No. 26476-9-III

IN THE COURT OF APPEALS
FOR THE STATE OF WASHINGTON
DIVISION III

STATE OF WASHINGTON,

Plaintiff/Respondent,

vs.

ANTHONY PARKS,

Defendant/Appellant.

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# Appellant's Supplemental Brief

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A. 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*[1] factors, thus excluding the public from that portion of the jury selection process, and violating Mr. Park's constitutional right to a public trial.

*Issue Pertaining to Assignment of Error*

Where the trial court did not analyze the *Bone-Club* factors before swearing in the jury panel off the record and outside the courtroom, did the court violate Mr. Park's constitutional right to a public trial by excluding the public from that portion of the jury selection process?

B. STATEMENT OF THE CASE

Anthony Parks was convicted by a jury of second-degree rape following a jury trial. CP 122. At the beginning of the trial the court addressed Mr. Parks as follows:

> Mr. Parks, you have a right to be present at all stages of these proceedings. We have a large jury panel. We probably can't get them all in here at any one time. And I would propose that – I would ask if you have any objection to me swearing the jury in the jury assembly room and handing them a questionnaire regarding their history of involvement in sexual abuse. You have a right to be present. I'm asking if you would waive that right?

RP 1.

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

Mr. Parks agreed to waive his presence. The judge then left the courtroom to swear in the jury panel in the jury assembly room. That swearing in was not made part of the record. RP 1.

On November 4, 2014, the Court of Appeals invited supplemental briefing on the applicability of the Washington Supreme Court's decision in *State v. Frawley*, __ Wn.2d __, 334 P.3d 1022, (September 25, 2014). Court of Appeals letter dated 11/4/14. The applicability of that decision is addressed below.

C. ARGUMENT

Since the trial court did not analyze the *Bone-Club* factors before swearing in the jury panel off the record and outside the courtroom, it violated Mr Park's constitutional right to a public trial by excluding the public from that portion of the jury selection process.

In *State v. Frawley*, __ Wn.2d __, 334 P.3d 1022, (September 25, 2014)[2], the Supreme Court reaffirmed its prior holdings in *State v. Wise,* 176 Wn.2d 1, 288 P.3d 1113 (2012) and *State v. Paumier,* 176 Wn.2d 29, 288 P.3d 1126 (2012). The Court reiterated the public trial right applies to jury selection. *Frawley*, __ Wn.2d __, 334 P.3d at 1026 (citing *Wise,* 176 Wn.2d at 11, 288 P.3d 1113; *State v. Bone-Club*, 128 Wn.2d 254, 259, 906

[2] Consolidated with *State v. Applegate*.

P.2d 325 (1995)). A trial court may close the courtroom but only after considering the five *Bone–Club* factors on the record. *Id.* (citing *Wise,* 176 Wn.2d at 13, 288 P.3d 1113). Closure of the courtroom without this analysis is a structural error for which a new trial is the only remedy. *Id.* (citing *Wise,* 176 Wn.2d at 15, 288 P.3d 1113.

*Affirmative Waiver.* The State argued in *Frawley* that the defendant affirmatively waived his public trial right and therefore could not challenge the closure. *Frawley,* __ Wn.2d __, 334 P.3d at 1027. But the Court rejected that argument reaffirming its decision in *In re Personal Restraint of Morris,* 176 Wn.2d 157, 288 P.3d 1140 (2012):

> In that case, similar to what occurred in *Frawley,* the defendant waived his presence for the in-chambers questioning of individual jurors in order to promote juror candor. Our plurality opinion held that waiver of the right to be present should not be conflated with waiver of the right to a public trial because waiver of the former does not necessarily imply knowledge of the latter. We found no discussion of the defendant's public trial right before the closure and thus no waiver of the public trial right . . . We cannot equate a waiver of the right to be present with a waiver of the right to a public trial; we require an independent knowing, voluntary, and intelligent waiver of the public trial right.

*Frawley,* __ Wn.2d __, 334 P.3d at 1028. Even if a valid waiver was obtained, a courtroom closure without a *Bone–Club* analysis would constitute a constitutional violation under both article I, section 10 and under article I, section 22. *Frawley,* __ Wn.2d __, 334 P.3d at 1028-29.

*Contemporaneous Objection.* The Court also rejected the State's argument to require a contemporaneous objection in order to preserve a public trial error for review. *Frawley*, __ Wn.2d __, 334 P.3d at 1029:

> Under such a rule, a trial court could permit a closure whenever the defendant did not object, except for situations in which the closure was "manifest" error, as defined by a common law approach. In practice, such a rule would create a perception of trial proceedings that could be presumptively closed, with open proceedings serving as the exception to the rule. This is inconsistent with our public trial rights jurisprudence, and we decline to overrule the long-standing rule that public trial rights violations may be asserted for the first time on appeal.

*Id.*

*De Minimis.* The *Frawley* court also declined to adopt a de minimis analysis similar to what federal courts have recognized for public trial rights violations:

> Looking to Washington law, even if the brief in-chambers questioning of one juror could constitute a de minimis violation of a defendant's public trial right, such a conclusion would find no place in our public trial rights case law. We have considered a de minimis argument in the context of public trial rights in past cases, and in *Easterling,* 157 Wn.2d at 180, 137 P.3d 825[3], we expressly rejected a de minimis approach as advocated for in the dissenting opinion. We have not deviated from this holding. Thus, in both cases here, the closures were not de minimis.

*Frawley*, __ Wn.2d __, 334 P.3d at 1029.

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[3] *State v. Easterling*, 157 Wn.2d 167, 179, 137 P.3d 825 (2006).

The facts in the present case cannot be distinguished from the holding in *Frawley*. Here, the swearing in of the jury panel is clearly part of "the process of juror selection." Mr. Parks may raise the public trial violation issue for the first time on appeal. He is not required to make a contemporaneous objection to preserve the error. There was no waiver of his right to a public trial and there can be no de minimis exception to the public trial violation.

The trial court excluded the public from witnessing a portion of the jury selection process by swearing in the jury panel off the record and outside the courtroom. The court did not conduct a *Bone–Club* analysis. Moreover, the reason stated by the court for this closure was the same one rejected by the Supreme Court in *In re Personal Restraint of Orange*, 152 Wn.2d 795, 100 P.3d 291 (2004)—limited courtroom space. Since the trial court did not analyze the *Bone-Club* factors before swearing in the jury panel off the record and outside the courtroom, it violated Mr. Park's constitutional right to a public trial. See *Orange*, 152 Wn.2d at 812.

D. CONCLUSION

For the reasons stated herein and in Appellant's opening brief, the conviction should be reversed.

Respectfully submitted December 3, 2014.

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PROOF OF SERVICE

I, David N. Gasch, do hereby certify under penalty of perjury that on December 3, 2014, I mailed to the following by U.S. Postal Service first class mail, postage prepaid, or provided e-mail service by prior agreement (as indicated), a true and correct copy of Appellant's Supplemental Brief:

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