NO. 72101-1-I

COURT OF APPEALS OF THE STATE OF WASHINGTON

DIVISION I

STATE OF WASHINGTON,

Respondent,

v.

DONALD TURPIN,

Appellant.

APPEAL FROM THE SUPERIOR COURT FOR KING COUNTY

THE HONORABLE DEAN S. LUM

BRIEF OF RESPONDENT

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A. ISSUE

1. Whether Turpin's right to a public trial was violated, where the court excused a juror who became ill during a recess and off the record?

B. STATEMENT OF THE CASE

1. PROCEDURAL FACTS

The State charged Donald Turpin with Burglary in the Second Degree, Theft in the First Degree, Trafficking in Stolen Property in the First Degree, and Leading Organized Crime. CP 1-15, 50-52. The theft charge included the aggravating circumstances that the property damage to the victim was more than three times the value of the stolen metal property, and that the theft created a public hazard. CP 51. A jury found Turpin guilty as charged. CP 62-67; 1RP 1149-50.[1] The trial court imposed a total of 149 months confinement. CP 179-89; 1RP 1167-68.

2. SUBSTANTIVE FACTS[2]

After the parties rested, the court explained to the jury that they would be instructed on the law, break early for lunch, and then

[1] The Verbatim Report of Proceedings consists of 11 consecutively paginated volumes from the following dates: 5/16/14, 5/7/14 (before Judge Lum), 5/12/14, 5/13/14, 5/15/14, 5/19/14 (part one), 5/19/14 (part two), 5/20/14, 5/21/14, 5/22/14, and 6/13/14. Additionally, there is one volume from 5/7/14 (before Judge Rogers) that is designated as 2RP, although not relevant to this appeal.

[2] The underlying facts of the case are not relevant to the public trial issue raised on appeal. Thus, the facts provided relate only to the public trial claim.

return for closing arguments. 1RP 1083. The court followed the announced schedule and took a lunch recess from 11:27 a.m. to 1:22 p.m. 1RP 1104. When the jurors returned, the court indicated, "Ladies and gentlemen, *Juror Number 3 got sick, you probably know that, and so we've excused Juror Number 3.* Could our alternate juror please take your materials and please have a seat right there? You're on the jury now." 1RP 1105 (emphasis added).

The clerk's minutes from the trial describe the juror's excusal as follows:

> 11:27:40 Recess
>
> Off Record:
>
> Due to illness, Juror 3 is excused from further consideration of this cause. The Court instructs the Bailiff to excuse Juror 3.
>
> On Record:
>
> 1:22:54 Jury present.
> The Court having excused Juror 3, Juror 14 will take Juror 3's place.

CP 217.

Turpin did not object to the court's excusal of the sick juror. 1RP 1105. Prior to bringing the jury out for closing arguments, the court inquired whether the parties were "ready for the jury."

1RP 1105. Turpin's counsel indicated "Yes," without any additional comments. 1RP 1105. After the court told the jury about excusing the sick juror, Turpin did not object to the juror's excusal, inquire further about the details of the juror's illness, or object to the court's replacement of the juror with an alternate juror. 1RP 1105. The parties proceeded to closing arguments, and the jury retired for deliberations. 1RP 1105-42. The issue of juror number three's illness was not mentioned again.

C. ARGUMENT

1. TURPIN'S RIGHT TO A PUBLIC TRIAL WAS NOT VIOLATED.

Turpin argues that the court's excusal of a sitting juror while "in recess and off the record" violated his right to a public trial. Br. of Appellant at 3. Turpin's claim fails in light of the court's obligation under RCW 2.36.110 and CrR 6.5 to dismiss a juror who is physically unfit to serve. Excusing an ill juror does not implicate the public trial right. Even if it did, Turpin cannot show that a closure occurred.

a. The Trial Court Properly Excused A Sick Juror.

