NO. 263541-III

COURT OF APPEALS
DIVISION III
OF THE STATE OF WASHINGTON

State of Washington,

Respondent,

v.

Jerry Allen Herron,

Appellant.

Appeal From The Superior Court Of Whitman County
Case No. 07-1-00022-9
The Honorable David Frazier

SUPPLEMENTAL BRIEF OF RESPONDENT
RE: APPLICATION OF *STATE v. WISE*, ___ Wn.2d ___, 288 P.3d 1113 (2012)

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I. INTRODUCTION

In his main appellate brief, Defendant argued that the trial court violated his right to a public trial when it conducted limited individual voi dire questioning of potential jurors in chambers, involving sexual abuse issues. Recently, the Washington Supreme Court issued a decision in a case presenting an issue of questioning jurors in chambers: *State v. Wise*, ___ Wn.2d ___ , 288 P.3d 1113 (2012). This court asked for supplemental briefing regarding the effect of *Wise* on the case at bar. This is the State's supplemental brief regarding *Wise*.

II. STATEMENT OF THE CASE

First, a note about citations to the record. All of the pre-trial proceedings are reported as Verbatim Transcript of Proceedings, Volume I – pages 1-176. Citations to that transcript in this brief will be noted as RP-I, followed by the page number. All of the trial and sentencing proceedings are reported as Verbatim Transcript of Proceedings, Volumes I-A, I-B, II-A, II-B, III, IV. All of those volumes have consecutive page numbers beginning in Volume I-A with page 1 and ending with Volume IV, page 748. Citations to those transcripts in this brief will be noted as RP, followed by the page number.

FACTUAL HISTORY

The victim, Kristen Beck, was a young woman living in Spokane, WA. She didn't know the defendant, but she accepted a ride from him in his car to Pullman, WA late one night. During the drive, he pulled off the rural highway onto a side road between Spokane and Pullman and raped her at knife point. For a detailed statement of the factual history, with citations to the record, please see the State's primary brief.

PROCEDURAL HISTORY

The defendant was charged by information with Rape in the First Degree, with an additional allegation that he was armed with a deadly weapon during the commission of the rape. (CP 8-10.)

At a pretrial readiness hearing (in open court), the issue of jury voir dire came up. The defense asked that the court give the venire a general questionnaire. (RP-I 66-67.) The court then noted that it also usually used a questionnaire in sex cases, asking whether the potential juror or close friend [or family member] had been charged with a sex offense, or whether they had been a victim of a sex offense. (RP-I 67-68.) The court then went on to state that its usual procedure was to question anyone who answered yes to those questions individually in chambers, with defendant and counsel. But the court noted that recent cases

"question that procedure." (RP-I 68.) A discussion was had between the court, the prosecutor, defense counsel, and the defendant. (RP-I 68-72.)

In that discussion, the prosecutor noted that a particular concern was the defendant's right to have the voir dire done in public (his right to a public trial). (RP-I 68.) The court noted: "I have always done that [individual questioning in chambers as to sex-related issues in sex cases] for fear that [with] sex sensitive issues, the jurors may have been victims and not disclose that because they're in front of all the jurors, and then there's a danger of seating jurors that aren't fair and unbiased. I [do this for the] protection of the defendant." But the court noted that it wouldn't do such a thing if the defendant objected. (RP-I 69.)

The prosecutor suggested two alternatives: either have a colloquy between the court and defendant and defense counsel, with a knowing and voluntary waiver of the right to public trial for this purpose, or conduct the individual questioning in a different courtroom down the hall. (RP-I 69-70.) The defendant's attorney then said that his and his client's preference was to conduct individual questioning in chambers. (RP-I 70.) The court then asked the defendant directly whether he understood the issues and the defendant said he did, and that he preferred the questioning be done in chambers, in the "privacy of your chambers." (RP-I 71.)

The court explained its reasoning, and its concern with both asking these questions in front of other jurors and in front of any spectators [such as in a courtroom down the hall]:

> Here's the issue: If you ask a group of people in open court, 'Have you ever been accused' [or] 'Have you ever been a victim of a sexual offense' or 'Have you ever been the victim of an inappropriate sexual touching' [or] 'Have you ever been accused of a sex crime,' because of the nature of the allegation, if someone has, they might be embarrassed and reluctant to say that in front of 50 other jurors and spectators. And these are things that we want to know, to determine whether that person can be fair and impartial. (RP-I 71.)

The court then explained its preferred method to fix the potential problem in obtaining a fair and impartial jury, which was individual questioning in chambers with both counsel and the defendant, and suggested that defendant talk it over with his counsel. (RP-I 71-72.)

