No. 44279-5-II

THE COURT OF APPEALS OF THE STATE OF WASHINGTON

DIVISION TWO

STATE OF WASHINGTON,
Respondent,

v.

VERNE JACKSON,
Appellant.

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

OPENING BRIEF OF APPELLANT

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A. ASSIGNMENTS OF ERROR.

1. The trial court violated Mr. Jackson's constitutional right to a public trial by taking for-cause and peremptory challenges during a private bench conference, which was also unreported.

2. The trial court violated Mr. Jackson's constitutional right to be present at all critical stages of trial.

B. ISSUES PERTAINING TO ASSIGNMENTS OF ERROR

1. The right of the accused to a public trial may only be restricted in the most unusual of circumstances, and if so, after a trial court considers the Bone-Club[1] factors and finds it necessary. Voir dire is a critical stage of trial that must be open to the public. During jury selection, the court called the parties to a private bench conference without analysis or opportunity for objection, at which private proceeding the parties apparently made juror-specific challenges. The proceeding was not recorded. Because the trial court did not make any Bone-Club assessment or findings before conducting this important portion of jury selection in private, did the court violate Mr. Jackson's constitutional right to a public trial?

[1] State v. Bone-Club, 128 Wn.2d 254, 906 P.2d 629 (1995).

2. An accused has a fundamental right to be present at all critical stages of a trial, including voir dire and the empanelling of the jury. Did Mr. Jackson's absence from the bench conference during which his jury was selected violate his constitutional right to be present at all critical stages of trial?

C. STATEMENT OF THE CASE

Verne Jackson, a man in his fifties, well-liked by his friends and neighbors, had not been in trouble since he was a teenager. 11/28/12 RP 95-101.[2] He kept to himself, did odd jobs, and occasionally babysat for the children of friends and neighbors. 10/18/12 RP 22-23.

On New Year's Eve of 2009, Mr. Jackson babysat for the four year-old son of a neighbor, Jalynn Gunter. 10/17/12 RP 12-15. On the morning after, the child, K.G.S., complained to his mother that he was very hungry, that Mr. Jackson had not let him eat the food that Jalynn had packed for him, and that he never wanted to go back to Mr. Jackson's house for babysitting again. Id.

[2] The verbatim report of trial proceedings are referred to by date, i.e.: 10/16/12 RP __. The voir dire proceedings are referred to as 2RP. Other than a dismissed deferred disposition from 1978, Mr. Jackson had no criminal history. 11/28/12 RP 101; CP 44.

More than a year later, in May 2011, K.G.S. grabbed his step-father Kenneth's penis while his stepfather was relieving himself in the kitchen sink. 10/17/12 RP 43-47, 51-53, 62-63.[3] Kenneth stated that he was very shocked and upset, and instantly "whacked" the child's hand away from him, telling K.G.S. that this type of touching was inappropriate. Id. at 62-63. At this time, K.G.S. told his stepfather that "Verne" had made him do the same thing. Id.

After CPS was notified, K.G.S. was interviewed on May 16, 2011; the child made additional allegations against "Verne," which CPS concluded referred to New Year's Eve of 2009. 10/17/12 RP 84-87. K.G.S. added a new claim that Mr. Jackson had made the child "suck his weiner." 10/16/12 RP 33-34. Mr. Jackson was charged with one count of rape of a child in the first degree and one count of child molestation in the first degree. CP 1-2.

At trial, the judge pro tem conducted the for-cause and peremptory challenges in a bench conference, which was unreported. 2RP 133-34. The judge ordered the jury venire to sit in the back of the courtroom, as "we actually know what we're doing, so we're going to ask you to just sit there, and when we're done,

[3] Stepfather Kenneth Nemeyer admitted that since the only facilities were upstairs, he frequently chose to relieve himself in the kitchen sink, particularly when drinking beer, which he and eye-witness Ramsay Rush did daily, and "downed [ ] like it was water." 10/17/12 RP 49.

we'll announce who the jury is." 2RP 133. There is no record of what transpired – no record of which potential jurors were challenged or for what reasons, since the transcript indicates that the challenges took place during an unreported "conference" amongst counsels only. 2RP 134. Mr. Jackson was not present for the bench conference at which his jury was selected. Id.

