act upon which it will rely for conviction or the court must instruct the jury that it must unanimously agree that one particular act was proved beyond a reasonable doubt. Petrich, 101 Wn.2d at 572. In the case at bar, the State made no election, so the court was required to give a unanimity instruction. Jury unanimity is a matter of constitutional magnitude, so it will be considered on appeal despite the failure to raise the issue below. State v. Moultrie, 143 Wn. App. 387, 392, 177 P.3d 776, rev. denied, 164 Wn.2d 1035 (2008).

A unanimity instruction is adequate if it conveys to the ordinary juror that the jury must be unanimous as to the act underlying the conviction. Id. at 393-94. This Court already has concluded that the language in this instruction does so.

In Moultrie, the defendant argued that the language of the current WPIC 4.25, which was used in that case and in the case at bar, did not adequately convey the requirement that jurors believe that the same act was proved. Id. at 393. This Court held that the

instruction "adequately addressed the requirement of jury unanimity." Id. The Court stated, "The instruction clearly states that the jury must unanimously agree on which act has been proved and that the act must be proved beyond a reasonable doubt." Id.

In the case at bar, the court's instructions 11-13, which specified that each act must be separate and distinct from the act in each of the other counts, emphasized the point that each count required a unanimous finding as to one specific act. CP 38-40. The court instructed the jury that a separate crime was charged in each count. CP 33. The prosecutor's closing argument also clearly explained that the jury must be in unanimous agreement as to a specific act for each count. 9RP 27-28.

Brick contends that the last sentence in the unanimity instruction (instruction 10) contradicts the previous statement that the jury must be unanimous as to a specific criminal act for each count. That sentence reads: "You need not unanimously agree that the defendant committed all the acts of Rape of a Child." CP 37. That sentence does not contradict the unanimity requirement as to the charged counts; it explains that the jurors need not agree that the defendant committed every act of Rape of a Child that was part of the evidence in the case. That language is in WPIC 4.25

and was in the instruction approved in Moultrie, as well as the instructions approved in State v. Noltie, 116 Wn.2d 831, 843, 809 P.2d 190 (1991), and in State v. Fisher, 165 Wn.2d 727, 755-56, 202 P.3d 937 (2009).

As this Court already has concluded, the unanimity instruction used in this case conveys to the ordinary juror that the jury must be unanimous as to the act underlying each conviction.

3. BRICK HAS NOT ESTABLISHED THAT JUROR QUESTIONNAIRES WERE SEALED WITHOUT NECESSARY FINDINGS AND WITHOUT HIS ASSENT.

Brick argues that his right to an open and public trial was violated when the trial court sealed jury questionnaires without required findings. This argument should be rejected. Most importantly, Brick has not established that the questionnaires were sealed without the findings required for sealing court records or without his specific agreement. Further, the questionnaires were not sealed until after the trial was completed, so any error cannot be structural and does not require a new trial.

A criminal defendant in Washington has the right to a "speedy and public trial." WA Const. art. I, § 22. The Washington

Constitution also requires that justice be administered openly. WA Const. art. I, § 10. Similar rights also are recognized under the federal constitution. U.S. Const. amend VI; Press-Enterprise Co. v. Superior Court, 464 U.S. 501, 104 S. Ct. 819, 78 L. Ed. 2d 629 (1984) (Press-Enterprise I).

The Washington Supreme Court has held that where a courtroom is closed during significant portions of trial, these constitutional rights are violated and a new trial may be required. State v. Marsh, 126 Wash. 142, 217 P. 705 (1923); State v. Bone-Club, 128 Wn.2d 254, 906 P.2d 325 (1995). A court must consider five factors set out in Bone-Club before ordering any closure. Bone-Club, 128 Wn. 2d at 258-59.⁵ A claim of violation of the right to a public trial is a question of law, reviewed de novo. State v. Easterling, 157 Wn.2d 167, 174, 137 P.3d 825 (2006).

