71193-8

FILED
May 1, 2015
Court of Appeals
Division I
State of Washington

No. 71193-8-I

IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON

DIVISION ONE

STATE OF WASHINGTON,

Respondent,

v.

CARRI WILLIAMS,

Appellant.

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

The Honorable Susan K. Cook

REPLY BRIEF OF APPELLANT/ SUPPLEMENTAL BRIEF

THOMAS M. KUMMEROW
Attorney for Appellant

WASHINGTON APPELLATE PROJECT
1511 Third Avenue, Suite 701
Seattle, Washington 98101
(206) 587-2711

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3. Ms. Williams' constitutional right to be present under the Sixth Amendment, the Due Process Clause and article I, section 22 was violated when the court conducted for-cause challenges at a sidebar.

B. ISSUES PERTAINING TO SUPPLEMENTAL ASSIGNMENTS OF ERROR

1. The federal and state constitutions guarantee the public and an accused the right to open and public trials. Accordingly, criminal proceedings, including jury selection and trial, may be closed to the public only when the trial court performs an on-the-record weighing test, as outlined in *State v. Bone-Club*, 128 Wn.2d 254, 906 P.2d 325 (1995), and finds closure favored. Violation of the right to a public trial is presumptively prejudicial. Where peremptory challenges were conducted at the bench, removed from public scrutiny without

considering the *Bone-Club* factors, was Ms. Williams' and the public's right to an open trial violated, requiring reversal?

2. The federal constitution guarantees an accused the right to be present at all critical stages in his trial. The Washington Constitution provides an even broader right to be present throughout trial. Was Ms. Williams' constitutional right to be present violated when the trial court conducted peremptory challenges at the bench in her absence?

C. ARGUMENT IN REPLY

1. **The trial court erroneously excluded the testimony of Dr. Bartelink, thus infringing Ms. Williams' right to present a defense.**

The State claims that no less severe sanctions *other* than exclusion would have protected the State's right to a fair trial, thus the trial court was correct in excluding the testimony of Dr. Bartelink. Brief of Respondent at 33-34. Without explanation, the State boldly states a continuance was "not available." *Id* at 34. Also without explanation, the State also claims that it was surprised and prejudiced by the late disclosure of Dr. Bartelink. *Id*.

While the State notes the trial court found that there was no good reason for the late disclosure, the State apparently agrees with Ms.

Williams that the court did not find the defense acted willfully or in bad faith.

It is important to begin with the fact the defendant has a constitutionally protected right to present a defense. U.S. Const. Amend. VI; *Holmes v. South Carolina,* 547 U.S. 319, 324, 126 S.Ct. 1727, 164 L.Ed.2d 503 (2006); *State v. Franklin,* 180 Wn.2d 371, 377, 325 P.3d 159 (2014). "[T]he Constitution prohibits the exclusion of defense evidence under rules that serve no legitimate purpose or that are disproportionate to the ends that they are asserted to promote[.]" *Holmes,* 547 U.S. at 326.

A defendant's right to present relevant evidence may be limited by "the State's interest in precluding evidence so prejudicial as to disrupt the fairness of the trial." *State v. Darden,* 145 Wn.2d 612, 621, 41 P.3d 1189 (2002). "[T]he State's interest to exclude prejudicial evidence must be balanced against the defendant's need for the information sought, and only if the State's interest outweighs the defendant's need can otherwise relevant information be withheld." *Darden,* 145 Wn.2d at 622. If the evidence is of high probative value, "it appears [that] no state interest can be compelling enough to preclude

its introduction consistent with the Sixth Amendment and Const. art. 1, § 22." *State v. Hudlow*, 99 Wn.2d 1, 16, 659 P.2d 514 (1983).

Finally, and most importantly here, the evidence sought to be admitted by the defendant need only be of "minimal relevance." *State v. Jones*, 168 Wn.2d 713, 720, 230 P.3d 576 (2010). "The threshold to admit relevant evidence is low, and even minimally relevant evidence is admissible." *State v. Gregory*, 158 Wn.2d 759, 835, 147 P.3d 1201 (2006). To be relevant, the evidence need provide only "a piece of the puzzle." *Bell v. State*, 147 Wn.2d 166, 182, 52 P.3d 503 (2002).

