COURT OF APPEALS NO. 45229-4-II

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

STATE OF WASHINGTON,

Respondent,

v.

RENEE REYNOLDS,

Appellant.

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

The Honorable John Nichols, Judge

OPENING BRIEF OF APPELLANT

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RULES, STATUTES AND OTHER AUTHORITIES

A. ASSIGNMENTS OF ERROR

1. The trial court violated appellant's constitutional right to a public trial.

2. The trial court violated appellant's constitutional right to be present for all critical stages of trial.

Issues Pertaining to Assignments of Error

1. During jury selection, the trial court employed a procedure that prevented the public from scrutinizing some of the parties' for-cause challenges and all of the parties' peremptory challenges. Did this violate appellant's constitutional right to public trial?

2. Jury selection is a critical stage of trial, and appellant had a constitutional right to attend and participate. When the court conducted a portion of jury voir dire by sidebar, only defense counsel and the prosecuting attorney participated in the process. Did appellant's exclusion from the process of selecting her jury violate her federal and state constitutional right to be present for all critical stages of trial?

B. STATEMENT OF THE CASE[1]

Following a jury trial in Clark County, Washington, appellant Renee Reynolds was convicted of one count of possessing methamphetamine and one count of possessing heroin. CP 38-39, 42-55. The substances were discovered when the department of corrections executed an arrest warrant[2] at the residence where an anonymous caller reported Reynolds was staying. 1RP 16-23, 43. Reynolds proceeded to trial following an unsuccessful motion to suppress the evidence. 1RP 47-51.

Voir dire took place on August 12, 2013. After general questioning, the court asked for "a quick side bar with counsel." RP 67. When the court came back on the record, it indicated it had additional questions for juror 14, after which the prosecutor moved to excuse the juror for cause. RP 67-70. The court granted the motion and asked the parties whether each had any additional challenges for cause. RP 70. Both said no. RP 70. However, the court's minutes indicate jurors 21 and 22 were excused for cause

[1] This brief refers to the transcripts as follows: "1RP" – pretrial hearing, jury trial and sentencing: "RP" – voir dire.
[2] The DOC warrant was for failing to report to her community corrections officer. 1RP 20, 43.

before the court conducted the individual questioning of juror 14. CP 62-64.

Once juror 14 was struck, the court informed jurors they could stand and stretch while the parties passed "the magic clipboard." RP 71. The court explained, "we use this magic clipboard to go back and forth to do our strikes." RP 71.

Somehow, the prosecutor broke "the magic clipboard" and the court held another sidebar. RP 73. After which, the transcript of voir dire indicates the court excused jurors: 8, 10, 11 and 3, respectively. RP 73. The court did not announce which side was dismissing which juror. RP 73. The juror information sheet is not consistent with what the court announced. CP 61; RP 73. It indicates the prosecutor struck jurors 3 and 13; whereas, the defense struck 11, 8, 17 and 10. CP 61.

C. ARGUMENT

1. THE COURT VIOLATED REYNOLDS' RIGHT TO A PUBLIC TRIAL WHEN IT CONDUCTED PORTIONS OF JURY SELECTION IN PRIVATE.

Under both the Washington and United States Constitutions, a defendant has a constitutional right to a speedy and public trial. Const. art. 1, § 22; U.S. Const. amend. VI. Additionally, article I, section 10 expressly guarantees to the public and press the right to

open court proceedings. State v. Easterling, 157 Wn.2d 167, 174, 137 P.3d 825 (2006). The First Amendment implicitly protects the same right. Waller v. Georgia, 467 U.S. 39, 46, 104 S. Ct. 2210, 81 L. Ed. 2d 31 (1984).