The subsequently-seated jury convicted Mr. Jackson as charged. CP 33-34. Mr. Jackson appeals. CP 58-71.

D. ARGUMENT

1. THE TRIAL COURT VIOLATED MR. JACKSON'S RIGHT TO A PUBLIC TRIAL BY CONDUCTING FOR-CAUSE AND PEREMPTORY CHALLENGES IN A PRIVATE BENCH CONFERENCE.

a. The federal and state constitutions provide parties the right to a public trial and also guarantee public access to court proceedings. Public trials are a hallmark of the Anglo-American justice system. Globe Newspaper Co. v. Superior Court, 457 U.S. 596, 605, 102 S.Ct. 2613, 73 L.Ed.2d 248 (1982); Richmond Newspapers, Inc. v. Virginia, 448 U.S. 555, 564-73, 100 S.Ct. 2814, 65 L.Ed.2d 973 (1980); State v. Coe, 101 Wn.2d 364, 380, 679 P.2d 353 (1984), quoting Craig v. Harney, 331 U.S. 367, 374, 67 S.Ct. 1249, 91 L.Ed.2d 1546 (1947).

In the criminal context, the Sixth Amendment[4] to the federal constitution and article I, section 22[5] of the Washington Constitution guarantee an accused the right to a public trial. Presley v. Georgia, 558 U.S. 209, 130 S. Ct. 721, 724, 175 L. Ed. 2d 675 (2010); State v. Bone-Club, 128 Wn.2d 254, 261-62, 906 P.2d 629 (1995). Likewise, Article I, section 10 recognizes that the public has a vital interest in access to the court system: "Justice in all cases shall be administered openly, and without unnecessary delay." This clear constitutional provision entitles the public and the press to openly administered justice. Seattle Times Co. v. Ishikawa, 97 Wn.2d 30, 36, 640 P.2d 716 (1982); Federated Publications Inc. v. Kurtz, 94 Wn.2d 51, 59-60, 615 P.2d 440 (1980).[6] The First Amendment's guarantees of free speech and a free press also protect the right of the public to attend trials. Globe Newspaper, 457 U.S. at 603-05; Richmond Newspapers, 448 U.S at 580 (plurality).

Although a defendant's right to a public trial and the public's right to open access to the court system are different, they serve

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[4] The Sixth Amendment provides, "In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial . . ."

[5] Article I, section 22 also guarantees "[i]n criminal prosecutions, the accused shall have the right to . . . a speedy public trial."

[6] Our Supreme Court recently noted that article 1, section 22, with its requirement of speedy and open justice, has no exact parallel in the federal constitution. State v. Wise, 176 Wn.2d 1, 9 n.2, 288 P.3d 1113 (2012).

"complementary and interdependent functions in assuring the fairness of our judicial system." Bone-Club, 128 Wn.2d at 259.

> 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.

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

Whether a trial court procedure violates the right to a public trial is a question of law that is reviewed de novo. State v. Easterling, 157 Wn.2d 167, 174, 137 P.3d 825 (2006); Bone-Club, 128 Wn.2d at 256. State v. Strode, 167 Wn.2d 222, 229-30, 217 P.3d 310 (2009) (holding the defendant cannot waive the public's right to open proceedings).

b. Washington courts apply a five-part test when addressing a request for full or temporary exclusion of the public from a trial. In order to protect the accused's constitutional right to a public trial:

> a trial court may not close a courtroom without, first, applying and weighing five requirements as set forth in Bone-Club and, second, entering specific findings justifying the closure order.

Easterling, 157 Wn.2d at 175 (emphasis added).

The constitutional right to a public trial is not waived by counsel's failure to object. Id. at 176 n.8 ("explicitly" holding "a defendant does not waive his right to appeal an improper closure by failing to lodge a contemporaneous objection."); State v. Brightman, 155 Wn.2d 506, 514-15, 122 P.3d 150 (2005); Strode, 167 Wn.2d at 229-30; Bone-Club, 128 Wn.2d at 257.[7]

The presumption of openness may be overcome only by a finding that closure is necessary to "preserve higher values" and the closure must be narrowly tailored to serve that interest. Waller v. Georgia, 467 U.S. 39, 45, 104 S.Ct. 2210, 81 L.Ed.2d 31 (1984), citing Press-Enterprise I, 464 U.S. at 510. Moreover, the trial court must enter specific findings identifying the interest so that a reviewing court may determine if the closure was proper. Id.

