NO. 29513-3-III

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

STATE OF WASHINGTON,

Respondent,

v.

MERLE WILLIAM HARVEY,

Appellant.

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

The Honorable Tari S. Eitzen, Judge

SUPPLEMENTAL BRIEF OF APPELLANT

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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. The trial court conducted several portions of jury selection outside the public view. Several jurors were dismissed at sidebar conferences, another juror was dismissed by stipulation for reasons never discussed in court, and peremptory challenges were made using charts in a manner that prevented the public from scrutinizing the process. Did these procedures 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 portions of jury voir dire by sidebar, only defense counsel and the prosecuting attorney participated in the process. Moreover, for the additional juror dismissed by stipulation, there is no indication appellant was present or consulted in any way prior to that decision. Did appellant's exclusion from the process of

selecting his jury violate his federal and state constitutional right to be present for all critical stages of trial?

B. STATEMENT OF THE CASE

1. Procedural Facts

Merle Harvey was convicted of Murder in the First Degree, Murder in the Second Degree, and two counts of First Degree Unlawful Possession of a Firearm. CP 411-412. He was sentenced to 753 months and appealed. CP 415, 425-438. In an unpublished opinion, filed March 29, 2012, this Court affirmed Harvey's convictions and sentence. See State v. Harvey, 167 Wn. App. 1026, 2012 WL 1071234 (2012).

On November 8, 2012, the Washington Supreme Court ruled that Harvey had been erroneously denied a transcript of jury voir dire for use on appeal, thereby preventing his claim that a portion of jury selection had been closed to spectators in violation of his right to public trial. The Supreme Court ordered preparation of the transcript and consideration of Harvey's claims. See State v. Harvey, 175 Wn.2d 919, 920-922, 288 P.3d 1111 (2012).

2. Jury Selection

The new transcripts reveal that jury selection occurred on September 13, 14, and 15, 2010. See SRP[1] 1-304. While Harvey and any spectators in the courtroom could observe and hear most of jury selection, the trial judge handled portions of the proceedings at private sidebar conferences. As discussed below, four prospective jurors [jurors 19, 43, 60, 77] were dismissed for cause at sidebar. CP 440-442; SRP 165, 293. In addition, one prospective juror [juror 78] was released by stipulation for reasons not discussed in court. SRP 297. And all of the peremptory challenges were made outside the public view using charts shared only by the court and counsel. SRP 297-302.

a. Sidebar Dismissals For Cause

Jurors initially were asked to provide general information regarding where they live, occupation, leisure activities, and whether they had served as jurors before. SRP 150-151. During this portion of jury selection, juror 19 indicated he had an upcoming business commitment the following week that required his presence

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[1] Following remand from the Supreme Court, transcripts were prepared for several hearings not previously transcribed for Harvey's appeal. For this supplemental brief, however, "SRP" refers exclusively to the transcripts of jury selection.

in Atlanta. SRP 164. Airline tickets had already been purchased and juror 19 indicated it would be a considerable financial hardship if he could not attend. SRP 165.

The court called counsel, but not Harvey, to a sidebar and asked how they wished to handle juror 19's conflict. The prosecutor indicated he had no objection to dismissing 19 for cause and defense counsel did not oppose that suggestion. SRP 165. The court then announced in open court that it was releasing juror 19 from serving on this particular jury. SRP 165.

Later, the court used a similar method for dismissing three additional jurors. During questioning by the attorneys, juror 43 indicated he would find it hard to look at graphic evidence in the case. SRP 245. He also indicated he was a Christian and would find it difficult or impossible to sit in judgment of another person. SRP 247-248, 257-258, 292-293. Similarly, juror 77 indicated she lives her life based on the Bible and would find it difficult or impossible to sit as a juror, although she also indicated she really wanted to serve. SRP 247, 258, 274, 292-293. Juror 60 indicated he was leaving for the Bahamas in a few weeks, the trip was paid for, and he would have a hard time concentrating if required to serve. SRP 190-191, 273.

The trial court dealt with all three of these jurors at the same time. The court called counsel up to the bench for another private sidebar conference. SRP 293. After noting that jurors 43 and 77 indicated they could not sit in judgment, and juror 60 had the upcoming trip, the court struck all three for cause. SRP 293. The court then announced publicly that it had excused the three and they could leave. SRP 294.

b. Off Record Dismissal By Stipulation

A fifth juror, juror 78, was released for reasons not discussed in court. Juror 78 indicated he had served in the Navy and been a high school teacher and principal. He was now a pastor at a local church. SRP 199. Once a week, he ministered at Airway Heights Corrections Center. SRP 199. He had never served on a jury, and some members of his extended family were lawyers or worked for lawyers. SRP 199-200. Twenty years earlier, his cousin – with whom he was "not real close" – had been robbed and murdered, but he did not believe it would affect his ability to serve in Harvey's case. SRP 130-133. Juror 78 also indicated he had a concealed pistol license and carried a weapon for self-defense. SRP 268.

