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COA NO. 63869-6-I

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

STATE OF WASHINGTON,

Respondent,

v.

JOSEPH NJONGE,

Appellant.

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

The Honorable Laura Middaugh, Judge

REPLY BRIEF OF APPELLANT

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TABLE OF CONTENTS

TABLE OF AUTHORITIES

Page

WASHINGTON CASES

TABLE OF AUTHORITIES (CONT'D)

TABLE OF AUTHORITIES (CONT'D)

TABLE OF AUTHORITIES (CONT'D)

A. ARGUMENT IN REPLY

1. THE TRIAL COURT VIOLATED NJONGE'S CONSTITUTIONAL RIGHT TO A PUBLIC TRIAL.

a. Closure Of Voir Dire To The Media Violated Njonge's Right To A Public Trial.

"The requirement of a public trial is satisfied by the opportunity of members of the public *and the press* to attend the trial and to report what they have observed." Nixon v. Warner Commc'ns, Inc., 435 U.S. 589, 610, 98 S. Ct. 1306, 55 L. Ed. 2d 570 (1978) (emphasis added).

The State asserts the trial judge only prohibited the TV station from filming voir dire and therefore the press was not excluded. Respondent's Brief (Br.) at 9, 20. The record shows otherwise. The judge, upon prohibiting filming of voir dire, simply told TV station employees to leave the courtroom: "I have no objection to them filming, but they cannot during jury selection. So, I told them they had to leave until after the jury selection." 3RP 4. Ordering members of the press to leave, rather than simply prohibiting them from filming while they remained present and observed, violated Njonge's right to a public trial.

The distinction between simply prohibiting members of the press from filming proceedings versus ordering the press to leave the courtroom altogether is constitutionally significant. The Sixth Amendment does not require any part of trial be broadcast live or on tape to the public. Nixon,

435 U.S. at 610. The right to public trial, however, requires an opportunity for the press to be present. Id.; accord State v. Russell, 141 Wn. App. 733, 735, 739-40, 172 P.3d 361 (2007).

b. The Trial Court Violated Njonge's Right To A Public Trial In Closing Voir Dire Without Taking The Steps Necessary To Justify Closure.

The State claims there was no violation of Njonge's constitutional right to a public trial because the record does not establish the courtroom was completely closed to the public. Br. at 1, 9. The State is wrong.

Before jury selection started, the judge rejected the prosecutor's request that a single family member be present in the courtroom during voir dire, stating "we are in very cramped quarters for jury selection, and I think about *the only place* for visitors to sit is going to be in the little anteroom out there, and I will tell you, with what we are going to do about trying to get enough just to do this in one meeting." 1RP 46 (emphasis added).

The judge later announced, "Just let me say for the people who are observing. You are certainly welcome to observe. Tomorrow when we have the jury selection, there will not be room for all of you. *What we are going to do to allow people to observe is check with the fire marshal* -- we have a new fire marshal in Kent -- *and make sure that we can keep those first swinging doors open. And if we can do that, then we will allow some*

people to observe if they wish to do so during jury selection by sitting in that kind of entry hall, if we can do that." 1RP 105 (emphasis added).

The State seizes upon the judge's statement "Tomorrow when we have the jury selection, there will not be room for all of you" as evidence that some members of the public were allowed to observe voir dire inside the courtroom. Br. at 18. That is not what happened. The plain language and context of the of the judge's statements show the judge was saying that to the extent anyone could observe, they would have to do so in the entry hall (anteroom) — the "only place" available. 1RP 46, 105. During the first portion of voir dire, the judge was unwilling to even let a single member of the public inside the courtroom due to a lack of space. 1RP 46.

After conducting the first portion of voir dire under these conditions, the judge granted the prosecutor's request to have some family members observe the remainder, noting "We checked with the fire department. They wouldn't let us leave the doors open for visitors to come in. Let's move No. 30 over next to 34, and then we can have visitors sitting in the second row there." 2RP 55. The fact that the doors were not allowed to remain open for visitors shows that no member of the public was allowed to observe the first portion of voir dire, given that the judge had earlier stated he would allow "some people to observe" in the entry

hall (anteroom) only if the fire marshal would permit the doors to remain open. 1RP 105.