In Washington, a court faced with a request for closure must perform a test based upon the five criteria adopted in Bone-Club and Ishikawa. Bone-Club, 128 Wn.2d at 259-60.[8] Although it is

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[7] This case is distinguishable from State v. Momah, in which the courtroom closure was suggested by defense counsel, and in which the closure was promoted to protect Momah's other constitutional rights, such as to an impartial jury. 167 Wn.2d 140, 151-52, 217 P.3d 321 (2009).

[8] 1. The proponent of closure or sealing must make some showing [of a compelling state interest], and where that need is based on a right other than an accused's right to a fair trial, the proponent must show a "serious and imminent threat" to that right;

conceivable that a court might find circumstances exist to justify some form of courtroom closure, the factors justifying any such limitation of public access must be articulated with specificity. E.g., Presley, 558 U.S. at 213-14; State v. Lormor, 172 Wn.2d 85, 91-92, 257 P.3d 624 (2011).

The accused's right to a public trial under both the federal and state constitutions applies to voir dire. Presley, 558 U.S. at 213-14; State v. Momah, 167 Wn.2d 140, 148, 217 P.3d 321 (2009); State v. Orange, 152 Wn.2d 795, 812, 100 P.3d 291 (2004). Washington courts have repeatedly held that jury selection conducted in chambers violates the right to public trial. See, e.g., Strode, 167 Wn.2d at 226-29 (Alexander, C.J., lead opinion); 167 Wn.2d at 231-36 (Fairhurst, J., concurring); State v. Paumier, 155 Wn. App. 673, 679, 685, 230 P.3d 212, review granted, 169 Wn.2d 1017 (2010); State v. Heath, 150 Wn. App. 121, 125-29, 206 P.3d 712 (2009).

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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, quoting Eikenberry, 121 Wn.2d at 210-11.

Exercising peremptory challenges is a vital part of voir dire. See State v. Wilson, 174 Wn. App. 328, 343, 298 P.3d 148, 156 (2013) (observing that unlike hardship strikes made by clerk, "voir dire" involves trial court and counsel questioning prospective jurors to determine their ability to serve fairly and to enable counsel to exercise informed challenges for cause and peremptory challenges); State v. Vreen, 99 Wn. App. 662, 668, 994 P.2d 905 (2000) (recognizing "it is the interplay of challenges for cause and peremptory challenges that assures the fair and impartial jury"), aff'd, 143 Wn.2d 923 (2001); People v. Harris, 10 Cal.App.4th 672, 684, 12 Cal.Rptr.2d 758 (Cal. App. 1992) (exercising peremptory challenges in chambers, "tracking" them on paper, and then announcing in open court the names of the stricken prospective jurors, violated federal and state public trial rights, even where such proceedings were reported).[9] Because the peremptory challenge process is an integral part of voir dire, the constitutional public trial right also extends to that portion of criminal proceedings.

[9] Unlike in Harris, the peremptory challenges in Mr. Jackson's case were not reported.

c. The trial court conducted cause and peremptory challenges in a private bench conference, off the record, without making specific findings or employing the required five-part *Bone-Club* test. The trial court here effectively closed the courtroom when it conducted for-cause and peremptory challenges at the bench, in the absence of oral or written findings explaining the need for such a procedure, or any apparent analysis of the rights and interests at stake or the alternatives available. 2RP 133-34.

The report of proceedings from voir dire appears as follows:

> COURT: All right. Well, thank you. That ends the voir dire. We are now going to go through the selection of a jury, and for those of you who have not been in this process before, there's just no – it seems like chaos, but we actually know what we're doing, so we're going to ask you to just sit there, and when we're done, we'll announce who the jury is. There – there's no good re – way to do this so.
>
> (Sidebar; not recorded.)
>
> (Jury panel members sit quietly.)
>
> COURT: (To the clerk.) Oh, and Madam Clerk, we have two alternates.
>
> CLERK: What's that?
>
> COURT: We have two alternates.

CLERK: Oh, okay.