Evidence may be excluded when exclusion is the *only* effective remedy. *State v. Hutchinson*, 135 Wn.2d 863, 881-83, 959 P.2d 1061 (1998). This is because of the defendant's fundamental and constitutionally protected right to present a defense. U.S. Const. Amend. VI; *Holmes*, 547 U.S. at 324; *Franklin*, 180 Wn.2d at 377. In determining the appropriate sanction for a discovery violation, the trial court should weigh: (1) the effectiveness of less severe sanctions; (2) the impact of witness preclusion on the evidence at trial and the outcome of the case; (3) the extent to which the witness's testimony will surprise or prejudice the State; and (4) whether the violation was willful or in bad faith. *Hutchinson*, 135 Wn.2d at 882-83.

Having these rules in mind, the essence of the State's argument is the disclosure was late; period. The State does not explain how much time it needed to interview Bartelink, or why a brief continuance for the State to interview Bartelink was not an adequate remedy. The State also doesn't explain how it was prejudiced by the late disclosure other than its speculative claim that it might have to do further testing or might have to obtain an additional expert.

There were only two issues for the jury to determine at trial; what or who caused H.W.'s death, and whether H.W. was 16 years or younger at the time of her death. The trial court's exclusion of Dr. Bartelink deprived the defense of the only expert who could have testified with any degree of medical certainty that H.W. could not have been younger than 15 years of age, thus rebutting not merely Wondetsadik's testimony, which was the essence of the trial court's ruling, but also that of Dr. Roesler as well. This later fact is of great importance because the trial court, and the State here, argued that Dr. Bartelink's testimony was only relevant to rebut Wondetsadik's testimony. This was simply wrong since it also rebutted the testimony of Roesler, who the State relies on heavily here in arguing there was

sufficient evidence for the jury to find H.W. was under 16 years of age. Brief of Respondent at 25, 27.

Finally, the actions of the State led to the necessity of Dr. Bartelink's testimony. The State did not disclose that Dr. Roesler would testify until just days before the commencement of the trial. 8/13/2013RP 11. Thus, prior to the State announcing that Roesler would testify, and the need to rebut Wondetsidik's testimony, did the need arise for Dr. Bartelink's testimony.

The trial court was correct in its initial ruling that the remedy was to give the State an opportunity to interview Dr. Bartelink. The court prevented Ms. Williams from presenting her defense when it subsequently barred Dr. Bartelink from testifying. This Court must reverse Ms. William's convictions for a violation of her constitutionally protected right to present a defense and remand for a new trial.

2. **The only remedy that could cleanse the taint from the State's conduct involving Wondetsidik was a mistrial.**

The State's brief addressing the trial prosecutor's conduct involving the witness Wondetsidik is astonishing in its soft-pedaling of this issue. Brief of Respondent at 36-39. It is important to remember the exact conduct of the prosecutor at trial. Contrary to the State's assertion that the prosecutor had merely provided lodging and a short

trip for Wondetsidik, the prosecutor also engaged in additional conduct that did not come to light until *after* the initial misconduct involving this act of providing payment to Wondetsidik.

Left out of the State's brief, and as stated in the Brief of Appellant, upon the completion of his testimony, instead of returning to Ethiopia, Wondetsidik fled the motel in Mt. Vernon in which he had been staying. 8/13/2013 51. It was not until a week later on August 20, 2013, that the defense discovered that one of the prosecutors, Richard Weyrich, had gone to Wondetsidik's motel room after Wondetsidik had fled, gathered up his items left behind in the motel room, and took them to his home. 8/13.2013RP 10. Weyrich waited three days before turning the items over to Mt. Vernon Police. 8/13/2013RP 10. The Brief of Respondent conveniently leaves out this misconduct.[1]

Yet another week later, On August 26, 2013, the defense discovered the fact that Weyrich had provided Wondetsidik with money prior to Wondetsidik fleeing, which the State had not previously disclosed. 8/26/2013RP 13. It was then that the defense moved for a mistrial or, in the alternative, striking Wondetsadik's testimony. And, it

[1] The Declaration of Richard Weyrich provided by the State also does not mention Weyrich's actions after finding that Wondetsidik had fled. CP 1-4.

was *another* week until the disclosure regarding Weyrich's actions came to light, again a fact not disclosed by the State.