A trial court's actions may amount to a closure excluding the public, regardless of whether the trial court entered a formal order closing the courtroom. State v. Brightman, 155 Wn.2d 506, 511, 122 P.3d 150 (2005) ("In terms of observers and witnesses, we can't have any observers while we are selecting the jury, so if you would tell the friends, relatives, and acquaintances of the victim and defendant that the first two or three days for selecting the jury the courtroom is packed with jurors, they can't observe that."); State v. Sadler, 147 Wn. App. 97, 107, 112, 193 P.3d 1108 (2008) (trial court heard Sadler's Batson[1] challenge in jury room, stating "We are going to step into the jury room for one matter on the record."); State v. Duckett, 141 Wn. App. 797, 801, 803, 173 P.3d 948 (2007) (trial judge told Duckett and his lawyer that follow-up questioning of those jurors whose questionnaire responses indicated some experience with sexual abuse would take place outside the courtroom stating, 'I generally do it in my jury room, Counsel . . . so as to maintain some privacy.'").

In Njonge's case, the judge's announcements about who would be allowed to observe voir dire and under what circumstances amount to a

[1] Batson v. Kentucky, 476 U.S. 79, 95, 106 S. Ct. 1712, 90 L. Ed. 2d 69 (1986).

closure. The plain language of the record shows members of the public were only allowed to observe the first portion of voir dire from the anteroom if the doors could remain open as per the judge's directive, the door separating the courtroom and the anteroom remained closed, and therefore no member of the public was permitted in the courtroom during that time period.

c. Even If The Closure Was Only Partial, Njonge's Constitutional Right To A Public Trial Was Still Violated.

The State contends the closure was only partial in that some members of the public were allowed to observe voir dire while others were not. Br. at 15, 20. Reversal is still required even assuming this is true.

The Bone-Club[2] requirements mirror the requirements set forth by the United States Supreme Court in Waller v. Georgia, 467 U.S. 39, 45-46, 48, 104 S. Ct. 2210, 81 L. Ed. 2d 31 (1984). In re Pers. Restraint of Orange, 152 Wn.2d 795, 806-07, 100 P.3d 291 (2004). Although Waller addressed the complete closure of a trial to the public, federal and state courts have subsequently extended the Waller requirements to partial closures. State v. Ortiz, 91 Haw. 181, 191, 981 P.2d 1127 (Haw. 1999) (citing authorities).

[2] State v. Bone-Club, 128 Wn.2d 254, 258-60, 906 P.2d 325 (1995).

Two state supreme courts have applied the Waller test to partial closures without alteration, including the requirement that a compelling, overriding interest must justify such closure. People v. Jones, 96 N.Y.2d 213, 219, 726 N.Y.S.2d 608 (N.Y. 2001) (posting court officer outside courtroom to monitor those entering and exiting was partial closure; threat from at large co-defendant and safety of undercover officer constituted overriding interest); State v. Mahkuk, 736 N.W.2d 675, 685 (Minn. 2007) (prosecutor's assertion of witness intimidation did not constitute overriding interest). Our Supreme Court has determined lack of courtroom space is not a compelling interest capable of overriding the right to a public trial. Orange, 152 Wn.2d at 809-10.