The right to a public trial includes the process of juror selection. Presley v. Georgia, ___ U.S. ___, 130 S. Ct. 721, 724, ___

⁵ The analysis requires (1) the proponent of sealing must make a showing of a compelling interest, and if the need is other than an accused's right to a fair trial, a "serious and imminent threat" to that interest; (2) anyone present when the closure motion is made must be given an opportunity to object; (3) the limitation on access must be the least restrictive means available; (4) the court must weigh the competing interests; and (5) the order must be no broader in application or duration than necessary to serve its purpose. Bone-Club, 128 Wn.2d at 258-59.

L. Ed. 3d __ (2010); In re Pers. Restraint of Orange, 152 Wn.2d 795, 804, 100 P.3d 291 (2004).

a. Relevant Facts

In its trial brief, the State requested the court use a confidential juror questionnaire; the proposed questionnaire was an attachment to the brief. CP 107, 113. That motion was number 16 in the State's brief. CP 107. During pretrial hearings, the defense agreed to that motion. 2RP 99 (agreeing to 12 through 18).

The questionnaire included questions about whether the juror, a relative, or a close friend had been the victim of sexual misconduct, or had been accused of sexual misconduct, along with some details if the answers were affirmative. CP 113. It also asked whether anyone had reported sexual misconduct to the juror and whether the juror had specialized training or experience in the area of sexual assault or sexual misconduct. CP 113. The proposed questionnaire stated, "Your responses on the questionnaire will not be available to the public and will eliminate having to ask these questions in open court." CP 113.

The judge gave a separate hardship questionnaire to the jurors, along with the sexual abuse questionnaire. 2RP 96. None

of the record of the proceedings related to voir dire has been provided by Brick.

No further reference is in the record related to jury questionnaires. The trial concluded with closing arguments on October 19, 2009. 9RP 69. On that day, the court signed an order to seal the jury questionnaires related to sexual abuse. CP 114-15. The order includes a standard typed statement that the court finds compelling reasons to seal the documents, with this handwritten finding: "The privacy interests of the prospective jurors in their answers regarding sexual history and victim status outweighs the public right of access." CP 114. The order includes blocks to be completed by the attorney presenting the order and by an opposing attorney approving the order for entry; both blocks are entirely blank. CP 115.

- b. Brick Has Not Established That The Juror Questionnaires Were Sealed Without Proper Findings.

Brick speculates that the trial court did not make the findings required by Bone-Club before it sealed the questionnaires but has provided no evidence to support that conclusion. The claim that his constitutional rights were violated because no Bone-Club analysis

was performed should be rejected because it is without factual basis.

Defense counsel at trial affirmatively stated that he agreed to the juror questionnaires, which included the representation that the contents would not be made public. CP 107, 113; 2RP 99. While no written findings reflecting a Bone-Club analysis appear in the court file, the order sealing the questionnaires (CP 114-15) includes written findings relating to that analysis, suggesting that the court did consider it. The entry of the order sealing on the day that the trial concluded also suggests that the parties agreed upon that procedure, which would allow access as long as the trial continued. However, no record of the proceedings relating to jury selection has been provided.

c. Brick Cannot Show The Right To Public Or Open Trial Was Violated.

Further, Brick has not shown that any right to an open or public trial was violated. He cites no case in support of the proposition that sealing juror questionnaires at the conclusion of a trial violates that right.

The only Washington case that supports the proposition that sealing juror questionnaires after voir dire has been completed is a

violation of the right to a public trial is State v. Coleman, 151 Wn. App. 614, 214 P.3d 158 (2009). That court's ruling relied on State v. Waldon, 148 Wn. App. 952, 202 P.3d 325, rev. denied, 166 Wn.2d 1026 (2009), which held that the Bone-Club analysis applied to court records of a conviction, and State v. Duckett, 141 Wn. App. 797, 173 P.3d 948 (2007), which held that GR 31 did not insulate voir dire questioning of jurors in the courtroom from open-court analysis. Neither of those cases considered sealing juror questionnaires.

