NO. 44487-9-II

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

STATE OF WASHINGTON,

Respondent,

v.

LARDELL COURTNEY,

Appellant.

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

The Honorable James Orlando, Judge

SUPPLEMENTAL BRIEF OF APPELLANT

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OTHER JURISDICTIONS

RULES, STATUTES AND OTHER

A. SUPPLEMENTAL 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 portions of jury selection outside the public view. Two jurors were dismissed at sidebar conferences, and peremptory challenges were made 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 a portion of jury voir dire by sidebar, only defense counsel and the prosecuting attorney participated in the process. 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. SUPPLEMENTAL STATEMENT OF THE CASE

1. Sidebar Dismissals For Cause

Jury selection occurred on January 23, 2013. After the prosecutor and defense counsel had questioned prospective jurors, Judge Orlando called counsel, but not Mr. Courtney, to a sidebar conference. SRP[1] 47. What occurred at this private conference was unknown to anyone else in the courtroom. Later, Judge Orlando indicated that, during the sidebar, he had removed jurors 11 and 16 for cause. RP 10-11. Juror 11 was removed because she worked for Safeway, and the charged crimes had occurred at a Safeway store. RP 11. Juror 16 was removed because the court questioned his ability to follow the instructions and keep an open mind. RP 11-12.

2. Peremptory Challenges

Immediately prior to counsel exercising their peremptory challenges, the court stated the following:

> Folks, you can sit back and relax. The attorneys will be making their final selection here in writing and then when they're done, we will have folks take the jury box. You can talk quietly between yourselves over anything other than this case, okay?

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[1] "SRP" refers to the report of proceedings of voir dire obtained after the filing of Courtney's opening brief. "RP" refers to the verbatim report of proceedings originally obtained for appeal.

SRP 47. Apparently, the attorneys then exercised peremptory challenges in another private meeting. The transcript simply says, "(Off the record while the attorneys are doing their peremptory challenges."). SRP 47.

Once the attorneys had made their challenges, the court filled the jury box with the jurors who had been selected to decide the case, plus two alternates. SRP 47-48. At no time did the court announce which party had removed which potential jurors. Instead, the court merely filed a document containing this information. That document reveals that the prosecution struck jurors 4 and 6 and the defense struck jurors 3 and 10. See CP 83.

C. ARGUMENT

1. THE COURT VIOLATED COURTNEY'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 Courtney's trial, the judge conducted portions of jury selection in private without ever considering or even articulating the Bone-Club factors. As discussed above, jurors 11 and 16 were dismissed for cause at a sidebar conference, meaning any public spectators could not hear what was happening. SRP 47; RP 10-12. 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 State v. Momah, 167 Wn.2d 140, 146, 217 P.d 321 (2009), cert. denied, 131 S. Ct. 160, 178 L. Ed. 2d 40 (2010); 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.

Moreover, that portion of jury selection when counsel exercised their peremptory challenges 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, 174 Wn. App. 328, 342-343, 298 P.3d 148 (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 Courtney's trial, the public was unable to see or hear what was happening when the attorneys made peremptory challenges. While members of the public could discern, *after the fact*, which prospective jurors had been removed by whom (generously assuming they knew to look in the court file), the public could not tell at the time the challenges were made 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); see also State v. Saintcalle, ___ Wn.2d ___, ___ P.3d ___, 2013 WL 3946038, at *7, *30-32, *46-47 (Aug. 1, 2013) (lead opinion, concurrence, and dissent underscore harm resulting from improper race-based exercises of peremptory challenges and difficulty of prevention).

There is no indication the trial court considered the Bone-Club factors before conducting the private hearings that led to dismissal of jurors 3, 4, 6, 10, 11, and 16. By employing its chosen procedures, the court violated Courtney'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. COURTNEY 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,

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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 . . . ."

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).

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

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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."

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 Courtney's case when he was excluded from the sidebar conference during which jurors 11 and 16 were discussed and released. Only counsel were called up to the bench. See SRP 47.

Indeed, the circumstances in Courtney'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 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).

The only issue is whether the violations of Courtney'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 20 (Tara Wadsworth) was the last individual chosen to sit on the jury (other than the two alternate jurors). CP 82, 85; SRP 48. Jurors 11 and 16 fell within the range of individuals who ultimately served. Therefore, the error was not harmless beyond a reasonable doubt and reversal is required.

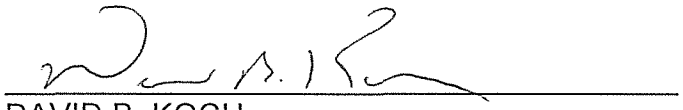
D. CONCLUSION

The procedures used to select Courtney'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 13th day of August, 2013.

Respectfully Submitted,

NIELSEN, BROMAN & KOCH, PLLC



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

STATE OF WASHINGTON	)	
	)	
Respondent,	)	
	)	
vs.	)	COA NO. 44487-9-II
	)	
LARDELL COURTNEY,	)	
	)	
	)	
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 13TH DAY OF AUGUST, 2013, I CAUSED A TRUE AND CORRECT COPY OF THE **SUPPELMENTAL BRIEF OF APPELLANT** TO BE SERVED ON THE PARTY / PARTIES DESIGNATED BELOW BY DEPOSITING SAID DOCUMENT IN THE UNITED STATES MAIL.

[X] LARDELL COURTNEY
DOC NO. 944037
STAFFORD CREEK CORRECTIONS CENTER
191 CONSTANTINE WAY
ABERDEEN, WA 98520

SIGNED IN SEATTLE WASHINGTON, THIS 13TH DAY OF AUGUST, 2013.

X Patrick Mayovsky

NIELSEN, BROMAN & KOCH, PLLC

August 13, 2013 - 2:58 PM

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