72359-6

NO. 72359-6-I

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

STATE OF WASHINGTON,

Respondent,

v.

JOHNSON AYODEJI,

Appellant.

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

The Honorable Eric Z. Lucas, Judge

REPLY BRIEF

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A. ARGUMENT IN REPLY

1. AYODEJI DID NOT INVITE THE PETRICH ERROR.

The State acknowledges Ayodeji "proposed only one jury instruction regarding the weight and credibility to be given to any alleged out of court statements of the defendant. CP 96-98. The defendant did not propose a Petrich[1] unanimity instruction." Br. of Resp't, 14. The State nevertheless argues the invite error doctrine precludes Ayodeji from challenging the trial court's failure to give a Petrich instruction on the rape charges. Br. of Resp't, 13-15. Neither the record nor the case law support the State's argument.

Under the invited error doctrine, "a party who sets up an error at trial cannot claim that very action as error on appeal and receive a new trial. The doctrine was designed to prevent parties from misleading trial courts and receiving a windfall by doing so." State v. Momah, 167 Wn.2d 140, 154, 217 P.3d 321 (2009). Ayodeji's did not "set up" any error, but merely failed to object or take exception to the erroneous Petrich instruction. "[F]ailing to except to an instruction does not constitute invited error." State v. Corn, 95 Wn. App. 41, 56, 975 P.2d 520 (1999).[2]

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[1] State v. Petrich, 101 Wn.2d 566, 683 P.2d 173 (1984), overruled in part by State v. Kitchen, 110 Wn.2d 403, 756 P.2d 105 (1988).

[2] Furthermore, by arguing that defense counsel's acquiescence to an instruction is invited error, the State "blur[s] the lines between the invited error doctrine and the

Courts find invited error when the defense proposes an erroneous jury instruction and then challenges that instruction on appeal. See, e.g., State v. Studd, 137 Wn.2d 533, 547-48, 973 P.2d 1049 (1999) (holding defense counsel's proposed erroneous jury instruction was invited error); State v. Henderson, 114 Wn.2d 867, 870-71, 792 P.2d 514 (1990) (same). Ayodeji did not propose the erroneous Petrich instruction.

Nor did Ayodeji take any affirmative action to set up the error, contrary to the State's argument. In the State's proposed instructions, the to-convict instructions left open the possibility that the jury could rely on alleged rape acts to also convict for molestation. Supp. CP__ (Sub. No. 56, Plaintiff's Proposed Jury Instructions). Defense counsel objected, arguing the to-convict instructions needed to specify each charge was "separate and distinct from any other charges." 10RP 160. The trial court agreed and added language to the instructions requiring a separate and distinct act on each charge as to each girl. 11RP 8-12. For instance, the to-convict specified Count I (E.A.) needed to be "an act separate and distinct from those alleged [in] Count III and IV." CP 73. Count II (F.A.) needed to be "an act separate and distinct from those alleged [in] Count V and VI." CP 74.

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waiver theory." Corn, 95 Wn. App. at 56. It is well established that failure to give a Petrich instruction in a multiple acts act is manifest constitutional error, and so the issue is not waived by failing to object at trial. State v. Holland, 77 Wn. App. 420, 424, 891 P.2d 49 (1995).

Defense counsel's objection and the trial court's correction of the to-convict instructions remedied a potential double jeopardy violation. See State v. Borsheim, 140 Wn. App. 357, 370, 165 P.3d 417 (2007) (holding that failing to give the "separate and distinct act" instruction violated double jeopardy). It is a separate issue whether the jury was properly instructed that it needed to unanimously agree as to which act was committed for each offense. See id. at 365-66 (addressing these two legal issues separately). This issue was never discussed. Defense counsel mentioned the Petrich instruction only in noting that it did not prevent the jury from using alleged rape acts to convict for molestation. 11RP 7. This double jeopardy discussion did not set up the Petrich error.

Defense counsel then simply failed to object or take exception to the Petrich instruction, which does not constitute invited error. 11RP 48; Corn, 95 Wn. App. at 56. This Court should reject the State's invited error argument.

2. THE PETRICH ERROR WAS PREJUDICIAL AND REQUIRES REVERSAL.

The State argues the jury instructions, as a whole, "accurately informed the jury that it must decide each count separately and that its verdicts must be unanimous." Br. of Resp't, 16. As with the invited error argument, the State conflates double jeopardy and jury unanimity, which

are independent rights. See Borsheim, 140 Wn. App. at 365-67. The "separate and distinct act" instruction does not cure the Petrich problem. The State ignores clear case law holding that "[w]hen the state fails to make a proper election and the trial court fails to instruct the jury on unanimity, there is constitutional error." State v. Kitchen, 110 Wn.2d 403, 411, 756 P.2d 105 (1988).