More importantly to the issue at hand, Wondetsadik's testimony was very powerful and very emotional. He testified that he was present when H.W. was born, cataloging her birth in the family bible with other family members. 8/19/2013RP 135-36, 150. He also testified about H.W.'s early life, including being raised by her father after her mother abandoned the family. 8/19/2013RP 137-38. Finally he related about the tragedy of H.W.'s father's death and her placement in an orphanage from where she was adopted. 8/19/2013RP 143. Given this powerful and emotional testimony it is beyond pale that the jury would be able to cleanse this testimony from its memory. *See State v. Suleski*, 67 Wn.2d 45, 51, 406 P.2d 613 (1965) ("However, where evidence is admitted which is inherently prejudicial and of such a nature as to be most likely to impress itself upon the minds of the jurors, a subsequent withdrawal of that evidence, even when accompanied by an instruction to disregard, cannot logically be said to remove the prejudicial impression created."); *State v. Escalona,* 49 Wn.App. 251, 255, 742 190 (1987) ("no instruction can 'remove the prejudicial impression created {by evidence that} is inherently prejudicial and of such a nature as to likely

impress itself upon the minds of the jurors.'" (*quoting State v. Miles*, 73 Wn.2d 67, 71, 436 P.2d 198 (1968)).

The trial court erred in failing to declare a mistrial in light of this extremely powerful evidence. Striking Wondetsidik's testimony was not a sufficient remedy given his emotionally charged testimony. Finally, the curative instruction was not sufficient to remove the prejudice in light of the testimony. This Court should reverse Ms. Williams' convictions and remand for a new trial.

D. ARGUMENT IN SUPPORT OF SUPPLEMENTAL ASSIGNMENTS OF ERROR

1. Ms. Williams should be afforded a new, public trial because peremptory challenges were conducted at the bench, thus closed to the public without an on-the-record analysis by the trial court.

a. The state and federal constitutions guaranteed Ms. Williams and the public open and public trials.

Our state constitution requires that criminal proceedings be open to the public without exception. Const. art. I, § 10; Const. art. I, § 22. Two provisions guarantee this right. First, article I, section 10 requires that "Justice in all cases shall be administered openly." Additionally, article I, section 22 provides that "In criminal prosecutions, the accused shall have the right to . . . a speedy public trial." These provisions serve

"complementary and interdependent functions in assuring the fairness of our judicial system." *State v. Bone-Club*, 128 Wn.2d 254, 259, 906 P.2d 325 (1995). The federal constitution also guarantees the accused the right to a public trial. U.S. Const. amend. VI ("In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial . . . ."); *see* U.S. Const. amends. I, V.

While article I, section 10 clearly entitles the public and the press to openly administered justice, public access to the courts is further supported by article I, section 5, which establishes the freedom of every person to speak and publish on any topic. *Seattle Times Co. v. Ishikawa*, 97 Wn.2d 30, 36, 640 P.2d 716 (1982); *Federated Publ'ns, Inc. v. Kurtz*, 94 Wn.2d 51, 58-60, 615 P.2d 440 (1980).

The public trial guarantee ensures "that the public may see [the accused] 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." *Bone-Club*, 128 Wn.2d at 259, *quoting In re Oliver*, 333 U.S. 257, 270 n.25, 68 S. Ct. 499, 92 L. Ed. 682 (1948).

With regard to jury selection in particular, closed proceedings "harm[] the defendant by preventing his or her family from

contributing their knowledge or insight to jury selection and by preventing the venire from seeing the interested individuals." *State v. Brightman*, 155 Wn.2d 506, 515, 122 P.3d 150 (2005), *citing In re Pers. Restraint of Orange*, 152 Wn.2d 795, 812, 100 P.3d 291 (2004); *accord* Const. art. I, § 35 (victims of crimes have right to attend trial and other court proceedings).

