

68846-4

68846-4

No. 68846-4-I

THE COURT OF APPEALS OF THE STATE OF WASHINGTON

DIVISION ONE

STATE OF WASHINGTON,

Respondent,

v.

RICKEY RAINEY,

Appellant.

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

BRIEF OF APPELLANT

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A. ASSIGNMENTS OF ERROR

1. The Court denied Mr. Rainey his Sixth Amendment right to confront witnesses.

2. The trial court violated Article I, section 10 and Article I, section 22 when it closed the courtroom.

B. ISSUES PERTAINING TO ASSIGNMENTS OF ERROR

1. The Confrontation Clause of the Sixth Amendment bars the admission of testimonial statements unless the declaring witness is subject to cross-examination under oath. A certified copy of a driving record is testimonial when offered to prove a person's license was suspended on a given date. Did the admission of a certified copy of Mr. Rainey's driving record without requiring testimony of the person who prepared the documents deny Mr. Rainey his right to confrontation?

2. The right to a public trial protected by the federal constitution and the express guarantees of the Washington Constitution mandates that the court not close any portion of a court proceeding to the public without first completing a specific on-the-record inquiry and explanation of the reasons for the courtroom closure. In this case, the court closed a portion of an evidentiary hearing without first conducting any on-the-record explanation of the closure. Does the

court's improper closure of the courtroom violate the federal and state constitution and require reversal?

C. STATEMENT OF THE CASE

Snoqualmie Police Officer Chris Sylvain saw a man driving a pickup belonging to Treva Rainey, the officer believed the man to be Rickey Rainey, Ms. Rainey's son. 3/9/10 RP 30. The officer also saw a female passenger in the truck. Upon learning that Mr. Rainey's license to drive was suspended, the officer signaled the truck to stop. *Id.* at 35. Rather than stop, the truck made a quick U-turn and accelerated. *Id.* The officer attempted to block both lanes of the road with his car, but the pickup drove around his car. *Id.*

Driving through the city of Snoqualmie, the pickup travelled in excess of 90 miles per hour and passed numerous vehicles. 3/10/10 RP 30. The pickup travelled through a red light at which cross traffic was present. *Id.* at 31. Continuing out of Snoqualmie, the truck travelled past a roadside beach where at least 12 people were present in the parking lot. *Id.* 42-44.

When the truck started up a road leading to Ms. Rainey's home, the officer waited for additional officers to arrive. 3/10/10 RP 54-55.

The officers found the truck at Ms. Rainey's, and saw Falon Mayhew in front the yard. 3/10/10 RP 55-56. Ms. Mayhew said nothing but pointed towards some nearby woods. *Id.* at 56. When asked if she enjoyed her ride, Ms. Mayhew responded "it was the scariest ride of my life." *Id.* at 64.

The state charged Mr. Rainey with one count of eluding a police officer and one count of third-degree driving with a suspended license. CP 5-6.

At trial, over Mr. Rainey's objection, the court admitted a certified copy of Mr. Rainey's driving record, which stated that his license was suspended at the time of the incident. Ex 2. The court reasoned that recent decisions of the United States Supreme Court did not bar admission of the documents. 3/10/10 RP 71-72.

A jury convicted Mr. Rainey of both charges. CP 36-37.

Following trial, Mr. Rainey made a motion for new trial based upon an affidavit of Ms. Mayhew, who did not testify at trial, stating, that Mr. Rainey was not the driver of the truck. CP 108-09.

The trial court closed the courtroom to hear Ms. Mayhew's testimony. 8/27/10 RP 66. The court then denied Mr. Rainey's motion. CP 131-37.

D. ARGUMENT

1. **The admission of certified copies of Mr. Rainey's driving records violated his Sixth Amendment right to confrontation.**

a. The Confrontation Clause bars admission of testimonial statements unless the declarant is subject to cross-examination.

The Sixth Amendment's Confrontation Clause dictates the procedure by which the prosecution must prove its case and it is rooted in long-standing common law tradition. *Crawford v. Washington*, 541 U.S. 36, 43-50, 124 S. Ct. 1354, 158 L. Ed. 2d 177 (2004); U.S. Const. amend. VI; Const. Art. I, § 22. The requirements of confrontation are live testimony, by the declaring witness, under oath, with the opportunity for cross-examination. If an out-of-court statement is testimonial in nature, it may not be introduced against the accused at trial unless the witness who made the statement is unavailable and the accused has had a prior opportunity to confront that witness.