RCW 2.36.110 and CrR 6.5 place a "continuous obligation" on the trial court to investigate allegations of juror unfitness and to

excuse an unfit juror, even if the juror is already deliberating. State v. Elmore, 155 Wn.2d 758, 773, 123 P.3d 72 (2005) (quoting State v. Jorden, 103 Wn. App. 221, 227, 11 P.3d 866 (2000)). RCW 2.36.110 provides in relevant part, "[i]t *shall* be the duty of a judge to excuse from further jury service any juror, who in the opinion of the judge, has manifested unfitness as a juror by reason of . . . any physical or mental defect . . . incompatible with proper and efficient jury service." (Emphasis added). CrR 6.5 employs a similar directive, stating "[i]f at any time before submission of the case to the jury a juror is found unable to perform the duties the court *shall* order the juror discharged." (Emphasis added).

A trial court's decision to excuse a juror prior to deliberations is reviewed for an abuse of discretion. State v. Hughes, 106 Wn.2d 176, 204, 721 P.2d 902 (1986). A court abuses its discretion only when its decision is "manifestly unreasonable, or exercised on untenable grounds, or for untenable reasons." State ex rel. Carroll v. Junker, 79 Wn.2d 12, 26, 482 P.2d 775 (1971).

In State v. Jorden, the court upheld the trial court's decision to dismiss a juror who, over the course of several days, was observed to be yawning, dozing, and sitting with her eyes closed during witnesses' testimony. 103 Wn. App. at 226. The court

reasoned that once the juror was found to be unfit, the trial court was "required" to remove the juror. Id. at 230. The trial court did not have the obligation to question the juror about the alleged misconduct. Id. at 228. Characterizing the trial judge's role as "an observer and decision-maker," the court reasoned that the trial judge's factual determinations should be afforded deference. Id. at 229. Further, the court rejected the notion that the defendant's right to a fair trial was prejudiced because the juror was removed before deliberations began, and a defendant does not have a right to be tried by a particular jury or juror. Id. (citing State v. Gentry, 125 Wn.2d 570, 615, 88 P.2d 1105 (1995)).

Here, the trial court was required to remove the sick juror upon determining that the juror was physically unfit and unable to continue jury service. The trial court's factual determination that the juror was too ill to serve should be afforded deference. Turpin has never challenged, below or on appeal, that the trial court wrongly concluded that the juror was ill. Given the juror's uncontested sickness and the trial court's obligation to discharge a juror who is physically unfit to serve, the trial court properly exercised its discretion to remove juror number three.

b. Excusing A Sick Juror Does Not Implicate The Public Trial Right.

Article I, section 10 of the Washington Constitution provides, "Justice in all cases shall be administered openly." This provision guarantees the public's right to open, accessible proceedings. State v. Lormor, 172 Wn.2d 85, 91, 257 P.3d 624 (2011). A criminal defendant's right to a public trial is guaranteed by both the state and federal constitutions. U.S. Const. amend. VI; Wash. Const. art. I, § 22. A defendant may claim a violation of the public trial right for the first time on appeal. State v. Njonge, 181 Wn.2d 546, 554-55, 334 P.3d 1068 (2014). Whether the right to a public trial has been violated is a question of law that is reviewed *de novo*. State v. Sublett, 176 Wn.2d 58, 70, 292 P.3d 715 (2012).

Although justice shall be administered openly, "not every interaction between the court, counsel, and defendants will implicate the right to a public trial, or constitute a closure if closed to the public." Id. at 71. To determine whether the public trial right was violated, courts employ a three-step framework considering: (1) whether the public trial right was implicated, (2) if so, whether a closure occurred, and (3) if so, whether the closure was justified. State v. Smith, 181 Wn.2d 508, 513-14, 334 P.3d 1049 (2014).

A defendant's public trial right is implicated when both prongs of the "experience and logic" test are met. Sublett, 176 Wn.2d at 73. The experience prong asks "whether the place and process have historically been open to the press and general public," while the logic prong asks "whether public access plays a significant positive role in the functioning of the particular process in question." Id. (quoting Press-Enterprise Co. v. Superior Court, 478 U.S. 1, 8, 106 S. Ct. 2735, 92 L. Ed. 2d 1 (1986) (Press II)). The guiding principle is whether openness will enhance "both the basic fairness of the criminal trial and the appearance of fairness so essential to public confidence in the system." Id. (quoting Press-Enterprise Co. v. Superior Court, 464 U.S. 501, 508, 104 S. Ct. 819, 78 L. Ed. 2d 629 (1984) (Press I)).