The decision in Coleman repeatedly asserts that the State provided no rationale for distinguishing between court records and court proceedings. Coleman, 151 Wn. App. at 621, 623. That rationale is found in Supreme Court case law analyzing the scope of the right to open courts.

Analysis of this question should begin with the Press-Enterprise I Court's explanation of the value of open jury selection:

The value of openness lies in the fact that people not actually attending trials can have confidence that standards of fairness are being observed; the sure knowledge that anyone is free to attend gives assurance that established procedures are being followed and that deviations will become known. Openness thus enhances both the basic fairness of the criminal trial and the appearance of fairness so essential to public confidence in the system.

Press-Enterprise I, 464 U.S. at 508 (citation omitted). In Press-Enterprise Co. v. Superior Court, 478 U.S. 1, 12-13, 106 S. Ct. 2735, 92 L. Ed. 2d 1 (1986) (Press-Enterprise II), the Court established a test⁶ for determining what is within the scope of the public-trial right, premised on whether such a right was consistent with "experience and logic." Press-Enterprise II, 478 U.S. at 8-9.

The "experience" inquiry is whether there has been a "tradition of accessibility." Press-Enterprise II, 478 U.S. at 8. That is, a court looks to "whether the place and process have historically been open to the press and general public." Id.

The "logic" inquiry is "whether public access plays a significant positive role in the functioning of the particular process in question." Press-Enterprise II, 478 U.S. at 8. A court should consider whether the process enhances the fairness of the criminal trial as well as "the appearance of fairness so essential to public confidence in the system." Id. at 9.

Turning first to the experience factor, sealing of juror questionnaires is common practice in Washington trial courts. Washington court rules reflect a presumption that such

⁶ The test was first described by Justice Brennan in his concurring opinion in Globe Newspaper Co. v. Superior Court, 457 U.S. 596, 605-06, 102 S. Ct. 2613, 73 L. Ed. 2d 248 (1982).

questionnaires are not public documents: GR 31(j) provides that "individual juror information, other than name, is presumed to be private."⁷

Nor is Washington alone in this conclusion. The majority of states that have addressed the issue by statute or rule conclude that juror questionnaires should not be available to the general public. See, e.g., Ala. R. Crim. Proc. 18.2(b) (juror questionnaire in record on appeal shall be available for inspection only by the court and parties); Alaska R. Admin. 15(j)(2)-(3) (questionnaires are confidential); Colo. Rev. Stat. §13-71-115(2) (original completed questionnaires shall be sealed in an envelope and retained in court file, but shall not constitute a public record); Conn. Gen. Stat. 51-232(c) (questionnaires may be viewed only by court and parties and are not public records); Idaho Crim. R. 23.1 ("In order to provide for open, complete and candid responses to juror questionnaires and to protect juror privacy, information derived from or answers to juror questionnaires shall be confidential and shall not be disclosed to anyone except pursuant to court order."); Mass. Gen. Laws, ch. 234A, §22 (notice of confidentiality shall appear

⁷ The holding of Duckett, supra, that GR 31(j) is limited by Bone-Club, does not minimize the significance of this presumption in the Press-Enterprise analysis.

prominently on face of questionnaire); Mich. Ct. R. 2.510(C)(1) and 6.412(A) (questionnaires available only to parties and court absent court order); Mo. S.Ct. R. 27.09(b) (questionnaires accessible only to court and parties; information collected is confidential and shall not be disclosed absent showing of good cause); N.H. Super. Ct. R. 61-A (attorneys receive copies of questionnaires but shall not exhibit to anyone other than client and other members of attorney's firm); N.J.R. Gen. Applic. 1:38-5(g) (questionnaires confidential and not public records); N.M. Stat. § 38-5-11(C) (questionnaires available to any person having good cause for access); Pa. R. Crim. Pro. 632 (questionnaires confidential and limited to use for jury selection; except for disclosures during voir dire, or other court order, information made available only to judge and parties); Tex. Gov't Code § 62.0132(f)-(g) (questionnaires confidential, may be disclosed only to court and parties); Cf Ark. Code §16-32-111(b) (questionnaires may be sealed on showing of good cause); La. Code Crim. Pro. art. 416.1(C) (qualification questionnaire "may" be made part of record); 49 Minn. Stat. Ann., R. Crim. P. Form 50 (form advising jurors that answers are public record).