Bullcoming v. New Mexico, _ U.S. __, 131 S. Ct. 2705, 2713, 180 L. Ed. 2d 610 (2011).

The "principal evil" at which the Confrontation Clause is directed is the use of an *ex parte* statement, such as an affidavit or letter, made for the purpose of establishing or proving some fact.

Crawford, 541 U.S. at 50-51. Affidavits or other pretrial statements “that declarants would reasonably expect to be used prosecutorially” fall within the “core class” of testimonial statements that are inadmissible absent confrontation. *Id.*

When the State seeks to present evidence of a person’s out-of-court analysis of information, it is by confronting the person who performed the analysis that the witness’s “honesty, proficiency, and methodology” may be explored by the accused. *Melendez-Diaz v. Massachusetts*, 557 U.S. 305, 321, 129 S. Ct. 2527, 174 L. Ed. 2d 314 (2009). Declarations of fact that are written, sworn, and prepared with an eye toward trial do “precisely what a witness does on direct examination.” *Id.* at 310-11 (quoting *Davis v. Washington*, 547 U.S. 813, 830, 126 S. Ct. 2266, 165 L. Ed. 2d 224, 237 (2006)). Such “‘certificates’ are functionally identical to live, in-court testimony.” *Melendez-Diaz*, 557 U.S. at 310-11.

b. Because a certified copy of a driving record is testimonial the admission of Exhibit 2 deprived Mr. Rainey of his right to confront witnesses.

The Supreme Court has concluded that certified copies of driving records “are plainly affidavits, falling within ‘core class of testimonial statements’ described in *Crawford* and *Melendez-Diaz*.”

State v. Jasper, 174 Wn.2d 96, 115, 271 P.3d 876 (2012). *Jasper* notes that such documents are “created, and in fact used, for the sole purpose of establishing critical facts at trial.” *Id.* Indeed, in this case the certificate was the State’s only proof that Mr. Rainey’s license to drive was suspended. Because it is testimonial, the certificate is only admissible if the person who prepared it is first subject to cross-examination. *Id.* Because that did not occur, Mr. Rainey was denied his right to confrontation.

Here, the trial court reasoned, *Melendez-Diaz* did not apply in this case because, unlike that case, the certificate was not the “opinion of a scientist” but the equivalent of a public or business record. 3/10/10 RP 72. *Jasper* rejected such a distinction noting the certificates “go beyond mere *authentication* of otherwise admissible public records.” 174 Wn.2d at 115 (italics in original). Further, these documents purport to offer a witness’s opinion and interpretation of evidence. *Id.* Moreover, the certificate “serve[s] as substantive evidence against the defendant whose guilt depends on the nonexistence of the record for which the clerk searched.” *Id.* (citing *Melendez-Diaz*, 557 U.S. at 322-23). Therefore, the trial court’s reasoning was erroneous and the

admission of the exhibits denied Mr. Rainey of his Sixth Amendment right to confront witnesses.

c. The Court must reverse Mr. Rainey's conviction for driving with a suspended license.

An error resulting in the denial of a constitutional right, such as a fair trial, requires reversal unless the State proves beyond a reasonable doubt the misconduct did not contribute to the verdict obtained. *Chapman v. California*, 386 U.S. 18, 24, 87 S. Ct. 824, 17 L. Ed. 2d 705 (1967). Following a confrontation violation, this analysis requires a court to assess whether it is possible the jury relied on the testimonial statement when reaching verdict. *United States v. Alvarado-Valdez*, 521 F.3d 337, 342 (5th Cir. 2008); *see also, Delaware v. Van Arsdall*, 475 U.S. 673, 684, 106 S. Ct. 1431, 89 L. Ed. 2d 674 (1986) (“The correct inquiry is whether, assuming that the damaging potential of the cross-examination were fully realized, a reviewing court might nonetheless say that the error was harmless beyond a reasonable doubt”). The State cannot meet the standard here.