When court adjourned for the day on the afternoon of September 14, juror 78 remained in the jury pool. On the morning

of September 15, however, the court simply noted that juror 78 had been released by stipulation of the parties, and counsel for the prosecution and defense agreed with that assertion. SRP 297.

c. Peremptory Challenges

Immediately prior to counsel exercising their peremptory challenges, the court explained the process to everyone in the courtroom. Using copies of a chart with the jurors' names and assigned numbers, each side would take turns (beginning with the prosecution) exercising a peremptory challenge by writing it down. The challenge was then recorded on the master chart and shared with the court and opposing counsel. This process continued back and forth until a jury was finally chosen. SRP 297-299.

In the midst of this process, there were two sidebar conferences in which the court and counsel discussed issues having to do with the number of possible strikes, and the procedure for using those strikes, against the three alternate jurors used at trial. SRP 299-300. The court then announced in open court that the jury had been selected, struck jurors were removed from the box, and other jurors took their places. SRP 301-302. A few weeks later, after the conclusion of trial, the chart used by the court

and counsel for peremptory challenges was filed as part of the record. CP 439.

C. ARGUMENT

1. THE COURT VIOLATED HARVEY'S 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 Harvey's trial, the judge conducted several portions of jury selection in private without ever considering or even articulating the Bone-Club factors. As discussed above, jurors 19, 43, 60, and 77 were all dismissed for cause at sidebar conferences, meaning any public spectators could not hear what was happening. SRP 165, 293. To dismiss jurors during a courtroom sidebar discussion 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 will likely 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. 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.

The removal of juror 78 also violated Harvey's right to public trial. Juror 78 apparently was dismissed when court was not even in session. The reason for juror 78's dismissal was not discussed or placed on the record during trial. The record merely reveals it was done by stipulation sometime after the end of the trial day on September 14. SRP 297.

Moreover, that portion of jury selection when counsel exercised their peremptory challenges on paper also was closed to the public. This portion of jury selection, like "for cause" challenges, constitutes a portion of "voir dire," to which public trial rights attach. State v. Wilson, __ Wn. App. ___, 298 P.3d 148, 155-56 (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).

At Harvey's trial, the public was unable to see what was happening with the charts used to make peremptory challenges. Moreover, they could not hear the two sidebar conferences that occurred during peremptory challenges. While members of the public could discern, after the fact, which prospective jurors had been removed – based on the clerk asking them to step from the jury box – the public could not tell 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). The chart revealing the source of each challenge was not even filed until after trial was over. CP 439.

There is no indication the trial court considered the Bone-Club factors before conducting any of the private hearings that led to dismissal of jurors 19, 43, 60, 77, or 78. Nor were the factors considered prior to peremptory challenges. By employing its chosen procedures, the court violated Harvey's 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. HARVEY WAS DENIED HIS 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.[2] 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 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).

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[2] 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 . . . ."

In contrast to the United States Constitution, article 1, section 22 of the Washington Constitution explicitly guarantees the right to be present,[3] 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.'" Id. 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 Harvey's case when he was excluded from sidebar conferences during which jurors 19, 43, 60, and 77 were discussed and released. See SRP 165, 293.

Indeed, the circumstances in Harvey's 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

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

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 ("where the [defendant's] personal presence is necessary in point of law, the record must show the fact."); Irby, 170 Wn.2d at 884 (same).

There also was a violation of Harvey's right to be present when juror 78 was released by stipulation of counsel. The discussion and resulting agreement to release 78 apparently took place off the record, and there is no indication Harvey was present

and participated in the decision. See SRP 297. This is reminiscent of Irby, where jurors were dismissed by stipulation of counsel, off the record, and with no indication the defendant was involved. Irby, 170 Wn.2d at 877-879.

The only issue is whether the violations of Harvey's 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.

Juror 28 was the last individual chosen to sit on the jury (other than the three alternate jurors). CP 439-440; SRP 301-302. Juror 19 fell within the range of jurors who ultimately served. Therefore, the error was not harmless beyond a reasonable doubt and reversal is required.

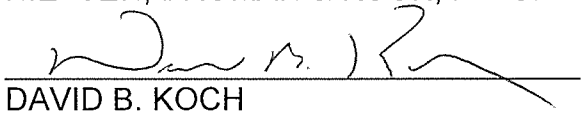
D. CONCLUSION

The procedures used to select Harvey's jury violated his right to public trial and his right to be present for all critical stages of trial. His convictions must be reversed and the case remanded for a new trial.

DATED this 25th day of June, 2013.

Respectfully Submitted,

NIELSEN, BROMAN & KOCH, PLLC.



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Certificate of Service by email

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 25th day of June, 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 per agreement of the parties pursuant to GR30(b)(4) and/or by depositing said document in the United States mail.

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Signed in Seattle, Washington this 25th day of June, 2013.

x Patrick Mayovsky