No Washington appellate court has ever been called upon to decide whether dismissing a sick, empaneled juror implicates the public trial right. The closest case on point is State v. Wilson, where Division Two of the Court of Appeals held that the bailiff's pre-voir dire excusal of two jurors for illness-related reasons did not implicate the public trial right under the "experience and logic" test. 174 Wn. App. 328, 342-47, 298 P.3d 148 (2013).

In applying the "experience" prong, the Wilson court noted that the defendant had failed to cite any case holding that preliminary juror excusals based on illness were historically open to the public, and that RCW 2.36.100(1)[3] affords trial courts, clerks, and court agents "broad discretion" to excuse prospective jurors outside the courtroom for statutorily-defined hardship reasons. Id. at 342, 344.

Regarding the "logic" prong, the court concluded that Wilson had failed to show that public access would play a significant positive role in pre-voir dire hardship excusals, in part by distinguishing the hardship excusal process from voir dire, where parties explore for-cause and peremptory challenges. Id. at 346. The court reasoned that openness during the pre-voir dire excusals would not have enhanced basic fairness because the bailiff had acted within her broad discretion to excuse members of the jury pool for hardship reasons. Id. at 346. Having concluded that the defendant had failed to demonstrate either prong of the "experience and logic" test, the court held that the bailiff's pre-voir dire,

[3] RCW 2.36.100(1) authorizes the trial court to excuse a prospective juror based "upon a showing of undue hardship, extreme inconvenience, public necessity, or any reason deemed sufficient by the court."

administrative excusal of two jurors based solely on their illness did not implicate the public trial right. Id. at 347.

Here, the trial court's administrative excusal of a sick, empaneled juror, also did not implicate the public trial right. Turpin has not shown that experience or logic compel an open proceeding in this context.

Applying the experience prong, Turpin, like the defendant in Wilson, has not cited a single case holding that an empaneled juror's excusal solely based on illness has historically been open to the public. The absence of appellate opinions on this specific issue establishes the uncontroversial and unremarkable principle that trial courts have dismissed, and must dismiss, sick jurors who are physically unfit to serve. Turpin does not argue, nor could he, that his is the first case involving a sick, empaneled juror who was dismissed during a recess.[4] Further, akin to the situation presented in Wilson, the trial court was statutorily-authorized, and indeed

[4] Turpin's counsel notes that he "has not located a single case where an empaneled juror was released from service off the record during a court recess." Br. of Appellant at 5. At least three Washington cases, however, refer to empaneled jurors who became ill, were taken to the hospital, and were thereby effectively released from service. See State v. Pinkerton, 72 Wn.2d 898, 902, 435 P.2d 661 (1967) (during the lunch recess an empaneled juror became ill, was sent to the hospital, and did not return for jury service); State v. Fisch, 22 Wn. App. 381, 381, 588 P.2d 1389 (1979) (during deliberations "one of the jurors became ill and had to be taken to the hospital by ambulance," and did not return for jury service); State v. Wirth, 121 Wn. App. 8, 12, 85 P.3d 922 (2004) (same).

obligated, to dismiss a juror who was physically unfit to serve. RCW 2.36.110; CrR 6.5.

