No. 24957-3-III
Consolidated with
NO. 24958-1-III

COURT OF APPEALS

STATE OF WASHINGTON

DIVISION III

STATE OF WASHINGTON,

Plaintiff/Respondent,

V.

JON GABRIEL DEVON,

Defendant/Appellant.

REPLY BRIEF

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ARGUMENT

The State's brief does not accurately address the issue of a public trial as required under Const. art. I, §§ 10 and 22.

The State's argument limits itself to § 22. It does not discuss, with any degree of specificity, the public's right to attend judicial proceedings.

The examples provided by the State in its brief are not on point.

Sidebars are conducted in open court. They should be conducted on the record; but outside the hearing of the jury.

BLACK'S LAW DICTIONARY (8th ed.) defines sidebar as follows:

> **1.** A position at the side of a judge's bench where counsel can confer with a judge beyond the jury's earshot ... **2.** SIDEBAR CONFERENCE ...[A] discussion among the judge and counsel, usually over an evidentiary objection, outside the jury's hearing ....

Bench conferences generally involve just the judge and the attorney's. The discussions relate to matters that are not for the jury's consideration until the judge makes a ruling.

The public is present and able to observe these proceedings, even though they cannot hear what is said.

Chambers hearings normally involve minor procedural matters. As the State's brief indicates, the defendant may be excluded from a chambers hearing without violating any constitutional right.

Minor procedural matters have little public import.

A motion to sequester is not equivalent to closed *voir dire.*

CrR 6.7(a) states:

> **During trial and deliberations** the jury may be allowed to separate unless good cause is shown, on the record, for sequestration of the jury.

(Emphasis supplied.)

CrR 6.7(a) comes into play after a jury has been selected. *See: State v. Ng,* 104 Wn.2d 763, 776, 713 P.2d 63 (1985).

Sequestration is to prevent contamination of an already selected jury. Closure of *voir dire* may be used to prevent contamination of potential jurors.

The public has no right to speak in connection with the sequestration of a jury. The public does have a right, pursuant to Const. art. I, § 10, to object to closure of trial proceedings.

The use of a special juror questionnaire does not obviate the need to comply with the *State v. Bone-Club*[1] factors.

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[1] *State v. Bone-Club,* 128 Wn.2d 254, 258-59, 906 P.2d 325 (1995).

Juror questionnaires are provided for the limited purpose of obtaining background information on potential jurors. They allow the attorneys to determine the possible existence of juror bias.

If the State's argument is accepted, then the logical conclusion is that any time an issue of juror bias arises, then *voir dire* must be closed to public scrutiny in order to inquire concerning that bias.

The State relies upon GR 31(j) for its argument.

GR 31(j) provides, in part:

> Individual juror information, other than name, is presumed to be private. After the conclusion of a jury trial, the attorney for a party, or party *pro se,* **or member of the public,** may petition a trial court for access to individual juror information under the control of court. Upon a showing of good cause, the court may permit ... access to relevant information. ...

(Emphasis supplied.)

What the State ignores is the policy and purpose of GR 31 as set forth in subparagraph (a).

GR 31(a) states:

> It is the policy of the courts to facilitate access to court records as provided by Article I, Section 10 of the Washington State Constitution. Access to court records is not absolute and shall be consistent with reasonable expectations of personal privacy as provided by Article 1, Section 7 of the Washington State Constitution and it shall not unduly burden the business of the courts.

Thus, it is apparent that a court must conduct a balancing test between Const. art. I., §§ 7 and 10.

Mr. Devon contends that juror information which is not to be disclosed is outlined in GR 31(e).

The State asserts that the trial court conducted the balancing required by *Bone-Club* and that all five (5) factors were met. The State is in error.

Mr. Devon concedes that in-chambers *voir dire* was for the purpose of protecting the constitutional right to a fair trial. He did not, however, request closure. At a pre-trial proceeding Ms. Devon's attorney mentioned the potential need for in-chamber's juror *voir dire.* (12/19/05 RP 27, l. 16 to RP 29, l. 3)

When the trial court announced that in-chambers *voir dire* would be conducted it did not question either the jury venire or members of the public as to whether or not there was any objection.

Mr. Devon contends that silence by members of the public does not necessarily constitute a waiver. The public may not know all of the intricacies of its rights under Const. art. I, § 10; or, even, courtroom procedure.

The appropriate step for a trial court to take is to ask if anyone present has an objection to conducting individual jury *voir dire* in chambers.

Moreover, the record does not reflect that the trial court considered alternatives. The State cites *State v. Clinkenbeard,* 130 Wn. App. 552,

571, 123 P.3d 872 (2005) for the proposition that the Okanogan County courtroom does not have the necessary facilities to conduct other than individual jury *voir dire.*

The reference in *Clinkenbeard* is *dicta.*

Mr. Devon contends that inadequacy of courtroom facilities is not an excuse for failure to comply with *Bone-Club. See: In re Personal Restraint of Orange,* 152 Wn.2d 795, 811, 100 P.3d 291 (2004).

The trial court did not enter findings of fact and conclusions of law. It did not enter a closure order. It did not conduct the balancing test on the record.

Only factor one (1) under the *Bone-Club* analysis was met.

Moreover, *voir dire* was not limited to those jurors who had heard of the case. Every single potential juror was interviewed in-chambers.

The State claims that Mr. Devon waived his right to raise the issue on appeal. It cites *North Carolina v. Butler,* 441 U.S. 369, 99 S. Ct. 1755, 60 L. Ed. 286 (1979); and *State v. Thomas,* 128 Wn.2d 553, 910 P.2d 475 (1996). Neither case is applicable.

State v. Bone-Club, supra, 257, specifically states that failure to object to closure does not constitute a waiver of the right to appeal that issue.

Moreover, since Mr. Devon did not request closure, the invited error doctrine cannot be used to prevent his raising the issue. The State cites

no authority for its proposition that the doctrine of invited error is applicable to a claim of a violation under Const. art., I, § 10.

Mr. Devon should not be penalized for any action on the part of Ms. Devon's attorney. Severance had been requested prior to trial. The Court denied the severance motion. (01/05/06 RP 160, ll. 10-13)

Finally, the State cites to *State v. Rivera,* 108 Wn. App. 645, 652, 32 P.3d 292 (2001). The issue in *Rivera* was a complaint by one (1) juror about another juror's personal hygiene. This was not a matter for public dissemination. It was truly ministerial in nature.

The actual selection of a jury is not a ministerial act. It is perhaps the most crucial aspect of the constitutional right to a fair trial.

Voir dire is a search for the truth concerning juror impartiality.

Does not the public have a right to know that a juror is unbiased?

Does not the public have a right to observe *voir dire* in its entirety, unless the *Bone-Club* factors are met?

CONCLUSION

The State's argument concerning the trial court's compliance with the *Bone-Club* factors lacks validity. Mr. Devon's constitutional right to an open and public trial was denied by conducting individual jury *voir dire* in chambers.

Mr. Devon otherwise incorporates his arguments from his initial brief into this reply brief.

DATED this 4th day of June, 2007.

Respectfully submitted,

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