The right to a public trial is the right to have a trial open to the public. In re Pers. Restraint of Orange, 152 Wn.2d 795, 804-05, 100 P.3d 291 (2004). This is a core safeguard in our system of justice. State v. Wise, 176 Wn.2d 1, 5, 288 P.3d 1113 (2012). The open and public judicial process helps assure fair trials, deters perjury and other misconduct by participants, and tempers biases and undue partiality. Wise, 176 Wn.2d at 6. It is a check on the judicial system, provides for accountability and transparency, and assures that whatever transpires in court will not be secret or unscrutinized. Id. The public trial requirement also 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." State v. Bone-Club, 128 Wn.2d 254, 259, 906 P.2d 325 (1995) (quoting In re Oliver, 333 U.S. 257, 270 n. 25, 68 S. Ct. 499, 92 L. Ed. 682 (1948)).

The right to a public trial encompasses jury selection. Presley v. Georgia, 558 U.S. 209, 723-24, 130 S. Ct. 721, 175 L. Ed. 2d 675 (2010); Wise, 176 Wn.2d at 11. Before a trial judge can close any part of voir dire, it must analyze the five factors identified in State v. Bone-Club. Orange, 152 Wn.2d at 806-07, 809; see also State v. Brightman, 155 Wn.2d 506, 515-16, 122 P.3d 150 (2005) (a trial court violates a defendant's right to a public trial if the court orders the courtroom closed during jury selection but fails to engage in the Bone-Club analysis).

Under the Bone-Club test, (1) the proponent of closure must show a compelling interest for closure and, when closure is based on a right other than an accused's right to a fair trial, a serious and imminent threat to that 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; and (5) the order must be no broader in its application or duration than necessary to serve its purpose. Bone-Club, 128 Wn.2d at 258-260; Wise, 176 Wn.2d at 12.

A violation of the public trial right is structural error, presumed prejudicial, and not subject to harmless error analysis. Wise, 176 Wn.2d at 13-15; State v. Strode, 167 Wn.2d 222, 231, 217 P.3d 310 (2009); Easterling, 157 Wn.2d at 181; Orange, 152 Wn.2d at 814. Moreover, the error can be raised for the first time on appeal. Wise, 176 Wn.2d at 13 n.6; Strode, 167 Wn.2d at 229; Orange, 152 Wn.2d at 801-02; Brightman, 155 Wn.2d at 517-518.

At Reynolds' trial, the judge conducted portions of jury selection in private without ever considering or even articulating the Bone-Club factors. As discussed above, jurors 21 and 22 were dismissed for cause at a sidebar conference, meaning any public spectators could not hear what was happening. CP 62-64; RP 67.

The same is true of the court's "magic clipboard" procedure and accompanying sidebar once the clipboard broke. RP 71-73. At no time did the court announce which party had removed which potential jurors. Instead, the court merely filed a document containing this information. CP 61. And it strangely does not match what the court announced in court. CP 61.

Both portions of jury selection – "for cause" and peremptory challenges constitute a portion of "voir dire," to which public trial rights attach. State v. Wilson, 174 Wn. App. 328, 342-343, 298

P.3d 148 (2013); see also People v. Harris, 10 Cal. App. 4th 672, 681-682, 684, 12 Cal. Rptr. 2d 758 (1992) ("The peremptory challenge process, precisely because it is an integral part of the voir dire/jury impanelment process, is a part of the 'trial' to which a criminal defendant's constitutional right to a public trial extends"; peremptory challenges made in chambers on paper violated public trial right even where proceedings were reported and results announced publicly), review denied, (Feb. 02, 1993).

To dismiss jurors during courtroom sidebars and by passing a clipboard back and forth is to hold a portion of jury selection outside the public's view. State v. Slert, 169 Wn. App. 766, 774 n.11, 282 P.3d 101 (2012), review granted in part, 176 Wn.2d 1031, 299 P.3d 20 (2013).

