69449-9

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NO. 69449-9-I

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

STATE OF WASHINGTON,

Respondent,

v.

COREY SCHUMACHER.

Appellant.

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

The Honorable Jim Rogers, Judge

SUPPLEMENTAL BRIEF OF APPELLANT

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RULES, STATUTES AND OTHER (Cont'd)

A. SUPPLEMENTAL ASSIGNMENTS OF ERROR

1. The trial court violated appellant's constitutional right to a public trial by taking juror hardship challenges during a private sidebar.

2. The trial court violated appellant's constitutional right to be present at all critical stages of trial by taking juror hardship challenges during a private sidebar.

Issues Pertaining to Supplemental Assignments of Error

During jury selection, the parties questioned jurors in open court about potential hardship associated with serving on the jury. The court then conducted hardship challenges at a private sidebar. After the sidebar conference ended, seven jurors were excused. Later, the judge identified on the record that he had denied a hardship excusal as to a specific juror during the sidebar.

1. Where the trial court did not analyze the Bone-Club[1] factors before conducting this portion of jury selection in private, did the court violate appellant's constitutional right to a public trial?

2. Did the appellant's absence from the sidebar violate his constitutional right to be present at all critical stages of trial?

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[1] State v. Bone-Club, 128 Wn.2d 254, 906 P.2d 325 (1995).

B. SUPPLEMENTAL STATEMENT OF THE CASE

After swearing in the venire, the trial court announced the charges against the appellant, Corey Schumacher, and explained the process of being excused for hardship. 1RPVD[2] 2-8. The trial court asked prospective jurors if they would suffer any hardship if serving on a case that would take two weeks to try. 1RPVD 5. In open court, the judge asked the potential jurors who claimed hardship to state their reasons, and they did so. 1RPVD 8-14. The trial court then asked jurors who had indicated in a questionnaire they "could not be fair and impartial in a case of this type," to raise their cards to affirm that belief. Fifteen jurors affirmed they did not believe they could be fair and impartial to both sides. 1RPVD 15-16.

After excusing the prospective panel, the trial court accepted hardship challenges from the parties in open court. The court excused some jurors for hardship and reserved ruling on others until they could be questioned further. 1RPVD 16-25. After hardship challenges ended, the court called for a new panel of prospective jurors because there were not enough people left in the venire. 1RPVD 25-26.

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[2] 1RPVD refers to the verbatim report of void dire occurring May 31, 2012; 2RPVD refers to the verbatim report of voir dire occurring June 4, 2012.

Following a recess, the court said, "So I think after the new panel comes up and we screen them for hardship and we'll have a side-bar, I will give you a chance to speak to your client so you can discuss any hardships before I make any final decisions[.]" 1RPVD 26-27. The trial court then excused an additional juror from the first panel for hardship and the parties agreed to individually question additional jurors regarding hardship. 1RPVD 29-32.

The court swore in the second panel of prospective jurors and followed the same procedure of explaining the charges and inquiring into potential hardships. 1RPVD 34-40. Potential jurors then stated their hardships in open court. 1RPVD 41-44. The court then explained, "Did I miss anybody? All right. I am going to talk to the lawyers over here, and if you want to stand and stretch or talk amongst yourselves, you certainly may. I will be right back." 1RPVD 44. An unrecorded sidebar discussion between counsel and the court then occurred. 1RPVD 44. The court did not mention the Bone-Club factors on the record. Neither party objected to considering hardship challenges at the sidebar.

After the sidebar, the court excused seven jurors. 1RPVD 44-45. After excusing the remaining venire members for recess, the court explained the sidebar:

> We had a side-bar, and there was no disagreement on the people excused. We did agree to let number 70 go, and I did not. And I will tell counsel now that the reason that I didn't is it seemed to me to be unfair to keep 61 and let 70 go. Really the same rational we are talking about there with people for work, but I may excuse him eventually, number 70.

1RPVD 45.

Neither the prosecutor nor defense counsel had anything to add to the sidebar. 1RPVD 45-46. Jury selection continued, a jury was shown, and trial commenced. See 2RPVD. At its conclusion, the jury found Schumacher guilty of one count each of first-degree and second-degree child molestation as to S.B., and guilty of one count of second-degree child molestation as to S.H. CP 49-51; 1RP 19-10. The jury was unable to reach a verdict so one count of first-degree child molestation as to S.H. was dismissed. CP 60; 1RP 20, 27.