Then at a pretrial motions hearing a few days before the trial (again, in open court), the issue of questioning the jurors in chambers came up again. The court, on the record, extensively and repeatedly explained its reasoning and its preference for the questioning to be done in chambers, not in front of the venire panel and not in front of any members of the public, to promote full disclosure of the very sensitive topics of sexual abuse or sexual assault. The defendant was given explicit options of 1) conducting the questioning in open court in front of the venire panel, 2) conducting the questioning in a different courtroom so that the venire

panel wouldn't be present but members of the public would, and 3) conducting the questioning in chambers with only the court, counsel and the defendant. The defendant, and his counsel, both expressed the clear request for the third option: questioning in chambers. (RP-I 103-10) In addition, the court read into the record the portion of the juror questionnaire which explained the court's reasoning again. (RP-I 109-110.)

During jury selection, the court proceeded in the manner that the defendant had requested and agreed to: those members of the venire panel who answered 'yes' to the questionnaire regarding sexual abuse or sexual assault issues were questioned individually as to those issues in chambers with all counsel and the defendant. Although in chambers, it was recorded and is part of the public record, and part of the record before this court. Beginning at RP 50, counsel and defendant and the trial judge are in chambers discussing any challenges up to that point (after having some questioning of the venire panel in open court). Before the individual questions started, the court and defense counsel discuss one potential juror. The court noted: "He pretty well said he'd have trouble being fair in a case involving a sex allegation. But we can bring him in and talk to him in greater detail." To which defense counsel responded: "Yeah. We don't know if it's somebody who was falsely accused or somebody that

was a victim. We don't know a lot about..." (RP 56-57.) This is another example, of very many, where defense counsel expressed his desire to proceed with individual questioning, and expressed the reason therefore: to get the potential jurors to talk openly about very sensitive topics, in order to get a fair panel.

Starting at RP 62, the court, counsel and defendant go through each questionnaire and determine to question every venire person individually who answered 'yes' to the 'sexual issues' questionnaire. The individual questioning in chambers begins at RP 71 and ends at RP 169. Over and over, the trial judge explains to the individual jurors that the questions are being asked in chambers to make it easier on the jurors to disclose things that might be embarrassing or sensitive. (See eg RP 76-77, 79, 93, 96, 126, 135, 140.) Over and over, the venire persons come forward with embarrassing or sensitive disclosures. For instance, at RP 77: two close friends raped; at RP 79, 81: two nieces sexually assaulted, which caused the venire person to be very upset.

When juror 12 was questioned he disclosed a friend was sexually assaulted. When asked if he could be fair in the case at bar, he said yes. But when pressed a little he admitted that he was still very angry about it, his anger was "boiling up." Defense counsel told that juror in chambers: "I appreciate your candor and honesty...that's exactly why we're going

through this process." Defense counsel challenged Juror 12 for cause and the judge agreed, excusing juror 12. (RP 89-95, 110.)

III. ARGUMENT

The trial court acted properly when it allowed Mr. Herron to conduct a portion of the voir dire in chambers so as to increase his chances of uncovering potential juror biases regarding sexual issues. These actions by the trial court were designed to ensure, in a manner that would be least intrusive on the public trial process, that Mr. Herron was accorded a fair trial by an impartial jury -- and that is precisely what Mr. Herron received.

The right to a public trial is found in our state and federal constitutions.

> "In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed . . . ." U.S. CONST. Amend. VI.

> "In criminal prosecutions the accused shall have the right to . . . a speedy public trial by an impartial jury of the county in which the offense is charged to have been committed . . . ." Wa. Const. Art. I, § 22.

In the State's primary brief, this court was cited to this court's opinion in *State v. Castro*, 141 Wn.App. 485, 490 (2007), "[a] criminal

defendant has a constitutional right to a 'public' trial, which includes the jury selection process, but that right is not absolute. (Citing to *PRP of Orange*, 152 Wn.2d 795, 804-05 (2004) and *State v. Bone-Club*, 128 Wn.2d 254, 259 (1995).) The *Castro* court noted that a defendant may waive his right with a knowing, intelligent, and voluntary waiver. *Id* at 490.

In a supplemental brief in the case at bar, discussing the application of *State v. Strode*, 167 Wn.2d 222 (2009), and *State v. Momah*, 167 Wn.2d 140 (2009), the State has pointed out that the Supreme Court ruled that the right to a public trial can be waived by the defendant. *State v. Strode*, 167 Wn.2d 222, 229, 234 (2009); *State v. Momah*, 167 Wn.2d 140, 154-156 (2009).