In response, the state may attempt to distinguish sidebar conferences from closures in which the public is prevented from entering the courtroom for a portion of jury selection. Physical closure of the courtroom, however, is not the only situation that violates the public trial right. For example, a closure also occurs when a juror is privately questioned in an inaccessible location. State v. Lormor, 172 Wn.2d 85, 93, 257 P.3d 624 (2011) (citing Momah, 167 Wn.2d at 146; Strode, 167 Wn.2d at 224); see also

State v. Leyerle, 158 Wn. App. 474, 483, 242 P.3d 921 (2010) (moving questioning of juror to public hallway outside courtroom a closure despite the fact courtroom remained open to public).

Thus, whether a closure – and hence a violation of the right to public trial – has occurred does not turn strictly on whether the courtroom has been physically closed. See e.g. See e.g. State v. Love, 176 Wn. App. 911, 915-16, 309 P.3d 1209 (2013) (rejecting state's "bright line rule" that for-cause challenges conducted at sidebar in open court did not constitute a courtroom closure). Members of the public are no more able to approach the bench and listen to an intentionally private voir dire process then they are able to enter a locked courtroom, access the judge's chambers, or participate in a private hearing in a hallway. The practical impact is the same – the public is denied the opportunity to scrutinize events.

In response, the state may also cite to Division Three's recent decision in State v. Love, 176 Wn. App. 911. There, the court applied the "experience and logic" test[3] and concluded the

[3] The "experience and logic" test requires courts to assess the necessity for closure by consideration of both history (experience) and the purposes of the open trial provision (logic). Sublett, 176 Wash.2d at 73, 292 P.3d 715. The experience prong asks whether the practice in question historically has been open to the public, while the logic prong asks whether public access is significant to the functioning of the right. Id. If both prongs are answered affirmatively, then the Bone–Club test must be applied before the court can close the courtroom. Id.

public trial right does not attach to for-cause and peremptory challenges. Love, 176 Wn. App. at 918. However, this Court has stated otherwise. Wilson, 174 Wn. App. at 342 (unlike potential juror excusals governed by CrR 6.3, exercise of for-cause and peremptory challenges, governed by CrR 6.4, constitutes part of "voir dire," to which the public trial right attaches).

Moreover, The Love decision is poorly reasoned.[4] First, it is well established that the right to a public trial extends to jury selection. See, e.g., Sublett, 176 Wn.2d at 71; State v. Strode, 167 Wn.2d at 226-227. This includes "'the process of juror selection.'" Orange, 152 Wn.2d at 804 (quoting Press-Enter. Co. v. Superior Court, 464 U.S. 501, 505, 104 S. Ct. 819, 78 L. Ed. 2d 629 (1984)). "For-cause" and peremptory challenges are an integral part of this process. Strode, 167 Wn.2d at 230 (for-cause challenges of six jurors in chambers not de minimus violation of public trial right); Wilson, 174 Wn. App. at 342, supra. There is nothing to indicate the identity of the attorneys exercising challenges – and their reasons for doing so (with respect to for-cause challenges) has historically been excluded from this right.

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[4] A petition for review is pending in Love. State v. Unters Love, Supreme Ct. No. 89619-4.

Moreover, logically, openness of jury selection (including which side exercises which challenge) clearly enhances core values of the public trial right – "both the basic fairness of the criminal trial and the appearance of fairness so essential to public confidence in the system." Sublett, 176 Wn.2d at 75; see also Orange, 152 Wn.2d at 804 (the process of jury selection "is itself a matter of importance, not simply to the adversaries but to the criminal justice system").

Indeed, the openness of peremptory challenges is particularly integral to the fairness of the proceeding to protect against inappropriate discrimination. This can only be accomplished if peremptory challenges are made in open court in a manner allowing the public to determine whether one side or the other is targeting and eliminating jurors for impermissible reasons. see State v. Sadler, 147 Wn. App. 97, 107, 109-118, 193 P.3d 1108 (2008) (private Batson[5] hearing following State's use of peremptory challenges to remove only African-American jurors from panel denied defendant his right to public trial), review denied, 176 Wn.2d 1032, 299 P.3d 19 (2013), overruled on other grounds Sublett, 176 Wn.2d at 71-73. The mere opportunity to find out, sometime after

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

the process, which side eliminated which jurors cannot satisfy this right.[6] That is particularly true here, since the juror information sheet does not appear to match what the court stated in court.

