26476-9-III

COURT OF APPEALS

DIVISION III

OF THE STATE OF WASHINGTON

STATE OF WASHINGTON, RESPONDENT

v.

ANTHONY PARKS, APPELLANT

APPEAL FROM THE SUPERIOR COURT

OF SPOKANE COUNTY

HONORABLE ROBERT D. AUSTIN

BRIEF OF RESPONDENT

STEVEN J. TUCKER
Prosecuting Attorney

Andrew J. Metts
Deputy Prosecuting Attorney
Attorneys for Respondent

County-City Public Safety Building
West 1100 Mallon
Spokane, Washington 99260
(509) 477-3662

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WASHINGTON CASES

SUPREME COURT CASES

I.

APPELLANT'S ASSIGNMENT OF ERROR

The trial court erred by swearing in the jury panel off the record and outside the courtroom without first considering the *Bone-Club* factors, thus excluding the public from that portion of the jury of a wide year process, and violating Mr. Park's constitutional right to a public trial.

II.

ISSUE PRESENTED

A. DID THE TRIAL COURT VIOLATE THE RIGHT TO A PUBLIC TRIAL?

III.

STATEMENT OF THE CASE

The defendant was charged by information filed in Spokane County Superior Court with one count of first degree rape and one count of first degree robbery. CP 1-2. The jury found the defendant guilty of the lesser included crime of second degree rape and not guilty of robbery.

At the beginning of the trial, the court elected to swear in the jury venire in the jury assembly area because the large number of jurors would not fit in the courtroom. RP 1. The jurors were sworn in and given a

questionnaire regarding any history of involvement with sexual abuse. RP 1.

The defendant was told that he had a right to be present and asked if he would waive that right. RP 1. The defendant agreed to waive. RP 1.

After motions in limine, the trial court noted *In re Orange* and the courts requirements to make findings regarding procedures. RP 39. Defense counsel requested that the court conduct individual *voir dire* with only the defendant, counsel and court staff present. RP 39. Defense counsel stated that the reason for the request was that prospective jurors are less forthcoming when asked about sensitive topics in a large group. RP 39-40.

The trial court again mentioned *In re Orange* and noted that a TV reporter had been in the courtroom in the morning, but had not returned that afternoon. RP 40. The court noted that there was no courtroom visitors or observers present. RP 40.

The trial court stated that it was "...most important..." for both parties to have open, frank discussions with potential jurors about sensitive sexual abuse issues. RP 40. The court declared that the general *voir dire* would be open to the public and there would be a partial *voir dire* of those persons who gave positive responses to the questionnaires. RP 40-41. The trial court noted that the room for the individual *voir dire*

was not generally open to the public, but was part of the court's public facilities. RP 41.

The trial court arranged with its staff that if any persons came into the courtroom with a desire to be present, the trial court would ask if the person wanted to be present for individual questioning. RP 41. The court stated that if necessary, it would revisit the issue. RP 41.

Following trial and conviction, the defendant filed this appeal. CP 166.

IV.

ARGUMENT

A. NO CONSTITUTIONAL VIOLATIONS OCCURRED.

The defendant raises only one issue in this case. He claims that Article 1, § 10 of the Washington State Constitution was violated by the trial court and the defendant's right to public trial was violated. The defendant cites to *State v. Bone-Club*, 128 Wn.2d 254, 906 P.2d 325 (1995) and its prodigy. The facts of this case are distinguishable from the cases cited by the defendant and no violation of the rights to public trial occurred here.

Preliminarily, the only aspect of the trial that even arguably transpired while the public was excluded was the first swearing in of the

jury venire. The guaranty of open criminal proceedings extends to "the process of *juror selection*," which "is itself a matter of importance, not simply to the adversaries but to the criminal justice system." *In re Orange,* 152 Wn.2d 795, 804, 100 P.3d 291 (2004) *citing Press-Enter. Co. v. Superior Court*, 464 U.S. 501, 505, 104 S. Ct. 819, 78 L. Ed. 2d 629 (1984) (emphasis added.) By no definition discovered by the State, is swearing in a venire the equivalent of "selection." The act of swearing in a mass of jurors in a jury assembly room selects nothing. The "swearing in" is a ministerial act that all juries go through prior to beginning the actual selection process. The defendant cites no authority that a swearing in is a selection process. The reason for swearing in the jury in the jury assembly area was because the jury would not physically fit inside the courtroom. RP 1.

Further, the trial court specifically informed the defendant of his right to be present during the procedure and asked the defendant if he would waive any objection to the swearing in procedure. RP 1. The defendant specifically waived any objection to swearing in the jury venire in the jury assembly area. RP 1. The defendant argues that he only waived his objections as to that procedure and not the subsequent individual *voir dire.* The State will not pursue that point as the State's position is that the defendant waived as to the swearing in and there was

no violations to waive regarding the individual *voir dire*. The record shows that the public was *not* excluded from individual *voir dire*.

In fact, the trial court went to some lengths to ensure that the public would *not* be excluded from the *voir dire* process. The trial court specifically mentioned *In re Orange*,[1] *supra* and the trial court's obligation to make findings about the individual *voir dire* procedure. RP 39.

