NO. 44061-0-II

IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON

DIVISION TWO

STATE OF WASHINGTON,

Respondent,

v.

LEE McCLURE,

Appellant.

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

APPELLANT'S SUPPLEMENTAL BRIEF

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A. SUPPLEMENTAL ASSIGNMENTS OF ERROR

1. The trial court violated Lee McClure's constitutional right to a public trial by addressing challenges for cause and taking peremptory challenges during off-the-record sidebar conferences.

2. The trial court violated Mr. McClure's constitutional right to a public trial by addressing evidentiary objections and other matters during off-the-record sidebar conferences.

B. ISSUES PERTAINING TO SUPPLEMENTAL ASSIGNMENTS OF ERROR

A criminal defendant has the constitutional right to a public trial, and the public also enjoys the right to open access to the courts. U.S. Const. amends. I, VI, XIV; Const. art. 1, §§ 5, 10, 22. Criminal proceedings may therefore be closed to the public only after the trial court performs a weighing test as outlined in State v. Bone-Club, 128 Wn.2d 254, 258-59, 901 P.2d 325 (1995), and finds closure is justified. Violation of a defendant's right to a public trial is assumed prejudicial.

1. The right to a public trial extends to the jury voir dire process. The trial court heard some challenges to prospective jurors for cause, oversaw all of the parties' peremptory challenges, and heard an objection during voir dire at sidebar conferences that could not be heard by the public. The court did not conduct the weighing process required to

evaluate a request to close a hearing. Must Mr. McClure's convictions be reversed because of the violations of his right to a public trial?

2. The trial court also heard five objections, three regarding the introduction of evidence, at sidebar conferences during the course of Mr. McClure's trial. The court did not consider the Bone-Club factors before addressing the issues at the sidebar conferences, and they could not be heard by the public. Are the court's determinations of what evidence may be presented at trial a part of the trial which require public access necessitating reversal of Mr. McClure's convictions?

C. STATEMENT OF THE CASE

After prospective jurors completed a questionnaire to complete in the Jury Administration area, jury selection in Lee McClure's trial proceeded in open court with voir dire, including the individual questioning of some jurors, and challenges for cause. CP 787-94; 800, 801-03; 8/6/12 RP 6, 52-53, 82-88; 8/7/12 RP 2-13, 57-62, 88-92.

The parties' last challenges for cause, however, occurred at a sidebar that was not recorded. CP 803; 8/7/12 RP 119-20; 4RP 298-30. Peremptory challenges were apparently done on paper. 8/7/12 RP 120. In addition, the court heard one objection that occurred during the voir dire process at a sidebar conference. 8/7/12 RP 106. There is no record of the

argument or rulings on the final challenges for cause or the sidebar concerning the objection. See CP 795-98.

During the trial, the trial court conducted five sidebar conferences to address evidentiary and other objections. 4RP 329, 354, 441; 8 RP 905; 9RP 954. The sidebars were held in the courtroom, but could only be heard by the court, the assistant prosecuting attorney, and Mr. McClure's attorney. The sidebars addressed:

- The State's objection to a question addressing the relationship between RH and her brother - 4RP 329
- The State's objection to question about qualifications for a child, like RH, to be permitted to enter a Mormon Temple - 4 RP 354
- A sidebar occurring during a discussion, already outside the presence of the jury concerning whether RH was well enough to continue testifying - 4RP 441
- The State's objection that a question on rebuttal was beyond the scope of cross-examination - 8RP 905
- A discussion whether defense counsel could recall Mr. McClure after State's rebuttal witness - 9RP 954

In contrast, nine other issues where a sidebar was suggested were discussed in open court after the jury was excused. 3RP 206, 208-10, 288-89; 5RP 494-97; 5RP 501-02; 5RP 517-18; 6RP 702-704; 8RP 885-87, 890-91, 901-05.

The court did not address whether any of the sidebar conferences during voir dire or the taking of evidence violated Mr. McClure's right to a public trial and did not consider the factors that guide the court in determining if closure is necessary despite the public trial right.

While the record does not reveal if members of the public attended Mr. McClure's jury trial, it is clear that at least one member of the public, Mr. McClure's mother, was present during the second day of jury selection. 8/7/12 RP 92-93.

D. ARGUMENT

Mr. McClure's constitutional right to a public trial was violated by the court's use of sidebar conferences to address challenges of prospective jurors for cause, peremptory challenges of jurors, and numerous evidentiary objections.

The defendant in a criminal case has the constitutional right to a public trial, and the public has a right to access to the courts. The trial court conducted sidebar conferences with the attorneys during two stages of Lee McClure's jury trial – jury selection and the presentation of evidence. Mr. McClure's constitutional right to a public trial was violated because several sidebar conferences could not be heard by the public, and his convictions must be reversed.