To protect this constitutional right to a public trial, our courts have repeatedly held that a trial court may not conduct secret or closed proceedings "without, first, applying and weighing five requirements as set forth in *Bone-Club* and, second, entering specific findings justifying the closure order." *E.g.*, *State v. Wise*, 176 Wn.2d 1, 12, 288 P.3d 1113 (2012); *State v. Paumier*, 176 Wn.2d 29, 34-35, 288 P.3d 1126 (2012); *State v. Easterling*, 157 Wn.2d 167, 175, 137 P.3d 825 (2006). The presumption of openness may be overcome only by a finding that closure is necessary to "preserve higher values" and the closure must be narrowly tailored to serve that interest. *Waller v. Georgia*, 467 U.S. 39, 104 S. Ct. 2210, 81 L. Ed. 2d 31 (1984), *quoting Press-Enterprise Co. v. Superior Court*, 464 U.S. 501, 510, 104 S. Ct. 819, 78 L. Ed. 2d 629 (1984).

This Court reviews violations of the public trial right *de novo*, and a defendant does not waive his public trial right by failing to object to a closure during trial. *Paumier*, 176 Wn.2d at 34, 36-37; *Wise*, 176 Wn.2d at 15-16.

b. Without analysis, the trial court closed proceedings when it conducted peremptory challenges by secret ballot.

The right to a public trial includes the right to have public access to jury selection. *E.g.*, *Presley v. Georgia*, 558 U.S. 209, 213, 130 S. Ct. 721, 175 L. Ed. 2d 675 (2010); *State v. Sublett*, 176 Wn.2d 58, 71-72, 292 P.3d 715 (2012); *Wise*, 176 Wn.2d at 11-12. "The process of juror selection is itself a matter of importance, not simply to the adversaries but to the criminal justice system." *Press-Enterprise I*, 464 U.S. at 505. Accordingly, the Court need not apply the experience and logic test to determine whether the proceeding is subject to the open trial right. *Sublett*, 176 Wn.2d at 73 (lead opinion); *id*. at 136 (Stephens, J. concurring).

In *State v. Love*, Division Two of the Court applied the experience and logic test to evaluate that appellant's claim that similarly closed proceedings violated his public trial right. 176 Wn.App. 911, 309 P.3d 1209, 1212-14 (2013), *review granted*, 181

Wn.2d 1029 (2015).[2] The Court did not explain why the experience and logic test must be applied to the for-cause and peremptory challenge portion of jury selection but not to other parts of that process. However, if the experience and logic test applies, the State must bear the burden to convince this Court that the proceeding is not generally open to the public. *Sublett*, 176 Wn.2d at 70-71. The State cannot satisfy that burden - even under the experience and logic test, preliminary challenges to the venire must be held in open court absent on-the-record satisfaction of the *Bone-Club* factors. *E.g.*, *State v. Jones*, 175 Wn.App. 87, 98-99, 303 P.3d 1084 (2013).

The process of excusing prospective jurors is a critical part of *voir dire* that must also be open to the public. *E.g.*, *Batson v. Kentucky*, 476 U.S. 79, 98, 106 S. Ct. 1712, 90 L.Ed.2d 69 (1986) (peremptory challenge occupies important position in trial procedures). Public scrutiny is essential because there are important limits on both parties' exercise of peremptory and for-cause challenges. *E.g.*, *Georgia v. McCollum*, 505 U.S. 42, 47-50, 112 S. Ct. 2348, 120 L. Ed. 2d 33 (1992) (discussing protection from racial discrimination in jury

[2] The Supreme Court heard oral argument in *Love* on March 10, 2015. *See http://www.courts.wa.gov/appellate_trial_courts/supreme/issues/?fa=atc_supreme_issues.display&fileID=2015Jan*. A decision is pending.

selection, including in exercise of peremptory challenges, and critical role of public scrutiny). For example, neither may be exercised in a racially discriminatory fashion. *Id*.; *see State v. Sadler*, 147 Wn.App. 97, 193 P.3d 1108 (2008) (open trial right violated where *Batson* challenge conducted in private).