C. SUPPLEMENTAL ARGUMENT

1. THE TRIAL COURT VIOLATED SCHUMACHER'S RIGHT TO A PUBLIC TRIAL BY CONDUCTING HARDSHIP CHALLENGES AT SIDEBAR.

The Sixth Amendment and article I, section 22 guarantee the accused a public trial by an impartial jury. Presley v. Georgia, 558 U.S. 209, 213, 130 S. Ct. 721, 724, 175 L. Ed. 2d 675 (2010); Bone-Club, 128 Wn.2d at 261-62. Additionally, article I, section 10 of the Washington

Constitution provides that "[j]ustice in all cases shall be administered openly, and without unnecessary delay." This latter provision gives the public and media a right to open and accessible court proceedings. Seattle Times Co. v. Ishikawa, 97 Wn.2d 30, 36, 640 P.2d 716 (1982). There is a strong presumption courts must be open at all stages of the trial. State v. Sublett, 176 Wn.2d 58, 70, 292 P.3d 715 (2012).

Whether a trial court has violated the defendant's public trial right is a question of law this Court reviews de novo. State v. Brightman, 155 Wn.2d 506, 514, 122 P.3d 150 (2005). A trial court may restrict the right only "under the most unusual circumstances." Bone-Club, 128 Wn.2d at 259. Before a court can close any part of a trial, it must first apply the five factors set forth in Bone-Club. In re Personal Restraint of Orange, 152 Wn.2d 795, 806-09, 100 P.3d 291 (2004).[3] Violation of this right is

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[3] The factors are:

> 1. The proponent of closure or sealing must make some showing [of a compelling 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.

presumed prejudicial even when not preserved by objection. State v. Wise, 176 Wn.2d 1, 16, 288 P.3d 1113 (2012).

"The process of juror selection is itself a matter of importance, not simply to the adversaries but to the criminal justice system." Press-Enterprise Co. v. Superior Court, 464 U.S. 501, 505, 104 S. Ct. 819, 78 L. Ed. 2d 629 (1984) (Press-Enterprise I). Washington courts have repeatedly held that jury voir dire conducted in private violates the right to public trial. See, e.g., State v. Wise, 176 Wn.2d at 15; State v. Paumier, 176 Wn.2d 29, 35, 288 P.3d 1126 (2012); State v. Strode, 167 Wn.2d 222, 217 P.3d 310 (2009) (Alexander, C.J., lead opinion); 167 Wn.2d at 231-36 (Fairhurst, J., concurring); State v. Erickson, 146 Wn. App. 200, 211, 189 P.3d 245 (2008), rev. denied, 176 Wn.2d 1031 (2013).

The question in Schumacher's appeal is whether the exercise of hardship challenges conducted as part of voir dire must be held in public. The jury selection process begins when jurors are sworn and complete their questionnaires. State v. Irby, 170 Wn.2d 874, 883-84, 246 P.3d 796 (2011). In Schumacher's case, jurors completed their questionnaires, entered the courtroom, and were sworn in. At that point, the jury

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> 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.

selection process began. Schumacher and counsel were introduced to the venire, and jurors were read the charges against Schumacher. Jurors were then questioned on hardship. Several jurors were excused for hardship following a sidebar discussion between counsel and the court.

The trial court in Schumacher's case violated his right to a public trial to the same extent any in-chambers conference or other courtroom closure would have. Even though the sidebar occurred in an otherwise open courtroom, it by definition occurred privately, outside the public's scrutinizing eyes and ears, and thus violated Schumacher'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), rev. 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).

The State may argue this Court should apply the "experience and logic" test adopted in Sublett, 176 Wn.2d at 73. Under the experience prong of the test, courts ask whether the proceeding has historically been open to the media and public. Id. at 73 (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). Under the logic prong, courts consider whether public access plays an important role in the functioning of the particular proceeding. Sublett, 176 Wn.2d at 73 (citing Press-Enterprise II, 478 U.S. at 8).

There is no need to apply the experience and logic test in this instance because the right to a public trial attaches to jury selection and a portion of jury selection in Schumacher's case took place in private. See State v. Njonge, 161 Wn. App, 568, 572, 580, 255 P.3d 753 (2011) (recognizing closure of courtroom during questioning and excusal of jurors for hardship constituted jury selection subject to Bone-Club analysis), rev. granted, 176 Wn.2d 1031 (2013). The public trial right "ensures[s] that the judge and prosecutor carry out their duties responsibly." Waller v. Georgia, 467 U.S. 39, 46, 104 S. Ct. 2210, 81 L. Ed. 2d 31 (1984). Conducting hardship challenges in an open courtroom during voir dire furthers that goal.

Under RCW 2.36.100, the judge may delegate the task of excusing jurors to the court clerk.[4] State v. Rice, 120 Wn.2d 549, 561, 844 P.2d 416 (1993). In Rice, the clerk excused jurors over the telephone, before

[4] GR 28(b)(1) is in accord: "The judges of a court may delegate to court staff and county clerks their authority to disqualify, postpone, or excuse a potential juror from jury service."

they were sworn to try any particular case, before they were introduced to any particular case, and before they were brought into the courtroom to be questioned on any particular case. Rice, 120 Wn.2d at 560.