(Counsels complete conference.)

COURT: Thank you for your patience. If there was no graceful way to do the last portion of what we just finished, this one is even more ungraceful. In fact, Mr. Bailiff, I'm going to do something totally unusual. I'm going to take all the jurors and have them sit in the back, and then just call them back up again, because –

BAILIFF: That works very well.

COURT: -- because there's big gaps here. So if you'd all just take a seat anywhere in the back, and I'll just call your name.

BAILIFF: Two alternates?

COURT: (To Bailiff.) Two alternates.

2RP 133-34 [court calls names and fills in box with petit jury that has been chosen during "conference"].

By requiring counsel to exercise cause and peremptory challenges at the bench, the trial court violated Mr. Jackson's right to a public trial to the same extent any in-chambers conference or other courtroom closure would have. Even though the bench conference occurred in an otherwise open courtroom, it by definition occurred privately, outside the public's scrutinizing eyes and ears, and thus violated Mr. Jackson's right to a fair and public trial. State

v. Slert, 169 Wn. App. 766, 774 n. 11, 282 P.3d 101 (2012) (rejecting argument that no violation occurred if jurors were dismissed at sidebar rather than in chambers because private discussion would have involved dismissal for case-specific reasons, thereby calling for public review), review granted, 299 P.3d 20 (2013); State v. Leyerle, 158 Wn. App. 474, 483, 242 P.3d 921 (2010) (questioning juror in public hallway outside courtroom is a closure despite the fact courtroom remained open to public). By failing to first apply the Bone-Club factors before hearing the peremptory challenges at the bench, the trial court violated Mr. Jackson's constitutional right to a public trial.[10]

d. Reversal is required. The remedy for a violation of the public's right of access is remand for a new trial. Easterling, 157 Wn.2d at 179-80. In Easterling, the court rejected the possibility that a courtroom closure may be de minimus, even for a limited closure. 157 Wn.2d at 180 ("a majority of this court has never found a public trial right violation to be de minimus."). Where a portion of the proceedings are fully closed to the public, the closure is not trivial or

[10] The jury trial minutes have been designated; however, they are of little value. The minutes do not indicate whether there were for-cause challenges, which jurors were challenged peremptorily, by which counsel, or who was present at the bench conference. CP ___, Jury Trial Minutes, Oct. 16, 2012.

subject to harmless error analysis and requires reversal. Id. at 174, 180-81.

Because of the court's violation of Mr. Jackson's right to a public trial constitutes structural error, prejudice is presumed and reversal is required. Strode, 167 Wn.2d at 231; Bone-Club, 128 Wn.2d at 257.

2. THE TRIAL COURT VIOLATED MR. JACKSON'S RIGHT TO BE PRESENT AT ALL CRITICAL STAGES BY CONDUCTING FOR-CAUSE AND PEREMPTORY CHALLENGES AT A PRIVATE BENCH CONFERENCE.

"A criminal defendant has a fundamental right to be present at all critical stages of a trial." State v. Irby, 170 Wn.2d 874, 880, 246 P.3d 796 (2011). This includes the right to be present during voir dire and empanelling of the jury. Diaz v. United States, 223 U.S. 442, 455, 32 S. Ct. 250, 56 L. Ed. 500 (1912). The right to be present derives from the Confrontation Clause of the Sixth Amendment and the Due Process Clauses of the Fifth and Fourteenth Amendments. Id.[11]

Jury selection is "'the primary means by which a court may enforce a defendant's right to be tried by a jury free from ethnic,

[11] In situations in which the accused is not actually confronting witnesses or evidence against him, this right is protected by the Due Process Clause. Irby, 170 Wn.2d at 880-81 (quoting United States v. Gagnon, 470 U.S. 522, 526, 105 S. Ct. 1482, 84 L. Ed. 2d 486 (1985)).

racial, or political prejudice, or predisposition about the defendant's culpability.'" Irby, 170 Wn.2d at 884 (quoting Gomez v. United States, 490 U.S. 858, 873, 109 S. Ct. 2237, 104 L. Ed. 2d 923 (1989)). "[A] defendant's presence at jury selection 'bears, or may fairly be assumed to bear, a relation, reasonably substantial, to his opportunity to defend' because 'it will be in his power, if present, to give advice or suggestion or even to supersede his lawyers altogether.'" Irby, 170 Wn.2d at 883 (quoting Snyder v. Massachusetts. 291 U.S. 97, 105-06, 54 S. Ct. 330, 78 L. Ed. 674 (1934), overruled on other grounds by Malloy v. Hogan, 378 U.S. 1, 84 S. Ct. 1489, 12 L. Ed. 2d 653 (1964)). This right attaches from the time empanelment of the jury begins. Irby, 170 Wn.2d at 883.