In *Wilson*, this Court distinguished between hardship strikes made by the clerk prior to the commencement of *voir dire*, which is not subject to the open trial right, and the for-cause and peremptory challenge process, which is part and parcel of *voir dire*. 174 Wn.App. 328, 343-44, 298 P.3d 148 (2013). This Court observed that unlike hardship strikes made by a clerk, "*voir dire*" under Criminal Rule 6.4 involves the trial court and counsel questioning prospective jurors to determine their ability to serve fairly and impartially, and to enable counsel to exercise informed challenges for-cause and peremptory challenges. *Id*. at 343. While a clerk may excuse jurors on limited, administrative bases, such excusals cannot interfere with the court's and parties' rights to excuse jurors based on cause and peremptory challenges. *Id*. at 343-44.

The trial court here closed the courtroom by instructing the parties to conduct peremptory challenges on paper. Although the public

was allowed in the courtroom where the silent proceedings occurred, the public did not see or hear which party struck which jurors or in what order and the process was conducted "of the record." *Cf. Leyerle*, 158 Wn.App. at 483-84 & n.9 (questioning juror in public hallway outside courtroom is a closure despite the fact courtroom remained open to public). The public had no basis upon which to discern which jurors had been struck by which party. Further, there was no public check on the non-discriminatory use of challenges to the venire or the court's rulings on such challenges. The procedure had the same effect as excluding the public from the courtroom. "Proceedings cloaked in secrecy foster mistrust and, potentially, misuse of power." *Dreiling v. Jain*, 151 Wn.2d 900, 908, 93 P.3d 861 (2004).

c. <u>These errors require reversal and remand for a new trial</u>.

When the record does not reveal that "the trial court considered [the] public trial right as required by *Bone-Club*, [an appellate court] cannot determine whether the closure was warranted" and reversal is required. *Brightman*, 155 Wn.2d at 515-16; *accord Easterling*, 157 Wn.2d at 181. If the trial court fails to conduct a *Bone-Club* inquiry, "a 'per se prejudicial' public trial violation has occurred 'even where the

defendant failed to object at trial.'" *Jones*, 175 Wn.App. at 96, *quoting Wise*, 176 Wn.2d at 18.

In Ms. Williams' trial, the court provided no compelling interest that required peremptory strikes to be conducted in secret. Further, the court failed to consider any of the *Bone-Club* factors on the record. Allowing the error to "go unchecked 'would erode our open, public system of justice and could ultimately result in unjust and secret trial proceedings.'" *Jones*, 175 Wn.App. at 96, *quoting Wise*, 176 Wn.2d at 18). Ms. Williams' convictions should be reversed and the matter remanded for a new, public trial.

2. Ms. Williams should be afforded a new trial because peremptory challenges were conducted at the bench in her absence.

A criminal defendant has a fundamental right to be present at all critical stages of a trial. *Rushen v. Spain*, 464 U.S. 114, 117, 104 S. Ct. 453, 78 L. Ed. 2d 267 (1983). Under the federal constitution, the right derives both from the Sixth Amendment and from the Due Process Clause. U.S. Const. amends. VI, XIV; *United States v. Gagnon*, 470 U.S. 522, 105 S. Ct. 1482, 84 L. Ed. 2d 486 (1985). These provisions protect a defendant's right to be present at a proceeding "whenever his presence has a relation, reasonably substantial, to the fullness of his

opportunity to defend against the charge." *Snyder v. Massachusetts*, 291 U.S. 97, 105-06, 54 S. Ct. 330, 78 L. Ed. 674 (1934). The constitutional right to be present includes the right to be present during voir dire and empanelling of the jury. *Diaz v. United States*, 223 U.S. 442, 455, 32 S. Ct. 250, 56 L. Ed. 500 (1912).[3]

Jury selection is "'the primary means by which a court may 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.'" *Irby*, 170 Wn.2d at 884, *quoting Gomez v. United States*, 490 U.S. 858, 873, 109 S. Ct. 2237, 104 L.Ed. 2d 923 (1989). "[A] defendant's presence at jury selection 'bears, or may fairly be assumed to bear, a relation, reasonably substantial, to his opportunity to defend' because 'it will be in his power, if present, to give advice or suggestion or even to supersede his lawyers altogether.'" *Id*. at 883, *quoting Snyder*. 291 U.S. at 105-06.