Exhibit 2 was the only evidence the State offered to prove Mr. Rainey's license was suspended. Thus, the error plainly affected the jury's verdict and this Court must reverse the conviction for driving with a suspended license.\

2. The trial court denied Mr. Rainey of his right to a public trial.

a. The trial court's closure of the hearing and sealing of the record violated Article I, §§ 10 and 22.

Article I, sections 10 and 22 guarantee the public's right to open court proceedings and a defendant's right to a public trial. Because the closing of a courtroom for even a portion of trial implicates these rights, a trial court must first comply with the requirements of *Seattle Times Co. v. Ishikawa*, 97 Wn.2d 30, 640 P.2d 716 (1982). *State v. Bone-Club*, 128 Wn.2d 254, 258–59, 906 P.2d 325 (1995).¹ The court's consideration of these criteria must occur on the record. *State v. Easterling*, 157 Wn.2d 167, 175-76, 137 P.3d 825 (2006). Further, the court must enter specific findings regarding its consideration of the *Ishikawa* criteria. *Bone-Club*, 128 Wn.2d at 260.

¹ Those five requirements are: 1. The proponent of closure must make some showing of a compelling interest; 2. Anyone present when the closure motion is made must be given an opportunity to object to the closure; 3. The proposed method for curtailing open access must be the least restrictive means available for protecting the threatened interests; 4. The court must weigh the competing interests of the proponent of closure and the public; 5. The order must be no broader in its application or duration than necessary to serve its purpose. *Bone-Club*, 128 Wn.2d at 258-59.

b. The trial court closed the courtroom.

The Supreme Court has adopted the “experience and logic” test to determine when a closure violates constitutional protections. *State v. Sublett*, 176 Wn.2d 58, 73, 292 P.3d 715 (2012). The Court explained:

The first part of the test, the experience prong, asks whether the place and process have historically been open to the press and general public. The logic prong asks whether public access plays a significant positive role in the functioning of the particular process in question. If the answer to both is yes, the public trial right attaches and the *Bone-Club* factors must be considered before the proceeding may be closed to the public.

Sublett, 176 Wn.2d at 73 (internal quotations and citations omitted.)

The right to open proceedings

. . . does not apply to every proceeding that transpires within a courtroom but certainly applies during trial, and extends to those proceedings that cannot be easily distinguished from the trial itself. This includes pre- and posttrial matters such as voir dire, evidentiary hearings, and sentencing proceedings.

State v. Lormor, 172 Wn.2d 85, 93, 257 P.3d 624 (2011). The hearing at issue here was an evidentiary hearing on Mr. Rainey’s motion for new trial. As *Lormor* recognizes, the resolution of factual disputes through evidentiary hearings are precisely the sort of court proceedings to which the open-court guarantee applies.

Applying the logic and experience test to these circumstances further illustrates the trial court’s error in closing the proceedings. The

Fifth Amendment privilege against self-incrimination generally permits a witness to refuse to answer a party's questions which may implicate the witness. *Hoffman v. United States*, 341 U.S. 479, 485-87, 71 S. Ct. 814, 95 L. Ed. 1118 (1951). The privilege applies only when the defendant has "reasonable cause to apprehend danger from a direct answer." *Id.* at 486. "The danger of incrimination must be substantial and real, not merely speculative." *State v. Hobble*, 126 Wn.2d 283, 290, 892 P.2d 85 (1995).

The witness is not exonerated from answering merely because he declares that in so doing he would incriminate himself -- his say-so does not of itself establish the hazard of incrimination. It is for the court to say whether his silence is justified, *Rogers v. United States*, 340 U.S. 367, 71 S. Ct. 438, 95 L. Ed. 2d 344 (1951), and to require him to answer if "it clearly appears to the court that he is mistaken." *Temple v. Commonwealth*, 75 Va. 892, 899 (1881).

Importantly, the question here is not whether the court properly permitted Ms. Mayhew to assert the privilege but rather whether that assertion of the right in response to specific questions is by experience and logic the sort of proceeding to which Article I, section 10 applies. The answer is yes. Because a witness's assertion of privilege is generally question-specific, experience dictates that occur in the courtroom, as that is where witnesses are questioned under oath and

give testimony. As *Lormar* explained, experience dictates that the taking of evidence, i.e., witness testimony occurs in open court.