As support for its contrary conclusion regarding "experience," the Love court noted the absence of evidence that, historically, for-cause and peremptory challenges were made in open court. Love, 176 Wn. App. at 918. But history would not necessarily reveal common practice unless the parties made an issue of the employed practice. History does not tell us these challenges were commonly done in private, either. Moreover, prior to Bone-Club, there were likely many common, but unconstitutional, practices that ceased with issuance of that decision.

The Love court cites to one case – State v. Thomas, 16 Wn. App. 1, 553 P.2d 1357 (1976) – as "strong evidence that peremptory challenges can be conducted in private." Love, 176

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[6] Members of the public would have to know the sheet documenting peremptory challenges had been filed *and* that it was subject to public viewing. Moreover, even if members of the public could recall which juror number was associated with which individual, they also would have to recall the identity, gender, and race of those individuals to determine whether protected group members had been improperly targeted. With regard to peremptories, this would have required members of the public to recall the specific features of 4 individuals in Reynolds' case. CP 61. With regard to for-cause challenges, it could not be deduced because there was no written record filed after-the-fact as to who challenged jurors 21 and 22. CP 62-64.

Wn. App. at 918. Thomas rejected the argument that "Kitsap County's use of secret – written – peremptory jury challenges" violated the defendant's right to a fair and public trial where the defendant had failed to cite to any supporting authority. Thomas, 16 Wn. App. at 13. Notably, Thomas predates Bone-Club by nearly 20 years. Moreover, the fact Thomas challenged the practice suggests it was atypical even at the time.[7] Labeling Thomas "strong evidence" is a vast overstatement.

Regarding "logic," the Love court could think of no manner in which exercising peremptory challenges in public furthered the right to fair trial, concluding instead that a written record of the challenges sufficed. Love, 176 Wn. App. at 919. The court failed, however, to mention or consider the increased risk of discrimination against protected classes of jurors resulting from non-disclosure. As discussed above, the subsequent filing of a written document from which the source of peremptory challenges might be deciphered is not an adequate substitute for simultaneous public

[7] Citing to a Bar Association directory, the Thomas court noted that "several counties" had employed Kitsap County's practice. Thomas, 16 Wn. App. at 13 n.2. Even ignoring the questionable methodology of what appears to be some type of informal poll, that only "several counties" had used the method certainly leaves open the possibility a majority of Washington's 39 counties did not even before Bone-Club and subsequent cases requiring an open process.

oversight. See also Sadler, 147 Wn. App. at 116 ("Few aspects of a trial can be more important . . . than whether the prosecutor has excused jurors because of their race, an issue in which the public has a vital interest.").

At Reynolds' trial, the public was unable to see or hear what was happening when for-cause challenges were made of jurors 21 and 22. The record does not disclose who moved to excuse those jurors or why. CP 62-64.

As for peremptory challenges, whether members of the public could discern, *after the fact*, which prospective jurors had been removed by whom (generously assuming they knew to look in the court file), the public could not tell at the time the challenges were made which party had removed any particular juror, making it impossible to determine whether a particular side had improperly targeted any protected group based, for example, on gender or race. See State v. Burch, 65 Wn. App. 828, 833-834, 830 P.2d 357 (1992) (identifying both as protected classes); see also State v. Saintcalle, 178 Wn.2d 34, 309 P.3d 326 (2013) (lead opinion, concurrence, and dissent underscore harm resulting from improper race-based exercises of peremptory challenges and difficulty of prevention). Moreover, the written document in the court file does

not match what the court stated in court, which makes it all the more unlikely a member of the public could make such a post-hoc determination.

