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.

SUPPLEMENTAL APPELLANT'S BRIEF,

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TABLE OF CONTENTS

TABLE OF AUTHORITIES

CASES

CONSTITUTIONAL PROVISIONS

RULES AND REGULATIONS

ARGUMENT

In his original brief dated November 29, 2006, Jon Gabriel Devon assigned error to conducting individual juror *voir dire* in chambers in violation of *State v. Bone-Club*, 128 Wn.2d 254, 906 P.2d 325 (1995). He further alleged violation of his public trial right as it is guaranteed by the Sixth Amendment to the United States Constitution and Const. art. I, §§ 10 and 22.

The references to the transcript support the following argument:

> Initial mention that *voir dire* might be conducted in-chambers occurred at a pre-trial hearing on December 19, 2005. Ms. Devon's attorney raised the issue. The Court then discussed weeding out those jurors who might have opinions about the case prior to conducting *voir dire* of the entire panel.

(12/19/05 RP 27, l. 16 to RP 29, l. 3)

> The next mention of *voir dire* occurred at a status conference on January 5, 2006.

(01/05/06 RP 162, ll. 20-22)

> When Court convened on January 10 the

> record indicates that individual juror questioning immediately commenced with Juror No. 1. It proceeded the rest of the day. The individual questioning of all members of the jury venire was completed on January 11.
>
> Jury *voir dire* commenced the morning of January 10, 2006 and continued throughout the day on January 11. Initially the *voir dire* was of individual jurors in-chambers. The judge, the court reporter, the court clerk, defense counsel and the Devons were present. After individual *voir dire* was concluded the court reconvened in the courtroom to complete the *voir dire* process.

(01/10/06 RP 1, *et seq;* 01/11/06 RP 1, *et seq.*)

Mr. Devon's appeal was stayed April 11, 2008 pending a decision by the Supreme Court in *State v. Frawley.* The Supreme Court issued its decision on September 25, 2014. *See: State v. Frawley, slip opinion* 80727-2 (September 25, 2014).

The procedural history as outlined by the Supreme Court in its opinion closely parallels what occurred in Mr. Devon's case. The Court noted at pp. 2-3:

> In 2004, Brian Frawley was charged with first degree felony murder. At trial, *voir dire* was divided into two phases: individual and general *voir dire.* At the individual portion of *voir dire,* some jurors were to be questioned in the judge's chambers regarding their answers on the juror questionnaire. Before this occurred, the court engaged in an extensive colloquy concerning Frawley's right to be present for the individual *voir dire* and he waived his right to be present. The court and counsel for both sides then interviewed thirty-five prospective jurors in chambers. Eleven prospective jurors were stricken for cause.

The Court of Appeals reversed Mr. Frawley's conviction for violation of his public trial right. *See: State v. Frawley,* 140 Wn. App. 713, 167 P.3d 593 (2007).

The Supreme Court stayed the *Frawley* case pending resolution of *State v. Strode,* 167 Wn.2d 222, 217 P.3d 310 (2009) (structural error occurs requiring reversal of a conviction and remand for a new trial when a trial court fails to properly analyze the *Bone-Club, supra,* factors, weigh competing interests, and enter appropriate findings of fact concerning the reasons behind the closure of the courtroom for individual juror *voir dire*) and *State v. Wise*, 176 Wn.2d 1, 288 P.3d 1113 (2012) (violation of the

public trial right constitutes a structural error and failure to object does not constitute a waiver of the right. Prejudice is presumed and a new trial warranted where hardship issues are discussed in chambers during *voir dire*).

The *Frawley* decision fully supports the position taken by Mr. Devon in his original brief. In reaffirming its decisions in *Bone-Club* and *Wise*, the Court stated at 7: "Closure of the courtroom without this analysis [the *Bone-Club* factors] is a structural error **for which a new trial is the only remedy.**" (Emphasis supplied.)

The trial court did not conduct a *Bone-Club* analysis on the record. The in-chambers questioning of jurors was done in violation of Mr. Devon's constitutional rights. It also violated the public trial right.

The record does not indicate that Mr. Devon made a knowing, intelligent and voluntary waiver of his constitutional rights.

The State's assertion of waiver, invited error, and in-chambers questioning as being ministerial are fully answered by *Frawley*, as does the RAP 2.5 issue.

In *Frawley,* the State argued that there was a waiver of Mr. Frawley's right to be present during individual *voir dire.* This is not the case with Mr. Devon. He was present.

What is critical is that there was no analysis with regard to the right of the public to be present during individual *voir dire.* The *Frawley* Court noted at 12:

> In *In re Personal Restraint of Morris,* 176 Wn.2d 157, 288 P.3d 1140 (2012), we discussed and resolved this argument. In that case, similar to what occurred in *Frawley,* the defendant waived his presence for the in-chambers questioning of individual jurors in order to promote juror candor. Our plurality opinion held that **waiver of the right to be present should not be conflated with waiver of the right to a public trial because waiver of the former does not necessarily imply knowledge of the latter. We found no discussion of the defendant's public trial right before the closure and thus no waiver of the public trial right.**
>
> In *Frawley's* case, because the trial court made no mention of *Frawley's* public trial right before the individual juror questioning - only his right to be present - Morris controls. **We cannot equate a waiver of the right to be present with a waiver of the right to a public trial; we require an independent, knowing, voluntary, and intelligent waiver of the public trial right.**

(Emphasis supplied.)

Moreover, the State cannot rely upon RAP 2.5(a)(3) to undermine Mr. Devon's position. The *Frawley* Court specifically rejected the need to

object at trial since the public trial right is of constitutional magnitude. *See: Frawley* at 15.

Finally, the *Frawley* Court addressed a *de minimis* argument made by the State. It concluded at 17:

> Looking to Washington law, even if the brief in-chambers questioning of one juror could constitute a *de minimis* violation of a defendant's public trial right, such a conclusion would find no place in our public trial rights case law. We have considered a *de minimis* argument in the context of public trial rights in past cases, and in *Easterling* [*State v. Easterling*, 157 Wn.2d 167, 137 P.3d 825 (2006)] at 180, we expressly rejected a *de minimis* approach as advocated for in the dissenting opinion. We have not deviated from this holding. Thus, in both cases here, the closures were not *de minimis.*

Mr. Devon otherwise relies upon his original briefing in support of this issue and the other issues raised at that time.

DATED this 11th day of October, 2014.

Respectfully submitted,

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DIVISION III

STATE OF WASHINGTON

STATE OF WASHINGTON,	)	
	)	OKANOGAN COUNTY
Plaintiff,	)	NO. 05 1 00059 5
Respondent,	)	
	)	**CERTIFICATE OF SERVICE**
v.	)	
	)	
JON GABRIEL DEVON,	)	
	)	
Defendant,	)	
Appellant.	)	
	)	

I certify under penalty of perjury under the laws of the State of Washington that on this 11th day of October, 2014, I caused a true and correct copy of the *SUPPLEMENTAL APPELLANT'S BRIEF* to be served on:

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