Turpin's reliance on four cases for the general proposition that "sitting jurors are excused from service on the record in open court when the court is in session" is unavailing. Br. of Appellant at 5. None of these cases involved an empaneled juror who was dismissed for illness-related reasons, and two of the cases involved deliberating jurors who were accused of jury nullification – a considerably more rare, "delicate and complex" situation than the one presented here. Elmore, 155 Wn.2d at 763, 781 (trial court dismissed a deliberating juror accused of refusing to follow the law) (citation omitted); see also State v. Depaz, 165 Wn.2d 842, 847-48, 204 P.3d 217 (2009) (trial court dismissed a deliberating juror accused of jury nullification and misconduct); Jorden, 103 Wn. App. at 226 (trial court dismissed a juror who was yawning, dozing, and sitting with her eyes closed); State v. Rafay, 168 Wn. App. 734, 820, 285 P.3d 83 (2012) (trial court dismissed a juror who had been sleeping, taking sheets of paper from the courtroom in violation of the court's order, using graphic language about wanting to get off the jury, and lying to the court). Having failed to demonstrate that the press and public have historically had access to trial courts

dismissing sick, empaneled jurors, Turpin's claim should be rejected.

Nonetheless, turning to the logic prong, Turpin's claim also fails. Public access would not play a significant positive role in the trial court's excusal of a sick juror who is physically unfit to serve. For the same reasons articulated in Wilson, public access would not enhance the basic fairness of the trial court's dismissal of a juror based solely on illness because the court was acting under its "continuous obligation" to ensure that the juror was fit for service, and to release the juror when found unfit. Elmore, 155 Wn.2d at 773.

Further, logic does not compel the conclusion that a trial court must wait to dismiss a juror in open court who becomes physically debilitated during the lunch recess. Nothing positive is added by allowing the public to observe, and possibly become exposed to, a sick juror, and nothing positive is added by subjecting the juror to such discomfort and embarrassment. The juror's excusal was promptly memorialized in the clerk's minutes, and noted on the record, within moments of the jury returning to their seats after lunch, thereby negating any concern about secrecy and informing the public of what had occurred. See Smith, 181 Wn.2d

at 1055 (concluding that public access to an evidentiary ruling at sidebar does not satisfy the "logic" prong because the sidebars were contemporaneously memorialized and recorded, and because "[n]othing positive is added by allowing the public to intrude on the huddle at the bench in real time").

Although Turpin argues that public oversight is required to ensure that jurors are not removed for improper or inadequate reasons, he does not rely on any case law to that effect, or provide any examples of trial courts that have improperly dismissed a juror based solely on illness-related reasons. Turpin's argument rests on speculation and falls far short of demonstrating the significant positive interest that is served by ensuring that the public is privy to the dismissal of a sick juror.[5] Turpin's claim fails because he has not shown that the public trial right is implicated under either prong of the "experience and logic" test.

c. The Juror's Excusal Did Not Constitute A Closure.

Even if this Court finds that the public trial right was implicated, then Turpin's claim should be rejected for failing to

[5] His argument also fails to account for the unexpected and at some point inevitable scenario where an empaneled juror is felled down by a heart attack, requires emergency medical attention, and cannot wait to be excused in open court.

demonstrate that a closure occurred. Turpin argues that the court's excusal of a juror during a court recess off the record constituted a closure. Turpin is incorrect. Turpin has not shown that the courtroom was closed to observers during the lunch recess, or that the juror's excusal occurred in an inaccessible location.

A closure occurs when the courtroom is "completely and purposefully closed to spectators so that no one may enter and no one may leave." Lormor, 172 Wn.2d at 93. For example, the Washington Supreme Court has found that a courtroom was closed when a defendant's entire family was excluded, when the courtroom doors were closed to all spectators, when the defendant was prohibited from attending a portion of his trial, and where part of voir dire was conducted in an inaccessible location such as the judge's chambers. Id. (citing cases). A defendant claiming a public trial rights violation must conclusively show that a closure occurred based on the facts in the record. Njonge, 181 Wn.2d at 556. A reviewing court will not presume that a closure occurred where the record is silent. Id.

If no closure is demonstrated, then the case is analyzed "as a matter of courtroom operations, where the trial court judge possesses broad discretion." Id. at 558 (quoting Lormor, 172

Wn.2d at 93). Conversely, if a closure occurred, then the question is whether the trial court properly conducted a Bone-Club[6] analysis prior to the closure. Smith, 181 Wn.2d at 1055. A closure without such an analysis will "almost never" be considered justified, while a trial court that properly conducts a Bone-Club analysis and enters findings on the record will "almost never be overturned" because such a determination is reviewed for an abuse of discretion. Id.