Our Supreme Court recently held that a defendant's right to be present is violated when a portion of jury selection is conducted without him or her present. *Irby*, 170 Wn.2d at 877, 887. In that case,

[3] As with all allegations of constitutional violations, "[w]hether a defendant's constitutional right to be present has been violated is a question of law, subject to de novo review." *State v. Irby*, 170 Wn.2d 874, 246 P.3d 796 (2011).

counsel and the court corresponded over email about the release of jurors from the panel. *Id*. at 877-78. The defendant was in custody and there was no indication that he was consulted. *Id*. at 878. Because the email communication tested the jurors' fitness to serve in the case at hand, the Court held the communication was a portion of jury selection to which Mr. Irby was entitled to be present. *Id*. at 882, 884-85.

As in *Irby*, the record here indicates the jurors were excused as part of a sidebar conference and "were being evaluated individually and dismissed for cause." 170 Wn.2d at 882. In conducting this process, the court only called counsel to the bench. Ms. Williams was not present while members of her jury panel were evaluated individually and dismissed as part of the peremptory challenge process. Thus, like in *Irby*, this process violated Ms. Williams' right to be present.

In *Irby*, the Court held the defendant's absence from the portion of jury selection at issue was not harmless:

> [T]he State has not and cannot show that three of the jurors who were excused in Irby's absence ... had no chance to sit on Irby's jury. Those jurors fell within the range of jurors who ultimately comprised the jury, and their alleged inability to serve was never tested by questioning in Irby's presence . . . . Therefore, the State cannot show beyond a reasonable doubt that the removal of several potential jurors in Irby's absence [was harmless].

170 Wn.2d at 886-87. Here, the lack of record regarding the substance of the peremptory challenges makes it impossible for the State to satisfy its burden. Although Ms. Williams was present during the individual and panel questioning, she was not called to the bench to discuss the jurors that were subsequently excused as part of peremptory challenges. Ms. Williams is entitled to a new trial at which she is present during all critical stages, including jury selection.

E. CONCLUSION

For the reasons stated in the previously filed Brief of Appellant, the and the instant reply/supplemental brief, Ms. Williams asks this Court to reverse her convictions and remand for a new trial.

DATED this 1st day of May 2015.

Respectfully submitted,

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s/ THOMAS M. KUMMEROW (WSBA 21518)
tom@washapp.org
Washington Appellate Project – 91052
Attorneys for Appellant

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

STATE OF WASHINGTON,	)	
	)	
Respondent,	)	
	)	NO. 71193-8-I
v.	)	
	)	
CARRI WILLIAMS,	)	
	)	
Appellant.	)	

DECLARATION OF DOCUMENT FILING AND SERVICE

I, MARIA ARRANZA RILEY, STATE THAT ON THE 1ST DAY OF MAY, 2015, I CAUSED THE ORIGINAL **REPLY BRIEF OF APPELLANT** TO BE FILED IN THE **COURT OF APPEALS – DIVISION ONE** AND A TRUE COPY OF THE SAME TO BE SERVED ON THE FOLLOWING IN THE MANNER INDICATED BELOW:

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[X]	CARRI WILLIAMS 370021 WASHINGTON CC FOR WOMEN 9601 BUJACICH RD NW GIG HARBOR, WA 98332	(X) ( ) ( )	U.S. MAIL HAND DELIVERY _____

SIGNED IN SEATTLE, WASHINGTON THIS 1ST DAY OF MAY, 2015.

X_____

Washington Appellate Project
701 Melbourne Tower
1511 Third Avenue
Seattle, WA 98101
☎(206) 587-2711