1. The federal and state constitutions provide the accused the right to a public trial and also guarantee public access to court proceedings. Public criminal 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) (plurality) (outlining history of public trials from before Roman Conquest of England through Colonial times). Both the federal and state constitutions guarantee the accused the right to a public trial. U.S. Const. amend. VI ("In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial . . . "); Const. art. I, § 22 ("[i]n criminal prosecutions, the accused shall have the right to . . . a speedy public trial."). The public's vital interest in access to the justice system is also protected by the Washington Constitution, which provides, "Justice in all cases shall be administered openly, and without unnecessary delay." Const. art. 1, § 10. This clear constitutional provision entitles the public and the press to openly administered justice.[1] Seattle Times Co. v.

[1] Public access to the courts is further supported by article 1, section 5, which establishes the freedom of every person to speak and publish on any topic. Kurtz, 94 Wn.2d at 58. In the federal constitution, the First Amendment's guarantees of free speech and a free press also protect the right of the public to attend a trial. Globe Newspaper, 457 U.S. at 603-05; Richmond Newspapers, 448 U.S at 580 (plurality).

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).

Although the defendant's right to a public trial and the public's right to open access to the court system are different, they serve "complimentary and interdependent functions in assuring the fairness of our judicial system." State v. Bone-Club, 128 Wn.2d 254, 259, 906 P.2d 325 (1995). The public trial guarantee ensures "that the public may see [the accused] 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). "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 Co. v. Superior Court, 464 U.S. 501, 104 S. Ct. 819, 78 L. Ed. 2d 629 (1984) (Press-Enterprise I). Open public access provides a check on the judicial process that is necessary for a health democracy and promotes public understanding of the judicial system. State v. Sublett, 176 Wn.2d 58, 142 n.3, 292 P.2d 715 (2012) (Stephens, J. concurring); Allied Daily Newspapers v. Eikenberry, 121 Wn.2d 205, 211, 848 P.2d 1258 (1993).

The trial court may restrict the right to a public trial only "under the most unusual circumstances." Bone-Club, 128 Wn.2d at 259. To protect this constitutional right, Washington court have repeatedly held that a trial court may not conduct secret or closed proceedings "without, first, applying and weighing five requirements set forth in Bone-Club and, second, entering specific findings justifying the closure order."[2] State v. Easterling, 157 Wn.2d 167, 175, 137 P.3d 825 (2006); accord In re Personal Restraint of Orange, 152 Wn.2d 795, 821-22, 100 P.3d 291 (2004). 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).

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[2] The factors are:

> 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;
>
> 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.

Whether a trial court has violated a defendant's right to a public trial is a matter of law that this Court reviews de novo. State v. Wise, 176 Wn.2d 1, 9, 288 P.3d 1113 (2012); Easterling, 157 Wn.2d at 173-74.

With no consideration of the Bone-Club factors, the trial court in Mr. McClure's case utilized sidebar conferences which could not be heard by the public, the jurors, or Mr. McClure during both jury selection and taking of evidence. These closures violated Mr. McClure's right to a public trial. His convictions must therefore be reversed.

2. Mr. McClure's constitutional right to a public trial was violated by unreported sidebar conferences during jury selection.[3] "The process of juror selection is itself a matter of importance, not simply to the adversaries, but to the criminal justice system." Press-Enterprise I, 464 U.S. at 505. The right to a public trial thus includes the right to have public access to jury selection. See Presley v. Georgia, 558 U.S. 209, 213, 130 S. Ct. 721, 175 L. Ed. 2d 675 (2010); Sublett, 176 Wn.2d at 71-72; Wise, 176 Wn.2d at 11-12; State v. Lormor, 172 Wn.2d 85, 93, 257 P.3d 624 (2011); State v. Strode, 167 Wn.2d 2d 222, 226-27, 217 P.3d 310 (2009); Orange, 152 Wn.2d at 804. This Court thus need not apply the

[3] Similar issues are currently before the Washington Supreme Court in State v. Kenneth Slert, No. 87844-7 (peremptory challenges addressed in email between court and attorneys) and State v. Joseph Njonge, No. 86072-6 (public excluded from discussion of removing prospective jurors for hardship). Both cases will be argued on October 17, 2013.

experience and logic test to determine if jury selection is subject to the public trial right. Sublett, 176 Wn.2d at 73 (lead opinion), 176 Wn.2d at 136 (Stephens, J., concurring); Wise, 176 Wn.2d at 11; State v. Wilson, 174 Wn. App. 328, 336, 298 P.3d 148 (2013).

