Cause No. 263541-III

COURT OF APPEALS
STATE OF WASHINGTON
(Div. III)

STATE OF WASHINGTON

Respondent,

v.

JERRY ALLEN HERRON

Appellant,

SUPERIOR COURT No. 07-1-00022-9
WHITMAN COUNTY
HONORABLE DAVID FRAZIER

APPELLANT'S SECOND SUPPLEMENTAL BRIEF

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INTRODUCTION & STATEMENT OF THE ISSUES PRESENTED FOR REVIEW

This appeal involves a series of stays (lasting five-years) in order to consider a *Bone-Club* error assigned in the original brief.

A. ASSIGNMENTS OF ERROR

Appellant Herron raised 3 assignments of error within his original Opening Brief, filed on May 22, 2008 and 2 additional grounds in his *pro se* brief filed June 11, 2008. These identified errors and their related issues remain unchanged.

B. STATEMENT OF THE CASE & PROCEEDINGS

Per Order of this Court, the following is included to supplement the original briefing in light of *State v. Wise*, __ Wn.2d __ (2012).

This matter went to trial on June 18, 2007, on an information charging the defendant with three sex offenses. During *voir dire* the court decided to interview over 20 prospective jurors in chambers regarding their answers to written questions regarding prospective jurors' past experience with sexual assault. RP Vol I-A 58, 67. After a lengthy colloquy with the trial court, Mr. Herron waived his right to a public trial in order to conduct these interviews in private. RP Vol I at 103-110. He was convicted and appeals on issues relating to his 3.5 hearing and to the *Bone-Club* violation.

C. FACTS

Prior to jury selection in a 3-count sexual assault case, the trial court permitted a confidential questionnaire to circulate to the venire panel. The questionnaire asked the prospective jurors questions on sensitive matters relating to sexual assault. [1] The prospective jurors who answered "yes" were questioned in judge's chambers to determine whether they could, in spite of their experience or association, render a fair and impartial verdict. RP Vol I-B at 116-69.

Before excluding the public from this private questioning, the trial court failed to hold a "*Bone-Club* hearing." The trial court did not

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[1] For example, the *venire* was asked to respond to the following written question: "Do you have any reason to believe you might not be able to be fair and impartial in a case involving allegations of a sexual nature." RP Vol I-A at 58:4-7. The venire was also asked whether "[a]ny member of your family or close friend ever been accused of or charged with a crime involving sexual" activities. RP Vol I-A at 65:14-16. At least one juror publically stated that issues involving allegations of sexual abuse evoked strong reactions —the trial court stated that the matter would be taken up "in an individual basis, here, with the attorneys." RP Vol I-A at 41:1-22.

seek any comment from those members of the public seated in the courtroom at the time of the closure motion. There was scant notice and no opportunity to object to closure. RP Vol I-A at 49. Addressing the *venire*, the lower court stated the following: "What I'm going to do, as a matter of fact, is take a break from our sessions in court, and I'm going to turn off our amplification system here, so when we have discussions in chambers it's not broadcast here." The trial court did not address any member of the public regarding his decision to close a portion of *voir dire*. The next reference, at Vol I-A at 70:10-12 ("at this time [we'll] be calling in a few of you for some examination in chambers"), was given after the decision was made to close voir dire and the court neither gave clarification nor sought comment.

While in chambers, the trial judge, prosecutor and defense counsel questioned the prospective jurors, and challenges for cause were heard and ruled upon resulting in several jurors excused for cause. RP Vo I-A at 71, 73, 76, 79, 83, 89, 96, 100, 103. RP Vol I-B at 116, 121, 124, 126, 130, 135, 139, 143, 146, 151, 154, 159, 165.

The defendant waived his right to a public trial on the record choosing to have the prospective jurors interviewed in chambers rather than in another courtroom away from the other prospective jurors. (RP

Vol I 108-9). Portions of the voir dire were preserved but due to noise from the adjoining room, much of the questioning was not preserved. For example, RP Vol I-B at 141, 160 and Vol I-A at 78, 84, 98.

ARGUMENT

I. UNDER *STATE V. WISE* AND *BONE CLUB*, THE TRIAL COURT'S FAILURE TO MAKE THE NECESSARY INQUIRY AND FINDINGS ON THE RECORD IS STRUCTURAL ERROR REQUIRING A NEW TRIAL

Standard of Review This Court reviews *Bone Club* errors *de novo*, *State v. Easterling*, 157 Wn.2d 167, 173-74 (2006), and the matter may be raised for the first time at appeal. *State v. Brightman*, 155 Wn.2d 506, 514-15 (2005).

Argument

To assure careful, case-by-case analysis of a closure motion, a trial court faced with the question of whether a portion of a trial should be closed must ensure, on the record, that each of five criteria are satisfied:

> 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 254, 259-60 (1995); *State v. Wise*, ___ Wn.2d ___, 288 P.3d 1113, 1116 fn. 1 (2012). Failure to meet the *Bone-Club* requirements is "structural error" requiring retrial. *State v. Wise*, 228 P.3d at 115.

The record here is plain. The State and the Defendant waived their own rights to a public *voir dire*. But the right to a public trial is shared with the public itself: waiver by the litigants is necessary but insufficient. *Id.*

In this case, not one of the five the *Bone-Club* requirements were met:

1. There was no showing of a serious and immenent threat to any rights inhering in the public interest. Defendant admits that he had concerns for a fair trial due to the potential for one prospective juror's remarks affecting the remaining panel, or causing some self-

censorship by the juror having to give private information in public, but the balance of concerns expressed by the court and state were for the juror's privacy rights, not the defendant's fair trial rights.