In contrast, the prospective jurors in Schumacher's case had already filled out a case-specific questionnaire, had been sworn in on Schumacher's case, and were questioned in the courtroom. Whatever line exists between administrative excusals carried out by a clerk and the voir dire process, Schumacher's case falls firmly on the side of voir dire. See United States v. Williams, 927 F.2d 95, 96 (2d Cir. 1991) ("Voir dire is conducted by the judge in the courtroom, not by the clerk in the central jury room."); United States v. Bordallo, 857 F.2d 519, 522 (9th Cir. 1988) ("At the stage of voir dire, the prospective jurors are questioned about their knowledge of a specific case; the jurors know what case they will hear if selected and know which parties are involved.").

The public has no expectation that it will be able to observe administrative excusals that take place before prospective jurors reach the courtroom. But once a prospective venire is sworn in on a particular case and questioned about the particular case in the courtroom, the selection process must be open to the public.

"Far from an administrative empanelment process, *voir dire* represents jurors' first introduction to the substantive factual and legal

issues in a case." Gomez v. United States, 490 U.S. 858, 874, 109 S. Ct. 2237, 104 L. Ed. 2d 923 (1989). Prospective jurors were introduced to the substantive factual and legal issues in Schumacher's case when the court brought them into the courtroom after filling out a case-specific questionnaire, and in accordance with WPIC 1.01,[5] read the charge against Schumacher, gave them a primer on basic criminal law principles such as the presumption of innocence, and displayed Schumacher to their gaze.

CrR 6.4(b) makes no distinction between hardship questioning and the voir dire process in general. Under CrR 6.4(b), "[t]he judge shall initiate the voir dire examination by identifying the parties and their respective counsel and by briefly outlining the nature of the case." That is what happened in Schumacher's case. The initiation of voir dire occurred in an open courtroom, but became closed to the public once hardship challenges were conducted at a private sidebar.

In State v. Wilson, Division Two recently held two "administrative" juror excusals occurred before the right to a public trial was triggered. 174 Wn. App. 328, 331, 298 P.3d 148, 150, petition for review pending (2013). In that case, the bailiff excused two jurors for

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[5] WPIC 1.01 contains the script to be read "Before Voir Dire of Prospective Jurors." Voir dire begins following the oath, which consists of an affirmative answer to the question "Do each of you solemnly swear or affirm that you will truthfully answer questions about your qualifications to act as jurors in this case." WPIC 1.01.

illness-related reasons before voir dire began in the courtroom. Wilson, 174 Wn. App. at 332. The difference in Schumacher's case is obvious: the closure occurred after voir dire began.

Public access to voir dire, including introduction of the case to prospective jurors and hardship challenges, serves the values underlying the public trial right. "The value of openness lies in the fact that people not actually attending trials can have confidence that standards of fairness are being observed; the sure knowledge that *anyone* is free to attend gives assurance that established procedures are being followed and that deviations will become known. 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., 464 U.S. at 508. Public scrutiny helps assure the trial court will appropriately exercise discretion on the matter. See Wise, 176 Wn.2d at 6 (the public nature of trials is a check on the judicial system, providing for accountability and transparency).

Having the hardship challenge portion of jury selection open to the public guards against arbitrary or discriminatory removal of prospective jurors. A judge could consciously or unconsciously exercise discretion in removing jurors for hardship without requisite justification. See Bordallo, 857 F.2d at 523 ("circumstances could arise in which a judge, either

consciously or inadvertently, excused a disproportionate percentage of a juror population, such as women or minorities . . . or otherwise adversely affected the neutrality of the juror pool."). The values served by the public trial right are frustrated when hardship challenges do not occur in open court.

By failing to first apply the Bone-Club factors before hearing the hardship challenges at sidebar, the trial court violated Schumacher's constitutional right to a public trial. And while there is no Washington case with identical facts, the private sidebar was no less a violation than the closed voir dire that has repeatedly been condemned. Because the error is structural, prejudice is presumed, and thus reversal is required. Wise, 176 Wn.2d at 6, 13-14, 16, 19.

2. THE TRIAL COURT VIOLATED SCHUMACHER'S RIGHT TO BE PRESENT AT ALL CRITICAL STAGES BY CONSIDERING HARDSHIP CHALLENGES AT SIDEBAR.

A criminal defendant has a due process right to be present for jury voir dire. Irby, 170 Wn.2d at 883-85. When a portion of voir dire occurs outside the defendant's presence, reversal is required unless the State proves the violation was harmless beyond a reasonable doubt. Irby, 170 Wn.2d at 886. The trial court violated Schumacher's due process right to be present by having the parties exercise hardship challenges during an

off-the-record bench conference. The State cannot meet the harmless error test. Reversal is warranted.