There is no indication the trial court considered the Bone-Club factors before conducting the private hearings that led to dismissal of jurors 21 and 22 (for cause) and either 8, 10, 11 and 3 (RP 73) or 3, 13, 11, 8, 17 and 10 (by peremptory challenge). CP 61. By employing its chosen procedures, the court violated Reynolds' right to public trial. Wise, 288 P.3d at 1119 ("The trial court's failure to consider and apply Bone–Club before closing part of a trial to the public is error."). Reversal is the only proper course.

2. REYNOLDS WAS DENIED HER CONSTITUTIONAL RIGHT TO BE PRESENT FOR ALL CRITICAL STAGES OF TRIAL.

The federal and state constitutions guarantee criminal defendants the right to be present at trial. State v. Irby, 170 Wn.2d 874, 880-881, 246 P.3d 796 (2011).

The federal Constitution does not explicitly guarantee the right to be present, but the right is rooted in the Sixth Amendment's confrontation clause and the Fourteenth Amendment's due process guarantee. Irby, 170 Wn.2d at 880-881. Under the federal Constitution, a defendant has the right to be present "'whenever his

presence has a relation, reasonably substantial, to the fullness of his opportunity to defend against the charge.'" Id. at 881 (quoting Snyder v. Massachusetts, 291 U.S. 97, 105-106, 54 S. Ct. 330, 78 L. Ed. 2d 674 (1934)). Stated another way, "'the presence of a defendant is a condition of due process to the extent that a fair and just hearing would be thwarted by his absence.'" Id. (quoting Snyder, 291 U.S. at 107-108).

The federal constitutional right to be present for the selection of one's jury is well recognized.[8] See Lewis v. United States, 146 U.S. 370, 373-374, 13 S. Ct. 136, 36 L. Ed. 1011 (1892); Gomez v. United States, 490 U.S. 858, 873, 109 S. Ct. 2237, 104 L. Ed. 2d 923 (1989); State v. Wilson, 141 Wn. App. 597, 604, 171 P.3d 501 (2007).

"Jury selection is the primary means by which [to] enforce a defendant's right to be tried by a jury free from ethnic, racial, or political prejudice, or predisposition about the defendant's culpability[.]" Gomez, 490 U.S. 858 at 873 (citations omitted). The defendant's presence "is substantially related to the defense and allows the defendant 'to give advice or suggestion or even to

[8] Consistent with this constitutional guarantee, CrR 3.4(a) explicitly requires the defendant's presence "at every stage of the trial including the empanelling of the jury . . . ."

supersede his lawyers.'" Wilson, 141 Wn. App. at 604 (quoting Snyder, 291 U.S. at 106); see also United States v. Gordon, 829 F.2d 119, 124 (D.C. Cir. 1987) (Fifth Amendment requires opportunity to give advice or suggestions to lawyer when assessing potential jurors).

In contrast to the United States Constitution, article 1, section 22 of the Washington Constitution explicitly guarantees the right to be present,[9] and provides even greater rights. Under our state provision, the defendant must be present to participate "'at every stage of the trial when his substantial rights may be affected.'" Irby at 885 (quoting State v. Shutzler, 82 Wash. 365, 367, 144 P. 284 (1914)). This right does not turn "on what the defendant might do or gain by attending . . . or the extent to which the defendant's presence may have aided his defense[.]" Id. at 885 n.6.

Whether there has been a violation of the constitutional right to be present at trial is a question of law this Court reviews de novo. Irby, 170 Wn.2d at 880. There was a violation in Reynold's case when he was excluded from the sidebar conference during which

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[9] Article 1, section 22 provides, "In criminal prosecutions the accused shall have the right to appear and defend in person, or by counsel."

jurors 21 and 22 were discussed and released. Only counsel were called up to the bench. RP 67. There was a second violation in Reynolds' case when the court called for a sidebar after the prosecutor broke "the magic clipboard" and before the court announced which of the jurors were released by peremptory challenge. RP 73. Presumably, the court's procedure allowing only counsel to approach the bench was repeated. It is the state's burden to show otherwise, which it cannot do based on the court's earlier chosen procedure. Irby, 170 Wn.2d at 884 ("where ... personal presence is necessary in point of law, the record must show the fact.") (quoting Lewis v. United States, 146 U.S. 370, 13 S. Ct. 136, 36 L. Ed. 1011 (1892)).