2. The public in attendance was not consulted. The trial court's public declarations on the matter were at best equivocal. The court at one point stated that the sensitive questions relating to prospective jurors' experience with sexual assault would be taken up "in an individual basis, here, with the attorneys," RP Vol I-A at 41:1-22, implying thereby that the process would occur in open court. In any event, the process took place in chambers and the trial court did not provide the public with any means to object.
3. Alternatives to complete closure were not considered. Sequestering the prospective jurors but allowing the public to attend was not considered. Nor was any consideration given to questioning jurors regarding whether they were discomforted about public disclosure of their responses to the *voir dire* process.
4. The means were not the least restrictive. This overlaps with item 3, above, insofar as complete closure was the most restrictive means and completely excluded public participation.

5. The order for in chambers examination was overbroad. While some prospective jurors may have had reluctance to speak publicly, there was no attempt to determine whether some or all of the selected interviewees in fact needed an in chambers conference. In some instances, the sensitive matter may have been remote in time, or an attenuated instance. While one question went to whether a juror could be fair and impartial — a question that might bear heavily on the court's fair trial obligation if the colloquy went too far — the other question only asked whether someone close to the prospective juror had ever been charged or accused of a sex offense. Impartiality and fairness was not an explicit matter. The trial court, however, lumped the answers together and determined without adequate consideration on the record, whether a closed hearing was necessary for each and every positive response.

Where there is structural error " 'a criminal trial cannot reliably serve its function as a vehicle for determination of guilt or innocence, and no criminal punishment may be regarded as fundamentally fair.'" *State v. Wise*, at 1119 (citation omitted). Such an error is "not subject to harmlessness analysis." *Id.* (Citation omitted). "Accordingly, unless the trial court considers the *Bone-Club* factors *on the record before closing a*

trial to the public, the wrongful deprivation of the public trial right is a structural error presumed to be prejudicial." *Id [emphasis added].*

The defendant anticipates that the State will argue that *State v. Wise* is not applicable but that *dicta* in *State v. Momah*[2] controls (stating that not all closures are fundamentally-unfair structural error).

As in *Momah*, the defendant here agreed to closure and "affirmatively assented" and "participate[d] in the design of the trial closure." But Momah's counsel was concerned about contamination of the panel, *not* the public's right to an open court. 167 Wn.2d at 146 ("we have the real concern that they will contaminate the rest of the jury").

More importantly, the *Momah* trial court "effectively considered the *Bone-Club* factors." *State v. Wise,* 288 at 1119-20. The record in this case does not support the "unique confluence of facts" showing that the public was aware of the rights at stake or that the court properly weighed those rights. *Id.* To the contrary, the trial court stated in open court that the sensitive matters would be taken up "in an individual basis, here, with the attorneys." RP Vol I-A at 41:1-22. The court may have reconsidered or simply not been mindful of the closure, but the panel and the public were not given accurate notice or opportunity to react once the decision to close

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[2] 167 Wn.2d 140 (2009).

voir dire was made. The decision was made with a background awareness but not adherence to *Bone-Club*'s requirements.

Momah itself was criticized in *Wise*. The *Wise* court noted that the opinion in *Momah* incorrectly cabined "structural error" by limiting the test to "fundamental fairness". *Wise*, 288 at 1119 fn. 7. Among the proper considerations for structural error is "the difficulty of assessing the effect of the error" and the "irrelevance of harmlessness." *Id.* An extention of *Momah's* dictum regarding structural error to the facts here is improper. Even if the Defendant here joined the court's inclination to exclude the public from sensitive voir dire (which the State may argue militates in the abstract against a finding of fundamental unfairness), the difficulty in evaluating the effect of the error cannot be overcome.

Momah has other defects. That panel made the suggestion that "the better practice is to apply the five guidelines and enter specific findings before closing the courtroom", *Momah*, 167 Wn.2d at 152 fn. 2. But the court in *Wise* plainly makes the point that the trial court does not have the option of cutting corners:

> unless the trial court considers the *Bone-Club* factors *on the record* before closing a trial to the public, the wrongful deprivation of the public trial right is a structural error *presumed to be prejudicial*.

Wise, 288 P.3d at 1119. [Emphasis added]. And again,

> A trial court is required to consider the Bone-Club factors *before* closing a trial proceeding that should be public.

Wise, 288 P.2d at 1118. [Emphasis in original] (Citing *Presley v. Georgia*, 558 U.S. 209, 130 S.Ct 721, at 724 (2010).

On this record the State cannot overcome the presumption of prejudice to "foundational principle of an open justice system..." *Wise*, 288 P.3d at 1118.

CONCLUSION

For the reasons set forth above, Jerry Herron respectfully asks this Court to vacate the verdict and remand for new trial.

DATED THIS 24th day of January, 2013.

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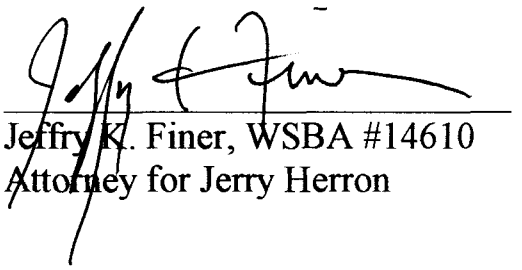

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CERTIFICATE OF SERVICE

I, Danette Lanet, certify that on the 24 day of January, 2013, I caused the foregoing *Appellant's Second Supplemental Brief*, to be served, via USPS, postage prepaid, on the following:

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DATED this 24 day of January, 2013.

Danette Lanet

Danette Lanet, Legal Assistant