The *defense counsel* specifically proposed an individual *voir dire* procedure with only the defendant present, counsel present and court staff present. RP 39. Defense counsel stated that in her experience, when persons are asked to discuss sensitive topics in front of a large group of people, the answers obtained are less forthcoming. RP 39-40.

The trial court noted that a reporter from a local TV station had been present in the morning but had not returned in the afternoon. The trial court stated that it did not know if the reporter would object to individual *voir dire* or not. The trial court also noted that there were no courtroom visitors or observers present. RP 40.

The trial court agreed that the nature of responses to questions regarding sexual abuse is very sensitive. The trial court noted that it is

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[1] Some texts cite this case as "In re Personal Restraint of Orange" while others citing to the same case cite it as "In re Orange."

most important to have free *voir dire* of prospective jurors in light of the nature of the sensitive questions and responses.

The trial court stated that the general *voir dire* would be open to the public. The partial *voir dire* of potential jurors who responded positively to questionnaires would be held in the jury room that is attached to the courtroom and is part and parcel of Department 1's public facilities. However, the nature of the attached jury room makes it not "...generally accessible by the public." RP 41. The trial court set up a procedure whereby if any persons came into the main courtroom, the judicial assistant would ask if they wished to observe the individual questioning. RP 41. The trial court stated that if any such persons appeared, the court would revisit the issue.

The defendant requested to be present during individual *voir dire* and this request was granted. RP 41.

Under this trial court's scheme, the public *was not excluded* from individual *voir dire.* Quite aside from the scenario of a defendant objecting on appeal to a procedure he both asked for and then sat quietly throughout, the trial court made provisions to deal with any "public" that appeared. The trial court instructed court personnel to alert the judge to any "public" that might appear and the trial court stood ready to revisit the

arrangement. The record does not show that any "public" appeared. If no "public" appeared, then no "public" was "excluded."

The defendant claims that the trial court did not follow the *Bone-Club* factors. Those 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.
>
> 5. The order must be no broader in its application or duration than necessary to serve its purpose."

State v. Bone-Club, 128 Wn.2d at 258-59.

As for the first factor, the defendant is the one who requested the procedure. The defense counsel stated a reason for the individual *voir dire* that pointed to a threat to the defendant's right to a fair trial. That reason was sufficient under *Bone-Club, Orange*, etc. as it was an assertion that the defendant would not get complete answers from the prospective jurors unless the "jury room" procedure was used. There was no need for the

proponent (the defendant) to show a "serious and imminent threat" to the threatened right as that standard only applies when the threatened right is something other than a threat to the right to a fair trial. *See Bone-Club, Id.* at 258-59.

The second factor is a non-issue as the trial court made a record that there was nobody (public) present when the motion to do individual *voir dire* was made.

The third factor was clearly the least restrictive method to conduct individual *voir dire.* As noted previously, the trial court made provisions to revisit the situation if anyone entered the courtroom and wanted to be present for individual *voir dire.* The record does not show that anyone arrived and made such a request.

The trial court clearly had the fourth factor in mind when it instructed the court staff to alert the judge if any "public" entered and wanted to observe. This arrangement not only balanced the competing interests of the defendant and the public, it made for a completely open proceeding in which the trial court would be notified of any citizens wishing to observe the *voir dire.* In effect, there was no closure of the procedures to the public. The record shows that there was no public present or later asking to observe.

The fifth factor is also a non-issue as the trial court tailored a set of procedures that would have had no effect on the "public's" right to observe the individual *voir dire*. The trial court stood ready to change the situation if anyone asked to observe, but since no one did ask to observe, we cannot tell from the record what provisions the trial court would have adopted.

The trial court did not intone the sonorous words, *"Bone-Club"* prior to analyzing and arranging the individual *voir dire* at the request of the defendant. However the court twice mentioned *"In re Orange"* and even gave the citation on the record. The State is unaware of any case that requires the trial court to invoke the name *"Bone-Club."* The trial court did follow the five factors from *Bone-Club* and did a good job of dealing with the hazardous shoals of current caselaw.

The defendant is attempting to stretch the current caselaw to the point where it will be impossible to accommodate both the need to maintain some semblance of privacy for potential jurors answering sensitive questions and the need to protect the defendant's (and presumably the public's) right to a public trial. At some point, reality must prevail. That point has been reached and exceeded in this case. The defendant is arguing that he should be given a new trial because the trial court granted the defendant's own request to *voir dire* the potential jurors

in a more private setting. If this trial court's procedures are insufficient, then it is difficult to say what procedures will allow individual *voir dire.* Defendants will, no doubt, be coming before this court to ask for a reversal based on the fact that a trial court has denied their request for individual *voir dire.*

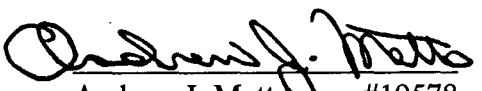
V.

CONCLUSION

For the reasons stated, the conviction of the defendant should be affirmed.

Dated this 2nd day of May, 2008.

STEVEN J. TUCKER
Prosecuting Attorney



Andrew J. Metts #19578
Deputy Prosecuting Attorney
Attorney for Respondent