Now, our State Supreme Court has issued the opinion in *State v. Wise*, ___ Wn.2d ___ , 288 P.3d 1113 (2012), another in a series of opinions regarding jury selection and open courtrooms. The court in *Wise* essentially repeats it rulings from *Strode* and *Momah*. The resulting rules can be summarized as: 1) jury selection is part of the defendant's right to a public trial; 2) the court may validly partially close jury selection by conducting examinations in chambers if the court conducts an express consideration of the *Bone-Club* factors on the record; 3) the court may validly partially close jury selection by conducting examinations in

chambers if the court conducts an effective, but not express, consideration of the *Bone-Club* factors; 4) a defendant may make a knowing, voluntary, and intelligent waiver of his or her right to have the examination done in the courtroom; and 5) even in the absence of an explicit waiver, the invited error doctrine prohibits a defendant from actively soliciting, and actively participating in, in-chambers questioning, and then later complaining of it.

In *Wise*, the defendant was accused of burglary and theft related to stealing items from a minimart. During the jury selection process, the judge, apparently sua sponte and without any input from the prosecutor or defense, told the venire that anyone who wanted to answer any question privately, could go into chambers to so. Ten jurors were questioned in chambers, with the judge, prosecutor, and defense counsel present (but apparently not the defendant himself). Two of the ten potential jury members had requested the chambers-questioning, while eight were apparently brought into chambers by the judge for follow-up questions based on answers they gave to questions in the courtroom. *State v. Wise*, ___ Wn.2d ___ , 288 P.3d 1113, 1115-1116 (2012).

The trial judge did not make any reference to the defendant's right to a public trial, nor consider other alternatives to chambers-questioning, nor consider any of the Bone-Club factors, on the record. No one, including the defendant, objected to the procedure. Defense counsel

participated in the process. But the defendant did not affirmatively agree to the process. *Id.* at 1116.

The Supreme Court ruled that failure to consider the *Bone-Club* factors on the record amounted to a 'structural error' in the trial process, and required reversal in *Wise*. *Id.* at 1119.

As noted in *Wise*, "*Bone-Club* requires that the trial courts at least: name the right that a defendant and the public will lose by moving proceedings into a private room; name the compelling interest that motivates closure; weigh these competing rights and interests on the record; provide opportunity for objection; and consider alternatives to closure, opting for the least restrictive." *Id* at 117.

However, the court did not overrule its decisions in *Momah* and *Strode*. According to court:

> "While this court stated in *Momah* that not all closures are fundamentally unfair and thus not all closures are structural errors, *Momah* presented a unique set of facts. This court distinguished the public trial right violation in *Momah* from the public trial right violations in *Easterling, Brightman, Orange*, and *Bone-Club*, which all involved structural error. *Momah* was distinguishable from other public trial violation cases on two principal bases: (1) more than failing to object, the defense affirmatively assented to the closure of voir dire and actively participated in designing the trial closure and (2) though it was not explicit, the trial court in *Momah* effectively considered the Bone-Club factors. At bottom, *Momah* presented a unique confluence of facts: although the court erred in failing to comply with Bone-Club, the record made clear – without the need for

> a post hoc rationalization – that the defendant and public were aware of the rights at stake and that the court weighted those rights, with input from the defense, when considering the closure."

State v. Wise, ___ Wn.2d ___, 288 P.3d 1113, 1119-1120 (2012) (citations to *Momah* and *Strode* omitted).

So in general, if any part of the jury selection process is conducted in chambers, there will be a structural error in the trial which will require reversal, unless the trial court first conducts an express weighing of the *Bone-Club* factors on the record. However, if "the record [makes] clear – without the need for a post hoc rationalization – that the defendant and public were aware of the rights at stake and that the court weighed those rights, with input from the defense, when considering the closure", then the trial court will be considered to have "effectively" complied with *Bone-Club*. *Id* at 1119-1120. The court in *Wise* stated repeatedly that this fact pattern from *Momah* was "unique" and it would be "unlikely" to see such a fact pattern again (where the trial court did effectively comply with *Bone-Club*). *Id.* But this is the fact pattern that we have in the case at bar.

In the case at bar, the trial court engaged in "constructive consideration of the Bone-Club factors" (to use the language of *Wise* from footnote 5 on page 1118). The trial court and the parties in this case engaged in a lengthy discussion of all of the Bone-Club issues in open

court on the record. No one objected. The defendant specifically advocated for the procedure that then occurred.

Under the rule from *Momah*, and upheld in *Wise*, this court should conclude that the trial court effectively complied with the *Bone-Club* factors, and so there was no error in conducting the limited in-chambers voi dire that occurred in this case.