There can be no reasonable dispute that failure to give a Petrich instruction on the rape charges was error. See Kitchen, 110 Wn.2d at 409 (noting no party disputed that failure to give a Petrich instruction or elect was error). The question is thus whether the error was harmless beyond a reasonable doubt. The State asks this Court to defer to the jury on issues of conflicting testimony and witness credibility. Br. of Resp't, 20-21. But this deference to the trier of fact does not apply in reviewing whether a Petrich error was harmless. In Petrich and Kitchen, the victims' contradictory statements and hazy, nonspecific memories undercut their credibility, making the lack of a Petrich instruction prejudicial. Petrich, 101 Wn.2d at 568; Kitchen, 110 Wn.2d at 406-07.

Like in those cases, this Court must consider the credibility of E.A.'s and F.A.'s testimony, and whether a rational juror could have a reasonable doubt "as to any one of the incidents alleged." Kitchen, 110 Wn.2d at 411. As discussed in the opening brief, E.A.'s and F.A.'s

testimony was riddled with inconsistencies, fabrications, and foggy recollections. Br. of Appellant, 24-28.

The prejudice was exacerbated in an additional way. The jurors were instructed they must be unanimous as to which act constituted child molestation. CP 72. They were not instructed they needed to be unanimous as to which acts constituted child rape. The logical conclusion would then be that they did not have to be unanimous as to the child rape acts. This is similar to the canon of statutory construction, expressio unius est exclusio alterius: "[T]o express one thing in a statute implies the exclusion of the other. Omissions are deemed to be exclusions." In re Detention of Williams, 147 Wn.2d 476, 491, 55 P.3d 597 (2002) (citation omitted).

The State also points out that the prosecutor argued in closing the jury must be unanimous on all seven counts. Br. of Resp't, 16-17. This does not cure the error because the trial court instructed the jury, "The law is contained in my instructions to you. You must disregard any remark, statement, or argument that is not supported by the evidence or the law in my instructions." CP 65. The prosecutor's argument conflicted with the Petrich instruction, which instructed the jurors only that they needed to be unanimous as to the child molestation acts. CP 72. Juries are presumed to

follow the instructions provided. State v. Ervin, 158 Wn.2d 746, 756, 147 P.3d 567 (2006).

The trial court's failure to give a Petrich instruction on the rape charges was prejudicial error that violated Ayodeji's right to a unanimous jury verdict. Reversal is necessary. Kitchen, 110 Wn.2d at 414.

3. EXCLUDING THE PUBLIC FROM VIEWING MEDIA EVIDENCE VIOLATED AYODEJI'S PUBLIC TRIAL RIGHT AND CONSTITUTED A CLOSURE.

The State asserts, without any citation to authority, that exhibits traditionally have not been displayed to the public. Br. of Resp't, 26-27. The State does not respond to the authority cited in Ayodeji's opening brief that experience and logic demonstrate *recorded media* must played so the public can hear or observe the evidence. Br. of Appellant, 39-42. Nor does the State distinguish this Court's decision in State v. Magnano, 181 Wn. App. 689, 326 P.3d 845, review denied, 339 P.3d 635 (2014). There, the court explained the purposes of the public trial right are served "by offering audio recording evidence, admitting it or not, and playing it for the jury in open court." Id. at 699 (emphasis added).

Furthermore, exhibits are available to the public even if they are not displayed to the public during trial. Article I, section 10 of our state constitution requires that "[j]ustice in all cases shall be administered openly." This "provides the public a right of access to court documents as

well as a right of physical access to courtroom proceedings," in both civil and criminal cases. Bennett v. Smith Bundy Berman Britton, PS, 176 Wn.2d 303, 308, 291 P.3d 886 (2013); Dreiling v. Jain, 151 Wn.2d 900, 908, 93 P.3d 861 (2004). Court records are "presumptively public" unless the trial court engages in an Ishikawa[3] analysis to determine whether sealing is permissible. Bennett, 176 Wn.2d at 308. Logic and experience demonstrate exhibits have historically been available to the public.

The video at issue here was sealed pursuant to a protection order and therefore unavailable for public access. CP 156-57. It makes no sense that a trial court would have to perform the Ishikawa analysis to seal an exhibit, but not perform the Bone-Club analysis to exclude to the public from viewing it during trial.