Moreover, logic dictates that public access to such proceedings plays a significant positive role.

The requirement of a public trial is for the benefit of the accused; that the public may see he is fairly dealt with and not unjustly condemned, and that the presence of interested spectators may keep his triers keenly alive to a sense of their responsibility and to the importance of their functions

....

In re Oliver, 333 U.S. 257, 270 n. 25, 68 S. Ct. 499, 92 L. Ed. 682 (1948)

(quoting Thomas M. Cooley, *Constitutional Limitations*, 647 (8th ed.

1927)) (cited in *Bone-Club*, 128 Wn.2d at 259). Just as public access

plays a significant positive role at proceedings in which witnesses give

testimony, that access plays a positive role where a witness refuses to

give testimony with the approval of the court.

Both experience and logic dictate that permitting a witness to assert a Fifth Amendment privilege in a closed courtroom or in chambers is a closure of the courtroom. As such, the trial court must first comply with the requirements of *Bone-Club*.

c. The trial court did not comply with the requirements of *Bone-Club* before closing the courtroom.

Findings justifying a closure must be made contemporaneously with the decision to close. *Ishikawa*, *Bone-Club*, and their progeny hold that the mandatory on-the-record analysis must occur before the courtroom closure, not as a *post hoc* justification. See *Lormor*, 172 Wn.2d at 91 n.1 (court must “justify any ensuing closure” by first determining if closure appropriate); *Easterling*, 157 Wn.2d at 175 (court may not bar public from proceedings without “first, applying and weighing five requirements as set forth in *Bone-Club* and, second, entering specific findings justifying the closure order.”); *State v. Brightman*, 155 Wn.2d 506, 515-16, 122 P.3d 150 (2005); *Bone-Club*, 128 Wn.2d at 258-59.

The purpose of on-the-record weighing of the specific factors is to guide the trial court’s decision in whether to close the courtroom. *Ishikawa*, 97 Wn.2d at 37. The factors do not exist solely for the purpose of appellate review, although the trial court’s analysis must be specific enough to allow for it. See *Bone-Club*, 128 Wn.2d at 260. If its purpose was simply for appellate review, it would be treated akin to

written findings of fact and could be prepared any time during the pendency of the appeal as long as not tailored to defeat the appeal

The order closing the courtroom provides only:

The above-entitled Court, having heard a motion decided to seal the
Courtroom under Rule 60.6

IT IS HEREBY ORDERED that the courtroom is sealed for the
sole purpose of taking testimony
to determine whether Ms. Fallon
Maghen has the right to assert
her 5th Amendment privilege against
self-incrimination in this new trial
hearing. The transcript is also sealed.

Supp. CP __, Sub 70.

Plainly missing is any analysis of the *Ishikawa* criteria. The trial court's Findings of Fact and Conclusions of Law regarding the motion for new trial, similarly lack any analysis of the *Ishikawa* criteria. So too, the oral record is devoid of any consideration of *Ishkawa*. See 8/27/10 RP 62.

Following the filing of a notice of appeal, Mr. Rainey filed a motion to unseal the proceedings for purpose of appeal noting the trial

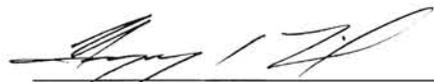
court had failed to engage in the required analysis. The trial denied that motion. In its order, the court cites to its Findings of Fact as setting forth the “compelling interest” necessitating closure of the courtroom and sealing of the transcript. Supp CP __, Sub 109. However, as set forth above, those findings do not discuss *Ishikawa* or *Bone-Club*. Instead, the cited findings address the substance of the motion for new trial. Thus, even if the court could engage in a *Bone-Club* analysis after the fact, the order fails address that analysis.

The closure of the court in the absence of any analysis of the right to open proceedings requires reversal of Mr. Rainey’s conviction ad a new hearing on his motion for new trial.

E. CONCLUSION

For the reasons above, this Court should reverse Mr. Rainey’s convictions.

Respectfully submitted this 30th day of April, 2013.



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RICKEY RAINEY,)	
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Appellant.)	

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