In addition to the above, even if the trial court had not constructively complied with Bone-Club, the defendant made a knowing, voluntary, and intelligent waiver of his right to a public trial, for the limited purpose of conducting limited voi dire in chambers. The court in *Wise* cites with approval to Justice Fairhurst's opinion in *State v. Strode*, 167 Wn.2d 222, 234 (2009). *Wise*, 288 P.3d at 1120.

In *Strode*, the lead opinion (signed by four justices) notes at page 229 that "the right to a public trial can be waived only in a knowing, voluntary, and intelligent manner". And in Justice Fairhurst's concurring opinion, also concurred in by Justice Madsen, she notes at page 234 that "...the court could properly conclude that the defendant waived his public trial right." Therefore, a clear majority of the court has ruled that the defendant <u>can</u> waive his/her right to a public trial, at least to the extent of conducting this sort of voi dire in chambers. Justice Fairhurst felt that the record in *Strode*, however, was not sufficient to show a knowing waiver.

167 Wn. 2d at 235. (The dissent in *Strode* would have affirmed the conviction regardless, and didn't reach the waiver issue.)

In *Strode*, the defendant was charged with a sex offense, and jurors responded to a questionnaire regarding whether they had been accused of such a crime, or had been victims (or knew victims) of such a crime. The court then conducted in-chambers questioning of those jurors who responded 'yes' to those questions. These facts are strikingly similar to the case at bar. Where the two cases diverge are in the defendant's conduct prior to, and during, voi dire. In *Strode*, the defendant and his counsel "acquiesced, without any objection" to the chambers-questioning. 167 Wn.2d at 229. They did not affirmatively assent. In the case at bar, the defendant was given a clear choice on how to proceed, was told the risks and benefits of both, and affirmatively waived his right to public voir dire on this topic, and specifically sought the closed-door questioning. Following the language of *Strode*, as approved of in *Wise*, this court should find the defendant waived his right to a public trial for the limited amount of questioning that was done in chambers.

A similar concept to waiver, is the invited error doctrine. The majority in *Wise* does not disapprove of applying the invited error doctrine, but notes that it would not apply it in *Wise* because the defendant didn't actively participate in effecting the courtroom closure during voir

dire. *Wise*, 288 P.3d at 1120. The dissent in *Wise* would apply the invited error doctrine even to the situation where the defense merely acquiesces to the closure. *Id.* at 1125. Of course, in the case at bar, the defendant actively sought the closure. Following *Wise*, there is no change to the application of the invited error doctrine to the facts in the case at bar. As in *Momah*, it would apply. *Momah*, 167 Wn.2d at 153-156. But that argument is covered already in the State's earlier supplemental brief regarding the effect of *Momah*.

The court in *Wise* explicitly applies the rules laid out in *Momah* and *Strode*. The following facts, when applied to those rules, require that defendant's appeal be denied.

In the case at bar, the trial judge repeatedly stated, at two different pretrial hearings, and again during jury selection, his reasoning. He indicated the compelling interest, which was the same as that in *Castro*, *Strode*: to gain better disclosure from the jurors regarding personal sexual abuse and sexual offenses. The overall interest, of course, is in obtaining an unbiased jury panel. That is also the same interest considered in *Momah*.

The court in the case at bar repeatedly allowed the defendant the option to object, and told him specifically that the court wouldn't do this if

the defendant did object. The court also gave him the option of conducting the sensitive questioning in a different courtroom; although the judge indicated that doing so would not do as much to protect against biased jurors because the potential jurors would still have to speak in front of members of the general public and might feel inhibited in doing so. The defendant waived his right to have the questioning done in public, and asked the judge repeatedly to conduct the examination in chambers. As in *Castro*, and *Momah*, the court used the least restrictive means necessary to accomplish its goal of full juror disclosure. As in *Castro*, and *Momah*, the court did not use the words "*Orange* factors" or *Bone-Club* factors"; nonetheless, it put on the record all of the information to satisfy those factors.

It is ironic that the procedure which ensured that the defendant's public trial would be had with an unbiased jury of his peers, and which the defendant himself sought, is now argued to be the basis to overturn his conviction.

This court should find that all of the 'factors' were met, that like *Momah*, there was no structural error requiring reversal and the invited error doctrine applies, and that unlike the defendant in *Strode*, this defendant affirmatively waived his right to public trial to the limited

extent of the in-chambers questioning that was done. This court should deny this ground for appeal.

IV. CONCLUSION

The defendant was caught, and was convicted by a fair and impartial jury. The procedure that was followed to pick that impartial jury was done at the defendant's request, with his full, knowing consent. The procedure was followed to protect the integrity of the process and to protect the defendant's rights. The defendant should not now be heard to complain about it.

This court is respectfully requested to uphold the defendant's conviction and deny his appeal.

Respectfully submitted this 4 day of February, 2013.

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