Other authorities apply a modified Waller test to partial closures, replacing the need for an overriding interest with a "substantial" reason for closure, while retaining the other Waller requirements without alteration. See, e.g., United States v. Sherlock, 962 F.2d 1349, 1357 (9th Cir. 1989) (protection of young sex crime victims from trauma and embarrassment of public scrutiny was substantial reason; some of defendant's family members excluded after court found they peered and giggled at previous witnesses); Woods v. Kuhlmann, 977 F.2d 74, 76-77 (2d Cir. 1992) (witness intimidation was substantial reason justifying partial closure); State v. Drummond, 111 Ohio St.3d 14, 22, 854 N.E.2d 1038 (Ohio 2006)

(trial court's interest in maintaining courtroom security and protecting witness safety were substantial reasons); State v. Sams, 802 S.W.2d 635, 640 (Tenn. Cr. App. 1990) (not wanting victims, the appellant's children, to face their relatives while testifying was not substantial reason); see also Ortiz, 91 Haw. at 192-93 (without deciding whether overriding interest or substantial interest was the proper standard for first prong of Waller test, holding public trial right violated because closure was broader than necessary, court considered no alternatives, and findings justifying partial closure were insufficient).

The judge here artificially reduced the number of seats available to the public by requesting an inordinate number of prospective jurors and crammed all of them into the courtroom to speed up the jury selection process. 1RP 90-91. Courts, however, "must not sacrifice constitutional rights on the altar of efficiency." State v. Madsen, 168 Wn.2d 496, 509, 229 P.3d 714 (2010) (criminal defendant's right to pro se status cannot be denied simply because affording the right will be a burden on the efficient administration of justice). Njonge's constitutional right to a public trial, even if only a partial closure occurred, cannot be sacrificed to the court's mere interest in making the jury selection process more efficient.

One foreign court has stated the lack of space to accommodate the general public due to the number of prospective jurors in the courtroom

qualifies as a substantial reason justifying partial closure. Commonwealth v. Cohen, 456 Mass. 94, 112, 921 N.E.2d 906 (Mass. 2010). Cohen, however, did not involve a judge affirmatively restricting available seating capacity by ordering a larger than ordinary panel. The desire for efficiency is not a "substantial" reason for partially closing the courtroom in Washington, given that constitutional rights should not be sacrificed to that interest. Madsen, 168 Wn.2d at 509.

Even if lack of seating capacity constitutes a substantial reason for partial closure, the other three Waller requirements must still be satisfied. See, e.g., Ortiz, 91 Haw. at 192-93 (applying Waller test to partial closure); Jones, 96 N.Y.2d at 217-21 (same); State v. Ndina, 315 Wis.2d 653, 686-88, 761 N.W.2d 612 (Wis. 2009) (same); Woods, 977 F.2d at 76-77 (same).

The requirement that the closure be no broader than necessary is unsatisfied in Njonge's case. The closure was broader than necessary because the size of the jury panel ordered by the court was larger than necessary. The requirement of findings justifying closure remains unsatisfied as well. There are none here.

Finally, the judge in Njonge's case considered no alternatives to partial closure whatsoever, such as reducing the size of the initial voir dire panel, splitting up the panel, or holding voir dire in a larger courtroom.

See Presley v. Georgia __U.S.__, 130 S. Ct. 721, 724-25, __L. Ed. 2d__ (2010) (possible alternatives included reserving one or more rows for the public, dividing the jury venire panel to reduce courtroom congestion; or instructing prospective jurors not to engage or interact with audience members); Orange, 152 Wn.2d at 810 (judge did not explain why he was compelled to call 98 prospective jurors (as opposed to 90, for example, which would have allowed seating for some family members, other spectators, and the press) or why the venire could not have been divided) (citing In re Closure of Jury Voir Dire, 204 Mich. App. 592, 596, 516 N.W.2d 514 (Mich. Ct. App. 1994) (closure of voir dire due to lack of space unconstitutional where court "gave no reason why every member of the jury pool had to be in the courtroom at one time.")).

By way of contrast, the judge in Cohen partially complied with this requirement by holding jury voir dire in the largest available courtroom and reserving space for the defendant's family and the press. Cohen, 456 Mass. at 115 (judge should have considered additional alternatives to the "do not enter" sign on courtroom door).

"Trial courts are obligated to take every reasonable measure to accommodate public attendance at criminal trials." Presley, 130 S. Ct. at 725. According to Paumier, Presley controls what a trial court must do under the federal constitution before excluding the public from voir dire.