The Irby court distinguished between the federal and state standards. Under the federal Constitution, "'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.'" Irby, 170 Wn.2d at 881 (quoting Snyder v. Massachusetts, 291 U.S. 97, 107-108, 54 S. Ct. 330, 78 L. Ed. 2d 674 (1934)). Under the state Constitution, which arguably provides greater rights, the defendant must be present to participate "'at every stage of the trial when his substantial rights may be affected.'" Irby, 170 Wn.2d at 885 (quoting State v. Shutzler, 82 Wash. 365, 367, 144 P. 284 (1914)). Under both standards, a defendant has the right to be present and participate in the process of selecting his jury. Irby, 170 Wn.2d at 885.

A long time ago, the United States Supreme Court emphasized the importance of having the accused present for voir dire:

> The prisoner is entitled to an impartial jury composed of persons not disqualified by statute, and his life or liberty may depend upon the aid which, by his personal presence, he may give to counsel and to the court and triers, in the selection of jurors. The necessities of the defense may not be met by the presence of his counsel only. For every purpose, therefore, involved in the requirement that the defendant shall be personally present at the trial, where the indictment is for a felony, the trial commences at least from the time when the work of impaneling the jury begins.

Hopt v. Utah, 110 U.S. 574, 578, 4 S. Ct. 202, 28 L. Ed. 262 (1884).

In Schumacher's case, the record does not affirmatively show Schumacher accompanied the parties to the bench or in any other way participated in counsel's hardship challenges to excuse seven prospective jurors. This is the State's problem, not Schumacher's. It is the State's burden to show Schumacher was present for the bench conference, not Schumacher's burden to show he was not. See, Irby, 170 Wn.2d at 884 (quoting Lewis v. United States, 146 U.S. 370, 372, 13 S. Ct. 136, 36 L. Ed. 1011 (1892), in which the Court observed that "where . . . 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, 150, 52 A.D.3d 94, 95-97 (N.Y. Sup. Ct. 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).

Williams is instructive. 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 juror were included in the discussion. One potential juror was retained and ultimately served. Two others were excused by consent of the attorneys because of a concern they would not be able to put aside previous 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. The Court agreed and reversed her convictions. Williams, 52 A.D.3d at 96. The Court held the exclusion of a defendant from a sidebar discussion, absent 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.

On the existing record, Schumacher has proven the trial court unconstitutionally took hardship challenges in her absence. A violation of the right to be present is subject to the harmless error test. Irby, 170 Wn.2d at 885-86. The only way to show Schumacher's absence was harmless error, however, is to show a juror excused in violation of the defendant's rights had no chance to sit on the jury. If the prospective juror fell within the range of jurors who ultimately comprised the jury, reversal is required. Irby, 170 Wn.2d at 886. Under that approach, reversal is required because at least three of the seven candidates excused for hardship were eligible to make the jury. See 2RPVD 144-150 (last individual chosen is juror 67).

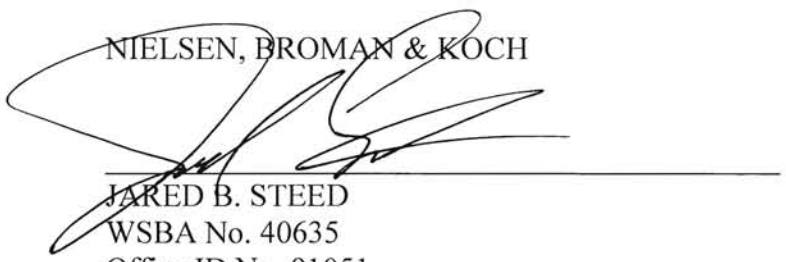
D. CONCLUSION

The trial court violated Schumacher's constitutional rights to a public trial and to be present by taking hardship challenges at sidebar. This Court should reverse Schumacher's convictions and remand for a new trial.

DATED this 5th day of August, 2013.

Respectfully submitted,

NIELSEN, BROMAN & KOCH



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DIVISION ONE

STATE OF WASHINGTON	)	
	)	
Respondent,	)	
	)	
vs.	)	COA NO. 69449-9-I
	)	
COREY SCHUMACHER,	)	
	)	
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 5TH DAY OF AUGUST, 2013, I CAUSED A TRUE AND CORRECT COPY OF THE **SUPPLEMENTAL BRIEF OF APPELLANT** TO BE SERVED ON THE PARTY / PARTIES DESIGNATED BELOW BY EMAIL AND/OR DEPOSITING SAID DOCUMENT IN THE UNITED STATES MAIL.

[X] COREY SCHUMACHER
DOC NO. 358676
WASHINGTON CORRECTIONS CENTER
P.O. BOX 900
SHELTON, WA 98584

SIGNED IN SEATTLE WASHINGTON, THIS 5TH DAY OF AUGUST, 2013.

X Patrick Mayovsky