Challenges for cause and peremptory challenges are an integral part of jury selection. See Batson v. Kentucky, 476 U.S. 79, 98, 106 S. Ct. 1712, 90 L. Ed. 2d 69 (1986) (peremptory challenge occupies important position in trial procedures); Wilson, 174 Wn. App. at 342 (noting peremptory challenges and challenges for cause are part of voir dire); New York v. Torres, 97 A.D.3d 1125, 1126-27, 948 N.Y.S.2d 488 (2012) (erroneous to close courtroom to defendant's wife during initial jury selection, including challenges for cause and peremptory challenges). As this Court stated, "it is the interplay of challenges for cause and peremptory challenges that assure the fair and impartial jury." State v. Vreen, 99 Wn. App. 662, 668, 994 P.2d 905 (2000), aff'd, 143 Wn.2d 923 (2001).

There are important limits on the parties' exercise of peremptory challenges that must be enforced in open court. See Georgia v. McCollum, 505 U.S. 42, 49, 112 S. Ct. 2348, 120 L. Ed. 2d 33 (1992) (discussing protection from racial discrimination in jury selection, including in exercise of peremptory challenges, and critical role of public

scrutiny). Like the questioning of prospective jurors, such challenges to the venire must be held in open proceedings absente an on-the-record consideration of the public trial right and the Bone-Club considerations. See, State v. Jones, 175 Wn. App. 87, 98-99, 303 P.3d 1084 (2013) (citing Laws of 1917, ch. 37 § 1 and former RCW 10.49.080 (1950), repealed by Laws of 1984, ch. 76, § 30(6) as requiring peremptory challenges as well as selection of alternative jurors to be held in open court); State v. Saintcalle, 178 Wn.2d 34, 41-42, 309 P.3d 326 (2013) (lead opinion) (discrimination in jury selection undermines public confidence in fairness of justice system, offends dignity of persons and integrity of courts). Moreover, the practice of exercising peremptory challenges in open court has been part of our legal system since the 15th Century. Press-Enterprise I, 464 U.S. at 506-08.

In Wilson, this Court distinguished between a clerk excusing prospective jurors for hardship prior to the commencement of voir dire, which is not subject to the public trial right, and for-cause and peremptory challenges, which are part of voir dire. Wilson, 174 Wn. App. at 343-44. The Wilson Court noted that "voir dire" as described in CrR 6.4 is a process in which the trial court and counsel ask prospective jurors questions to determine their ability to be fair and impartial and to permit counsel to exercise their peremptory challenges. Id. at 343. While a clerk

may excuse jurors on limited, administrative bases, such excusals are not the equivalent of peremptory or for-causes challenges. Id. at 343-44.

This approach is consistent with California, which has long held that even peremptory challenges must be exercised in open court. California v. Harris, 10 Cal.App.4th 672, 682, 12 Cal.Rptr.2d 758 (1992). In Harris, the right to a public trial was violated where peremptory challenges were exercised in chambers even though the court tracked the challenges, announced the names in open court, and the proceedings were recorded. Id. at 677, 684-85, 688-89. The court held that the peremptory challenge process is part of the "trial" to which the defendant's constitutional right to a public trial applies because it is "an integral part of the voir dire/jury empanelment process." Id. at 684.

Significant portions of the jury selection process in Mr. McClure's case were not open to the public. Several challenges for cause, all peremptory challenges, and the court's ruling on defense counsel's objection to one of the prosecutor's voir dire questions were heard at sidebar. Thus, while members of the public were allowed in the courtroom, the public could not hear why certain juror were or were not excused for cause and how the prosecutor and defense counsel exercised their peremptory challenges. See 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 that courtroom remained open to public). In addition, the public was unable to hear the parties' arguments or the court's ruling on defense counsel's objection to one of the prosecutor's voir dire questions. Nor could any members of the public seek out this information later, as no record was made of these proceedings. Mr. McClure's right to a public trial was thus violated.

3. Mr. McClure's constitutional right to a public trial was violated by the use of sidebar discussions during trial.[4] Mr. McClure's right to a public trial obviously includes the portion of the trial where witnesses are called and the court makes evidentiary and other rulings. The Washington Supreme Court, however, has not addressed whether sidebar conferences on evidentiary rulings violate the accused's constitutional right to a public trial. Thus, this Court must first determine if the use of sidebars in Mr. McClure's trial violated his constitutional right to a public trial.

The "experience and logic" test is useful in determining if the core values of the public trial right are implicated. Sublett, 176 Wn.2d at 73 (lead opinion) (citing Press-Enterprise Co. v. Superior Court, 478 U.S. 1, 8-10, 106 S. Ct. 2735, 92 L. Ed. 2d 1 (1986) (Press-Enterprise II), 176 Wn.2d at 141 (Stephens, J., concurring). The test requires the court to look at (1) whether the proceeding has historically been open to the public

[4] A similar issue is before the Washington Supreme Court in State v. Glen Smith, No. 85809-8, which was heard on October 15, 2013.

and the press, and (2) whether public access plays an important role in the functioning of the particular proceeding. Id. If both parts of the test are met, the public trial right is implicated and the Bone-Club factors must be considered before the proceeding may be closed to the public. Id.