State v. Paumier, 155 Wn. App. 673, 685, 230 P.3d 212 (2010). The State nevertheless contends Presley does not apply in the absence of objection, citing State v. Bowen, __Wn. App.__, 236 P.3d 220, 223 (2010) (recognizing conflict with Paumier).[3] Br. at 19-20.

Even if the Presley requirement of sua sponte considering alternatives does not apply in the absence of objection, that requirement exists under pre-existing Washington precedent. Bone-Club, 128 Wn.2d at 260 (requirement that trial court choose the least restrictive means meets the Waller directive to consider alternatives); State v. Strode, 167 Wn.2d 222, 226-36, 217 P.3d 310 (2009) (Alexander, C.J., lead opinion), (Fairhurst, J., concurring) (majority of the Supreme Court reversed conviction because the trial court failed to weigh the required Bone-Club factors before closing the courtroom). The Strode court reversed in the absence of objection because "the trial court did not consider whether there were less restrictive alternatives to closure available." Strode, 167 Wn.2d at 229.

In an attempt to exonerate the partial closure that it maintains took place here, the States cites United States v. Shryock, 342 F.3d 948, 974 (9th Cir. 2003). Br. at 17. In Shryock, the Ninth Circuit stated the trial

[3] The Bowen decision was withdrawn on September 16, 2010 and reissued on September 21 with the same analysis on the public trial issue.

judge must affirmatively act to close a courtroom and that the limited size of a courtroom in that case did not amount to a "de facto" closure for public trial purposes. Shryock, 342 F.3d at 974. Specifically, it determined no public trial violation occurred where the trial court did not do anything affirmative to close the courtroom and freely allowed the press, the defendant's family members and the general public to use available seating during the trial. Id. at 974-75.

The State claims Njonge's case is like Shryock because both involve "de facto" closures based on limited seating. Br. at 18. The comparison fails. Njonge's case does not involve a simple "de facto" closure. Unlike Shryock, the trial judge here engaged in an affirmative act that created the partial closure. The judge's unilateral decision to order a larger than ordinary panel of prospective jurors caused members of the public being turned away that would otherwise have been able to observe. 1RP 90-91. The judge created the limited seating problem by requesting a larger than ordinary voir dire panel. The judge took further affirmative action in telling observers they could not all observe voir dire in the courtroom due to the space constraints created by the judge.

Shryock, meanwhile, involved a fully available courtroom packed with the press and members of the public, including the defendant's family. There simply was no more capacity. That is a far cry from Njonge's case,

where the judge artificially reduced capacity, preventing at least some members of the public from observing voir dire.

In claiming no public trial violation occurred here, the State also cites State v. Collins, 50 Wn.2d 740, 314 P.2d 660 (1957). Br. at 15-16. The Collins court held a partially closed hearing did not rise to the level of a constitutional violation where a trial court ordered the courtroom doors locked while allowing a reasonable number of spectators to remain. State v. Collins, 50 Wn.2d 740, 747, 314 P.2d 660 (1957). Much has changed in the more than half century since Collins was decided. Waller and its progeny now provide the proper legal analysis in partial closure situations.

The Collins court also stated the public trial issue was waived on the ground that "[w]here the ruling is discretionary, a defendant who does not object when the ruling is made waives his right to raise the issue thereafter." Collins, 50 Wn.2d at 747. Whether the trial court abused its discretion is no longer the correct legal standard for assessing partial closure claims. The Waller test provides the correct standard.

Furthermore, the notion of waiver advanced in Collins is now outdated. Our Supreme Court has since determined the trial court must at least give the defendant an opportunity to object, even where removal of a spectator fell within a trial court's discretion to regulate the conduct of a trial. State v. Gregory, 158 Wn.2d 759, 816, 147 P.3d 1201 (2006)

(removal of single observer from the courtroom during witness's testimony did not violate public trial right because judge explained reason for exclusion, offered defendant a chance to object and limited exclusion to the duration of witness's testimony). Unlike Gregory, the trial court here did not give Njonge an opportunity to object.