This case resembles Irby in important respects. In Irby, both counsel exercised their challenges by email while the accused was in custody, unable to hear or participate. Id. at 878-79. Here, the trial court took for-cause and peremptory challenges at sidebar, and there is no indication that Mr. Jackson was present or permitted to participate in the proceedings. See Lewis v. United States, 146 U.S. 370, 372, 13 S. Ct. 136, 36 L. Ed. 1011 (1892) ("[W]here the [defendant's] personal presence is necessary in point of law, the record must show the fact."); see also People v.

Williams, 858 N.Y.S.2d 147, 52 A.D.3d 94, 96-97 (2008) (exclusion of defendant from sidebar conference where jurors excused by agreement violates right to be present; court refuses to speculate that defendant could overhear conversations).

The fundamental purpose of a defendant's right to be present during jury selection, including the exercise of peremptory challenges, is to allow him to give advice or suggestions to counsel or even to supersede counsel's decisions. Irby, 170 Wn.2d at 888; Gomez, 490 U.S. at 874. Here, as in Irby, because Mr. Jackson was not present for this portion of jury selection, he was unable to exercise that right. See Commonwealth v. Owens, 414 Mass. 595, 602, 609 N.E.2d 1208 (1993) (defendant "has a right to be present when jurors are being examined in order to aid his counsel in the selection of jurors and in the exercise of his peremptory challenges") (citing Lewis, 146 U.S. at 372).

Nonetheless, violation of the right to be present is subject to harmless error analysis. Irby, 170 Wn.2d at 885. The State bears the burden of proving beyond a reasonable doubt that the error is harmless. Id. at 886.

The Irby Court found Irby's absence from the portion of jury selection at issue was not harmless:

> [T]he State has not and cannot show that three of the jurors who were excused in Irby's absence ... had no chance to sit on Irby's jury. Those jurors fell within the range of jurors who ultimately comprised the jury, and their alleged inability to serve was never tested by questioning in Irby's presence . . . . Had [those jurors] been subjected to questioning in Irby's presence . . . the questioning might have revealed that one or more of these potential jurors were not prevented by reasons of hardship from participating on Irby's jury . . . . Therefore, the State cannot show beyond a reasonable doubt that the removal of several potential jurors in Irby's absence [was harmless].

Id. at 886-87.

Thus, the Irby Court considered whether the same jurors would have inevitably sat on the jury regardless of Irby's participation and concluded the answer was no. Accordingly, the State could not show the error was harmless. Id. As in Irby, the State cannot show that the venire members excused during the discussion at sidebar had no chance to sit on this jury; indeed, since the for-cause and peremptory challenge process was not reported, there is no record of what transpired in the bench conference. Peremptory challenges are largely based on subjective decision-making, albeit with some limitations.[12]

Accordingly, the State cannot show that Mr. Jackson's absence during this critical stage was harmless beyond a

[12] Batson v. Kentucky, 476 U.S. 79, 85-86, 106 S. Ct. 1712, 90 L. Ed. 2d 69 (1986).

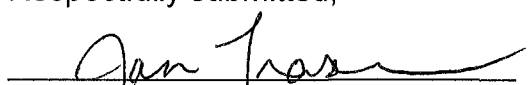
reasonable doubt. Reversal and a new trial are required. Irby, 170 Wn.2d at 886-87.

E. CONCLUSION

For the reasons stated above, Mr. Jackson respectfully asks this Court to reverse his conviction and remand for a new trial.

DATED this 12th day of August, 2013.

Respectfully submitted,



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

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	)	
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	)	NO. 44279-5-II
v.	)	
	)	
VERNE JACKSON,	)	
	)	
APPELLANT.	)	

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