Consideration of logic does not support Brick's claim either. In Richmond Newspapers v. Virginia, 448 U.S. 555, 569-72, 100 S.

Ct. 2814, 65 L. Ed. 2d 973 (1980), the Court identified the purposes served by openness in criminal proceedings: (1) ensuring proceedings are conducted fairly; (2) discouraging perjury, misconduct of participants, and biased decisions; (3) providing a controlled outlet for community emotion; (4) securing public confidence in a trial's results through appearance of fairness; and (5) inspiring confidence in judicial proceedings through education on the methods of government and judicial remedies.

There is no allegation in this case that any juror was challenged or stricken on the basis of information contained in the questionnaires. Further, Brick does not claim (and there is no evidence) that he or his attorney did not have access to the questionnaires throughout voir dire. Brick does not claim (and there is no evidence) that the court limited Brick's disclosure of the forms or their contents to anyone with whom Brick wished to consult about jury selection.

The procedure used both protects juror privacy and encourages candid responses. The case at bar involved both sexual assault and domestic violence, and in this type of case questions must be asked of jurors regarding their private personal

experiences with often very painful subjects that may not previously have been revealed.

In sum, both the experience and logic prongs of the Press-Enterprise II test support the conclusion that jury questionnaires are not within the scope of the right to a public trial.

- d. Based On The Record Provided, Relief Should Be Denied Because Brick Invited The Error He Claims Occurred.

Even if jury questionnaires are deemed presumptively open to the public, Brick is precluded from seeking reversal on that account, because he invited the claimed error. A defendant who invites error may not claim on appeal that he is entitled to reversal based on that error. State v. Studd, 137 Wn.2d 533, 546, 973 P.2d 1049 (1999). The invited error doctrine bars relief regardless of whether counsel intentionally or inadvertently encouraged the error. Seattle v. Patu, 147 Wn.2d 717, 720, 58 P.3d 273 (2002).

A defendant who is merely silent in the face of manifest constitutional error does not fall within the invited error doctrine. State v. Stein, 144 Wn.2d 236, 241, 27 P.3d 184 (2001). But a defendant who affirmatively assents to error, participates in it, and benefits from it, is precluded from obtaining reversal based on the

procedure to which he assents. State v. Momah, 167 Wn.2d 140, 154-56, 217 P.3d 321 (2009), cert. denied, 131 S. Ct. 160 (2010)131 S. Ct. 160 (2010).

Brick affirmatively agreed to the use of the questionnaire, which included the statement that it would not be made public. CP 113. Brick has not shown that he did not affirmatively agree to the court's order sealing the questionnaires, when no evidence concerning that event has been provided. In addition, Brick benefitted from the procedure, since it is unlikely that he would have received the same candor from jurors had they been required to answer the very personal questions in front of the entire jury panel. Because he acquiesced, participated, and benefitted, Brick should not now be permitted to claim error.

e. Even If Relief Is Granted, The Remedy Would Not Be A New Trial.

The usual remedy when documents are sealed without conducting the proper weighing of interests under Seattle Times v. Ishikawa, 97 Wn.2d 30, 640 P.2d 716 (1982), is to remand for the trial court to reconsider its decision, applying the proper rule. Rufer v. Abbott Laboratories, 154 Wn.2d 530, 540, 114 P.3d 1182 (2005) (exhibits and deposition testimony in civil case sealed), citing

Dreiling v. Jain, 151 Wn.2d 900, 907, 93 P.2d 861 (2004) (motions and discovery filed in civil case).