Significantly, the Gregory court did *not* hold the defendant waived his right to raise the public trial issue for the first time on appeal by failing to object below. RAP 2.5(a)(3) provides the proper framework for deciding when a constitutional error may be raised for the first time on appeal. It is well settled that a criminal defendant's right to a public trial is an issue of constitutional magnitude that may be raised for the first time on appeal under RAP 2.5(a)(3). State v. Duckett, 141 Wn. App. 797, 805-06, 173 P.3d 948 (2007); Easterling, 157 Wn.2d at 173 n. 2. RAP 2.5(a)(3) applies even to discretionary trial court decisions. See, e.g., State v. Kirkman, 159 Wn.2d 918, 926-27, 934-35, 155 P.3d 125 (2007) (admission of expert testimony reviewed for abuse of discretion; explicit or near explicit opinion on witness credibility is error of constitutional magnitude that can be raised for first time on appeal).

Comparison with Gregory shows why reversal is required here. The trial court in Gregory excluded the defendant's aunt while his grandmother was testifying because the court observed the aunt nodding

her head, which it regarded as either prompting or tampering with the witness. Gregory, 158 Wn.2d at 815-16. The removal of one disruptive spectator for a limited time amounted to no more than the trial court's exercise of discretion to regulate the conduct of a trial. Id. at 816. Gregory involved the trial court exercising its inherent authority to exclude a spectator that was potentially undermining the fairness of the trial. State v. Lormor, 154 Wn. App. 386, 390, 224 P.3d 857, review granted, 236 P.3d 206 (2010).

That feature is absent from Njonge's case. The closure here did nothing to protect the fairness of proceedings, involved more than one person, and existed for an extended period of time. The Bone-Club (Waller) test is the proper test to measure the constitutionality of the closure at issue in Njonge's case.

In Lormor, Division Two determined the trial court's exclusion of the defendant's four year old daughter from the courtroom was trivial because she was the only person excluded and the presence of someone of such tender years would not serve any of the interests associated with the public trial right. Lormor, 154 Wn. App. at 394. For this reason, the closure did not need to pass the Bone-Club (Waller) test. Id. at 391. Assuming the validity of that analysis, Lormor is readily distinguishable from Njonge's case, where an untold number of adults were excluded.

2. THE COURT'S IMPROPER ADMISSION OF CHARACTER EVIDENCE UNDER ER 405 UNFAIRLY INFLUENCED THE OUTCOME OF THE CASE.

The trial court admitted evidence of Jane Britt's reserved character through the testimony of Britt's granddaughter under ER 405(b). 9RP 9-10. At trial, the prosecutor did not dispute the granddaughter's testimony described "a general character trait for reservedness." 9RP 8. The State on appeal does not dispute this evidence was inadmissible under ER 405(b).

Instead, the State argues the granddaughter's testimony as well as Colvin's testimony was admissible as evidence of Britt's "habit" under ER 406.[4] Br. at 43. This is the entire extent of its argument: "Jane Britt's habit was that she did not run her hands through the hair of staff members at the nursing home or of members of her family." Br. at 43. The State does not support this argument with any authority or any development. This Court should therefore refuse to consider it. State v. Thomas, 150 Wn.2d 821, 868-69, 83 P.3d 970 (2004) (passing treatment of an issue without citation to authority is insufficient to merit judicial consideration).

The trial court expressly rejected the notion that this evidence was admissible as habit under ER 406. 9RP 8. A habit is a regular, semi-

[4] The Sate's brief mistakenly cites ER 405 and then quotes from ER 406. Br. at 43.

automatic, almost involuntary and invariably specific response to a repeated specific situation involving fairly specific stimuli. Washington State Physicians Ins. Exch. & Ass'n v. Fisons Corp., 122 Wn.2d 299, 325, 858 P.2d 1054 (1993); Norris v. State, 46 Wn. App. 822, 826, 733 P.2d 231 (1987). Those criteria do not even come close to being met here. The State has not cited a single case, and undersigned counsel has found none, where habit evidence consisted of *not* acting in response to a general situation.