Here, the record reveals that the trial court dismissed the sick juror off the record at some point during the lunch recess. CP 217 (clerk's minutes stating, "Off Record: Due to illness, Juror 3 is excused"); 1RP 1105 (court announcing "Juror Number 3 got sick, you probably know that, and so we've excused Juror Number 3"). Neither party objected to the juror's excusal, or asked for more information about the details of the dismissal. 1RP 1104-05.

Thus, the record does not reveal where the excusal took place, and specifically whether it was in a publicly accessible location. Without these facts, Turpin cannot make the "conclusive showing" required to demonstrate reversible error. See Njonge, 181 Wn.2d at 556 (refusing to find that a closure occurred where the defendant failed to make a conclusive showing that spectators

[6] 128 Wn.2d 254, 258-59, 906 P.2d 325 (1995).

were "totally excluded" from juror excusals). A reviewing court "cannot presume facts to which the record is silent." Id.

Having failed to demonstrate that a closure occurred, Turpin's claim must be analyzed "as a matter of courtroom operations, where the trial court judge possesses broad discretion." Njonge, 181 Wn.2d at 558 (quoting Lormor, 172 Wn.2d at 93). Here, the trial court acted within its discretion, and under its continuing duty, to ensure that both parties received a fair trial by an impartial jury fit for service. Once the trial court determined that juror number three was physically unfit to serve, it had no other choice but to dismiss the juror. Elmore, 155 Wn.2d at 860 (recognizing that the trial court is obligated "to excuse jurors who are found to be unfit, even if they are already deliberating").

Turpin's attempts to analogize this case to State v. Jones are unpersuasive. 175 Wn. App. 87, 303 P.3d 1084 (2013). In Jones, Division Two of the Court of Appeals held that the defendant's right to a public trial was violated when the court clerk drew the alternate jurors' names off the record during a court recess. Id. at 96. Applying the "experience and logic" test, the court concluded that the clerk's alternate juror drawing constituted a closure because Washington courts' historical and current practices

revealed that alternate juror selection generally occurs during voir dire in open court, and logic indicated that the alternate juror drawing implicated the core concerns of basic fairness and reminding the trial court of the importance of its functions. Id. at 101-02.

The court's analysis does not apply with equal force here, where historical and current practices have not shown that trial courts excuse jurors based solely on illness-related reasons in open court, and logic does not compel the conclusion that a trial court dismiss a physically sick juror in open court.

Further, Turpin's assertion that "[t]aking a recess has the effect of notifying members of the public that nothing of substance will take place until court is called back into session on the record," should be rejected. Br. of Appellant at 7-8. Turpin provides no authority for this proposition, which obscures the basic premise of the public trial right, specifically the right to open and accessible proceedings, and ignores the reality that a court may announce a recess and then unexpectedly resume proceedings.[7] Lormor, 172 Wn.2d at 91.

[7] For example, in Turpin's case, the court recessed for jury deliberations and then resumed proceedings on the record to address a jury question. 1RP 1144, 1148.

Turpin's claim fails because he cannot conclusively show, on this record, that the trial court's excusal of the sick juror constituted a closure.

D. CONCLUSION

For the foregoing reasons, the Court should affirm Turpin's convictions.

DATED this 27th day of March, 2015.

Respectfully submitted,

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By: /s/ Kristin #40986 for
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Certificate of Service by Electronic Mail

Today I directed electronic mail addressed to Casey Grannis, the attorney for the appellant, at Grannisc@nwattorney.net, containing a copy of the Brief of Respondent, in State v. Donald Howard Turpin, Cause No. 72101-1, in the Court of Appeals, Division I, for the State of Washington.

I certify under penalty of perjury of the laws of the State of Washington that the foregoing is true and correct.

Dated this 30 day of March, 2015.

Name:
Done in Seattle, Washington