The only published Washington case involving juror questionnaires is a criminal case that applied that remedy, remanding for reconsideration of the decision to seal the questionnaires and rejecting an argument that reversal was required. Coleman, 151 Wn. App. at 623-24. Coleman was a direct appeal based on the trial court's sealing questionnaires after jury selection was complete. Id. at 624. This Court concluded that the failure to conduct a Bone-Club analysis before sealing the questionnaires was error, but was not structural error under these circumstances. Id.

Presley v. Georgia, supra, is not to the contrary, as reversal in that case was premised on the conclusion that the courtroom was closed during all of voir dire, and that was over the defendant's objection. In Presley, the single observer was ejected from the courtroom before voir dire began and the trial court made clear that no observers would be permitted, based on the court's concern that observers would interact with jurors. Presley, 130 S. Ct. at 722. Presley's counsel objected to the exclusion of the public and asked for accommodation to allow observers. Id. The summary reversal

in Presley controls only the situation where the defendant has objected to exclusion of the public. State v. Bowen, ___ Wn. App. ___, 239 P.3d 1114 (Wa. Ct. App. 2010); contra State v. Paumier, 155 Wn. App. 673, 230 P.3d 212 (2010), rev. granted, 169 Wn. 2d 1017 (2010).

Brick's claim that any violation of the right to a public trial is structural error requiring reversal and remand for a new trial is without merit. Momah makes it clear that any error in sealing the questionnaires in this case was not structural error. The Court in Momah found that although it was not a "classic case of invited error," Momah's participation in and affirmative agreement with the questioning of individual jurors in a closed courtroom caused any error not to be structural, and not to warrant reversal. Momah, 167 Wn.2d at 154-56.

Moreover, courtroom proceedings are simply different in character from documents. The differences suggest that a different remedy should follow when records are inappropriately closed.

Courtroom proceedings are transitory; what occurs cannot be recreated, and only a facsimile can be reproduced in the form of a transcript of the proceedings. A transcript captures the words spoken but not any number of intangible factors like body language,

intonation of voices, or facial expressions. There is a long legal tradition demanding openness of proceedings because a closed proceeding deprives spectators of the opportunity to assess such intangibles. By its very nature it is impossible to assess or quantify prejudice when a person is robbed of these intangible observations.

Records are different. A person viewing a record tomorrow or next year can assess its content just as easily as if it had been viewed today. A record improperly sealed can later be unsealed and the parties and public can review it. This does not mean that all instances of improper sealing of records will be harmless error. If a sealed record contains a material fact that a party or the public was unable to use during trial, the error may be deemed harmful, and reversal of a conviction may be required. But the error is not structural, because it is possible to assess the effects of an improper order sealing records.

Moreover in this case any improper sealing did not occur until after the trial was complete, so that error could not have been a structural error that infected the entire framework of trial.

D. CONCLUSION

For the foregoing reasons, the State respectfully asks this Court to affirm Brick's conviction and sentence.

DATED this 22 day of December, 2010.

Respectfully submitted,

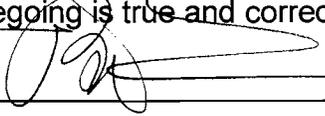
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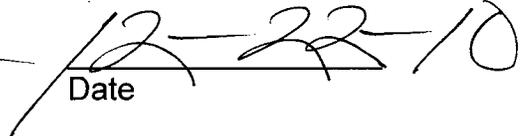
Certificate of Service by Mail

Today I deposited in the mail of the United States of America, postage prepaid, a properly stamped and addressed envelope directed to Suzanne Lee Elliott, the attorney for the appellant, at 705 Second Avenue, Suite 1300, Seattle, WA 98104, containing a copy of the Brief of Respondent, in STATE V. ADAM BRICK, Cause No. 64509-9-1, in the Court of Appeals, Division I, for the State of Washington.

I certify under penalty of perjury of the laws of the State of Washington that the foregoing is true and correct.



Name
Done in Seattle, Washington



Date

12/22/10