The State elsewhere suggests this evidence was simply admissible as relevant under ER 401. Br. at 43-44.[5] Evidence of a victim's character does not get in simply because it is relevant. Its admission must past the test for admissibility under ER 404(a) and ER 405. Character evidence can qualify under one of the ER 404(a) exceptions, as it does here, but remain inadmissible if the method of proof does not meet the requirements of ER 405. State v. Kelly, 102 Wn.2d 188, 196-97, 685 P.2d 564 (1984); State v. Mercer-Drummer, 128 Wn. App. 625, 630, 632, 116 P.3d 454 (2005).

The State also argues this evidence was admissible as rebuttal evidence on the theory that Njonge opened the door to its admission. Br.

[5] Contrary to the State's assertion, Njonge does not concede this was admissible evidence under ER 401 or any other rule. Br. at 44.

at 43-44. The "open door" rule applies only when the opposing party has first introduced inadmissible evidence. Patterson v. Kennewick Public Hosp. Dist. No. 1, 57 Wn. App. 739, 744, 790 P.2d 195 (1990). "If the introduction of admissible evidence opened the door to rebuttal by inadmissible evidence, the rules of evidence would be rendered virtually useless." 5 K. Tegland, Evidence Law and Practice § 103.15 at 78-79 (5th ed. 2007). Defense counsel did not elicit inadmissible evidence from Njonge on this issue during examination. He therefore did not open the door to the inadmissible character evidence elicited by the State in rebuttal.

3. THE COURT COMMITTED REVERSIBLE ERROR IN ALLOWING ADMISSION OF ER 404 (b) EVIDENCE.

The State claims defense counsel did not preserve an ER 404(b) objection to evidence about substandard dental care. Br. at 27-28. The State is mistaken. In its presentation to the trial court, the prosecutor argued for its admission using an ER 404(b) analysis and stated her understanding "from the Defense brief" that the defense had objected to it. 1RP 5-6. The defense in its pre-trial brief objected to this evidence (assumed at the time to be coming in through the dentist's testimony) on grounds of ER 401 and ER 403. CP 17-18. In colloquy, defense counsel further argued this evidence lacked probative value and did not show motive to kill. 1RP 12.

Although an objection based on relevance fails to preserve an appeal based on ER 404(b), an objection based on "prejudice" is adequate to preserve an appeal based on ER 404(b) because it suggests the defendant was prejudiced by the admission of evidence of prior bad acts. State v. Mason, 160 Wn.2d 910, 933, 162 P.3d 396 (2007). Moreover, an objection is sufficient if a specific basis is apparent from the context of trial. State v. Braham, 67 Wn. App. 930, 935, 841 P.2d 785 (1992). Defense counsel's objection was sufficient to invoke ER 404(b) under the circumstances.

D. CONCLUSION

For the reasons stated, above and in the amended opening brief, this Court should reverse the conviction and remand for a new trial.

DATED this 24th day of September 2010.

Respectfully Submitted,

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DIVISION ONE

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	)	
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	)	
JOSEPH NJONGE,	)	
	)	
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 24TH DAY OF SEPTEMBER, 2010, 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] JOSEPH NJOONGE
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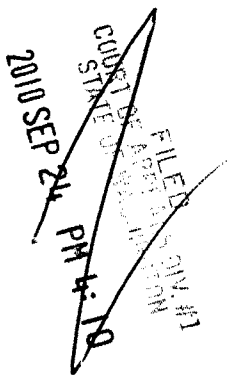

SIGNED IN SEATTLE WASHINGTON, THIS 24TH DAY OF SEPTEMBER, 2010.

x Patrick Mayovsky