Indeed, the circumstances in Reynolds' case are similar to those in People v. Williams, 52 A.D.3d 94, 858 N.Y.S.2d 147 (2008). At Williams' trial, the court conducted sidebar discussions during voir dire to determine whether three prospective jurors should be excused. At each conference, only the judge, counsel, and the juror were included in the discussion. One potential juror was retained and ultimately served. Two other jurors were excused on consent of the attorneys based on concern regarding their

abilities to put aside prior experiences. Williams, 52 A.D.3d at 95-96.

On appeal, Williams alleged a violation of her right to be present at all critical stages of trial based on her absence from the sidebar conferences. The Supreme Court of New York agreed and reversed her convictions. Williams, 52 A.D.3d at 96. The Court held that the exclusion of a juror – without a knowing, intelligent, and voluntary waiver of the right to be present – requires reversal, even when the juror is excused on consent of counsel. Id. The Court also rejected "the People's speculative suggestion that the defendant may have been able to hear what was said during the sidebar[.]" Id. at 97 (citation omitted); see also Lewis, 146 U.S. at 372; Irby, 170 Wn.2d at 884.

The only issue is whether the violations of Reynolds' rights can be deemed harmless. When a defendant is excluded from a portion of jury selection, reversal is required unless the state proves the violation was harmless beyond a reasonable doubt. Irby, 170 Wn.2d at 886. The only way to accomplish that task is to show that no juror excused in violation of the defendant's rights had a chance to sit on the jury. If a prospective juror in question fell within the

range of jurors who ultimately comprised the jury, reversal is required. Id.

Jury selection, which proceeded numerically, proceeded as high as number 19. RP 74. Therefore, all of the jurors excused by peremptory challenge had a chance to sit on the jury. RP 73-74. Moreover, it appears defense counsel still had two peremptory challenges remaining when he accepted the panel. CP 61. Accordingly, there is a chance juror 21 could have served on the jury, had Reynolds been allowed to participate fully in selecting her jury. Therefore, the error was not harmless beyond a reasonable doubt and reversal is required.

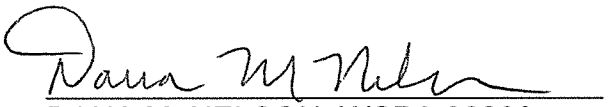
D. CONCLUSION

Because the court's jury selection process violated Reynolds' right to a public trial, this Court should reverse her convictions. This Court should also reverse because the same procedure violated Reynolds' right to be present.

Dated this 26th day of March, 2014

Respectfully submitted

NIELSEN, BROMAN & KOCH



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

STATE OF WASHINGTON,	)	
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v.	)	COA NO. 45229-4-II
RENEE REYNOLDS,	)	
Appellant.	)	

DECLARATION OF SERVICE

I, PATRICK MAYOVSKY, DECLARE UNDER PENALTY OF PERJURY UNDER THE LAWS OF THE STATE OF WASHINGTON THAT THE FOLLOWING IS TRUE AND CORRECT:

THAT ON THE 26TH DAY OF MARCH 2014, I CAUSED A TRUE AND CORRECT COPY OF THE **BRIEF OF APPELLANT** TO BE SERVED ON THE PARTY / PARTIES DESIGNATED BELOW BY DEPOSITING SAID DOCUMENT IN THE UNITED STATE MAIL.

[X] RENEE REYNOLDS
CLARK COUNTY WORK RELEASE
P.O. BOX 61447
VANCOUVER, WA 98660

SIGNED IN SEATTLE WASHINGTON, THIS 26TH DAY OF MARCH 2014.

X Patrick Mayovsky

NIELSEN, BROMAN & KOCH, PLLC

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