Jury trials have historically been open to the public. Richmond Newspapers, 448 U.S. at 578-80. Article I, section 10 of Washington's constitution reflects this history by requiring that "[j]ustice in all cases shall be administered openly." Evidentiary objections and rulings are a critical part of the trial process, and experience dictates they should be open to the public.

The trial court stated early in Mr. McClure's trial that the courtroom was open to the public. 8/6/12 RP 6. The court then conducted the majority of the sidebar conferences in open court after excusing the jury. With the exception of the five sidebars that were off the record, the court's actions demonstrate Washington's long experience with trials that are presumptively open to the public.

Open and public trials help assure that trials are fair, deter misconduct by the participants, and tempers biases and undue partiality. Wise, 176 Wn.2d at 5-6. When a trial court hears arguments and rules on objections, there is a potential for an abuse of power that is tempered by

an open and public process. Thus, logically, the core values of the public trial right are protected when evidentiary rulings are made in open court.

The right to public access includes pre-trial motions in criminal cases. Easterling, 157 Wn.2d at 179-80, 182 (co-defendant's motions for severance and dismissal should not have been closed to the defendant and the public); Bone-Club, 128 Wn.2d at 257 (public trial right applies to pre-trial suppression hearing). The right should thus also apply to evidentiary rulings occurring during the trial.

In a Fifth Circuit case, the judge presiding over a criminal trial held two hearings on a request to restrict cross-examination of two witnesses in chambers without offering reasons for the procedure. Rovinsky v. McKaskle, 722 F.2d 197, 198 (5th Cir. 1984). The circuit court held that the constitutional right to a public trial is violated by in camera hearings on matters that arise in the course of a criminal trial, absent an overriding need to limit public attendance that is articulated by the court at the time of the closure. Id. at 199. The court found that any need to hear the matters outside the jury's presence did not authorize exclusion of press and public.[5] Id. at 201. The court in Mr. McClure's

[5] The Rovinsky Court upheld the defendant's conviction because he failed to object to the closure. Rovinsky, 722 F.2d at 198, 201. Under Washington case law, however, no contemporaneous objection is necessary to address a public trial right on appeal. Wise, 176 Wn.2d at 15, 18.

case had the capability of hearing mid-trial evidentiary rulings in open court by excusing the jury, and could have done so throughout his trial

"A public trial helps assure that the trial is fair; it allows the public to see justice done, and it serves to hold the justice system accountable." Wise, 176 Wn.2d at 17. These goals can only be met if the public is permitted to observe the court's determination of what evidence the jury will hear in determining the case. Mr. McClure's right to a public trial was violated when the court held sidebar conferences to address evidentiary rulings.

4. Mr. McClure's convictions must be reversed. During jury voir dire the trial court heard and decided several challenges for cause, oversaw the parties' peremptory challenges, and addressed an objection to one of the prosecutor's voir dire questions at sidebar conferences that could not be heard by the public. The court also addressed five issues concerning the presentation of evidence at sidebar so that the objections and ruling could not be heard by the public. The court did not consider the right to a public trial as required by Bone-Club prior to any of the unrecorded sidebars.

"Be it through members of the media, victims, the family or friends of a party, or passersby, the public can keep watch over the administration of justice when the courtroom is open." Wise, 176 Wn.2d

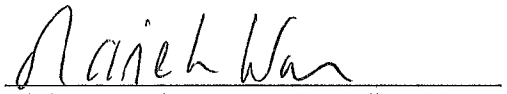
at 5. A violation of the right to a public trial infects the entire trial process, rendering the proceedings fundamentally unfair. The denial of the constitutional right to a public trial is thus one of the limited classes of fundamental constitutional rights not subject to harmless error analysis. Neder v. United States, 527 U.S. 1, 8, 119 S. Ct. 1827, 144 L. Ed. 2d 35 (1999) (citing Waller, supra); Wise, 176 Wn.2d at 18; Easterling, 157 Wn.2d at 181; Bone-Club, 128 Wn.2d at 261-62; State v. Marsh, 126 Wash. 142, 146-47, 217 Pac. 705 (1923); Jones, 175 Wn. App. at 96. Mr. McClure's convictions must be reversed and remanded for a new, public trial.

E. CONCLUSION

Lee McClure respectfully asks this Court to reverse his convictions and remand for a new trial due to the violation of his constitutional right to a public trial.

DATED this 30th day of October, 2013.

Respectfully submitted,



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

STATE OF WASHINGTON,	)	
	)	
RESPONDENT,	)	
	)	NO. 44061-0-II
v.	)	
	)	
LEE MCCLURE,	)	
	)	
APPELLANT.	)	

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