Relying on State v. Love, 183 Wn.2d 598, 354 P.3d 841 (2015), the State argues no closure occurred, despite the fact that the public was purposefully excluded from viewing the video evidence.

In Love, the court held there was no courtroom closure when for cause challenges were made at the bench and peremptory challenges were made by silently exchanging a written list of jurors. The court explained:

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[3] In Seattle Times Co. v. Ishikawa, 97 Wn.2d 30, 37-39, 640 P.2d 716 (1982), the court held the public's right of access to court records may be limited only if the proponent of secrecy can show a compelling need for sealing. Whether sealing is warranted turns on a five factor test intended to balance the public's right of access against other countervailing interests. Id.

> [O]bservers could watch the trial judge and counsel ask questions of potential jurors, listen to the answers to those questions, see counsel exercise challenges at the bench and on paper, and ultimately evaluate the empaneled jury. The transcript of the discussion about for cause challenges and the struck juror sheet showing the peremptory challenges are both publically available. The public was present for and could scrutinize the selection of Love's jury from start to finish, affording him the safeguards of the public trial right missing in cases where we found closures of jury section.

Love, 183 Wn.2d at 607. The court further reasoned, "written peremptory challenges are consistent with the public trial right so long as they are filed in the public record." Id.

Unlike the jury selection in Love, the public was excluded from viewing the evidence. In Love, the public could view the struck jurors leave the courtroom and could see the final empaneled jury. The State's and the defense's challenges were also filed in the public record, so the public could find out exactly which party struck each juror. By contrast, the video was played solely for the jury and was sealed pursuant to a protective order, so it was never made part of the public record. The identity of the man in the video was a primary issue at trial. The public trial goal of encouraging witnesses to come forward was destroyed without public scrutiny. See State v. Sublett, 176 Wn.2d 58, 72, 292 P.3d 715 (2012).

Finally, the State argues: "When a court fails to conduct an express Bone-Club analysis a reviewing court may examine the record to determine if the trial court effectively weighed the defendant's public trial right against other compelling interest," citing State v. Smith, 181 Wn.2d 508, 520, 334 P.3d 1049 (2014). Br. of Resp't, 29-30. Immediately after making this point, though, the Smith court emphasized, "we have said that 'it is unlikely that we will ever again see a case like Momah where there is effective, but not express compliance with Bone-Club' and thus far, our prediction has been correct." Smith, 181 Wn.2d at 520 (quoting State v. Wise, 176 Wn.2d 1, 15, 288 P.3d 1113 (2012)).

Here, the trial court did not weigh any of the competing interests. The parties disputed whether the public trial right attached to exhibits and the court responded, only: "Okay. We will leave it at that, at this point." 9RP 106. This is hardly the situation in Momah where the trial court affirmatively recognized the competing article I, section 22 interests and, "in consultation with the defense and the prosecution, carefully considered the defendant's rights and closed a portion of voir dire to safeguard the accused's right to an impartial jury." 167 Wn.2d at 156; accord Wise, 176 Wn.2d at 12-13 ("We do not comb through the record or attempt to infer the trial court's balancing of competing interests where it is not apparent in the record.").

The courtroom closure violated Ayodeji's public trial right. This Court should reverse and remand for a new trial.

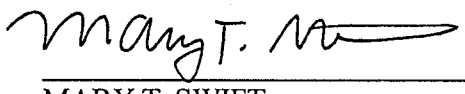
B. CONCLUSION

For the reasons articulated here and in the opening brief, this Court should dismiss counts V and VI with prejudice, and reverse and remand for a new trial on the remaining counts.

DATED this 10th day of February, 2016.

Respectfully submitted,

NIELSEN, BROMAN & KOCH, PLLC



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JOHNSON AYODEJI,	)	
	)	
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 10TH DAY OF FEBRUARY 2016, I CAUSED A TRUE AND CORRECT COPY OF THE **REPLY BRIEF OF APPELLANT** TO BE SERVED ON THE PARTY / PARTIES DESIGNATED BELOW BY DEPOSITING SAID DOCUMENT IN THE UNITED STATES MAIL.

[X] JOHNSON AYODEJI
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CLALLAM BAY CORRECTIONS CENTER
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SIGNED IN SEATTLE WASHINGTON, THIS 10TH DAY OF FEBRUARY 2016.

X Patrick Mayovsky