

NO. 60153-9-I

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

STATE OF WASHINGTON,

Respondent,

v.

CHANCEY BANKS,

Appellant.

REC'D  
JUN 23 2010  
King County Prosecutor  
Appellate Unit

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

The Honorable Nicole K. MacInnes, Judge

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REPLY BRIEF OF APPELLANT

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A. ARGUMENTS IN REPLY

1. THE TRIAL COURT VIOLATED BANKS' RIGHT TO A PUBLIC TRIAL.

The state charged Chancey C. Banks with first degree robbery and second degree assault. CP 5-6. During jury selection one prospective juror disclosed she had been a violent crime victim and indicated she wished to discuss her experience in private. RPVD 76-77. The trial court decided the prospective juror would be questioned in chambers to protect her privacy. RPVD 104. The court sought no input from counsel, did not ask whether anyone objected to in-chambers questioning, and did not express concern for Banks' right to a fair trial by an impartial jury. Once in chambers, the judge posed a series of questions to the juror, after which the prosecutor and defense counsel indicated they had no additional questions. 2RP 106.

Banks argues the trial court violated his constitutional right to a public trial by closing this portion of voir dire without first considering the Bone-Club<sup>1</sup> factors. Brief of Appellant at 5-15. The state maintains that under State v. Momah,<sup>2</sup> this Court should either find the trial court did not err or fashion a remedy less than reversal and retrial. The state's argument

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<sup>1</sup> State v. Bone-Club, 128 Wn.2d 254, 906 P.2d 325 (1995).

<sup>2</sup> 167 Wn.2d 140, 217 P.3d 321 (2009).

stretches the fact-specific holding in Momah well beyond its narrow contours. Momah is a very unusual case, a far cry from the run-of-the-mill closure cases like Banks' case. It has limited application, and none here.

The Court was clear on this fact:

[W]e find the facts distinguishable from our previous closure cases. Here, Momah affirmatively assented to the closure, argued for its expansion, had the opportunity to object but did not, actively participated in it, and benefited from it. Moreover, the trial judge in this case not only sought input from the defendant, but he closed the courtroom after consultation with the defense and the prosecution. Finally, and perhaps most importantly, the trial judge closed the courtroom to safeguard Momah's constitutional right to a fair trial by an impartial jury, not to protect any other interests.

Momah, 167 Wn.2d at 151-52.

None of these distinguishing features exists in Banks' case. First, Banks did not affirmatively assent to closure, much less "argue for its expansion." Instead, he said nothing; he merely acquiesced when the court announced, "[M]aybe we can go into chambers with the court reporter, and we are going to talk to you back there." RPVD 104. Second, the trial court gave Banks no opportunity to object. Third, Banks did not participate at all in the private questioning. RPVD 106. Fourth, Banks did not "benefit" from private voir dire in the way the Court evidently found

Momah did.<sup>3</sup> Fifth, the trial court did not seek Banks' input or move into chambers only after consulting with the parties.

Finally, and "most importantly," the trial judge did not close the courtroom to safeguard Banks' right to a fair trial by an impartial jury. Plainly, the court left the public eye solely because the prospective juror "wanted to speak privately." RPVD 104. It is this feature of Momah that sets it apart from all but the rarest case. The case arose from allegations Momah, a gynecologist, sexually violated patients during physical examinations. It hardly gets more salacious than that; it is truly the stuff of corporate media pandering.

As the Court observed, "Momah's case was heavily publicized, having received extensive media coverage." Momah, 167 Wn.2d at 145. The heavy coverage gave rise to a very real possibility that some prospective jurors knew enough about the case that traditional voir dire would result in contamination of the entire venire. Defense counsel did not want that, explaining he wanted all prospective jurors privately

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<sup>3</sup> The Court did not explain how Momah "benefited" from private voir dire, other than to speculate that "[a]s a result of the in-chambers voir dire, defense counsel exercised numerous challenges for cause." Momah, 167 Wn.2d at 147. The Court did not explain how Momah would have "benefitted" less had the trial court individually questioned each of the prospective jurors in open court, outside the presence of the venire, especially considering the reason for the procedure was to find out what the panelists knew about the highly-publicized case, rather than to discuss sensitive personal matters.

questioned because "[t]hey may have prior knowledge to the extent that they might disqualify themselves, or we have the real concern that they will contaminate the rest of the jury." Momah, 167 Wn.2d at 146.

These features set Momah's case apart from Banks' case. Here no one said anything about publicity or possible juror taint. Nor did the court even hint it brought the juror into chambers to protect Banks' right to an impartial jury. The state nevertheless maintains the prospective juror was brought into chambers to ensure this right. If this Court accepts the state's claim, it will gut the most important part of Momah. Under the state's rationale, private voir dire can always be said to foster a defendant's right to a fair trial by an impartial jury. This is also the view of at least two judges of this Court. See State v. Wise, 148 Wn. App. 425, 445, 200 P.3d 266 (2009) ("We also note that a trial court's decision to conduct small portions of jury selection in private did not prejudice Wise and that private questioning, on the record, generally works to a defendant's advantage."), petition for review pending.

Accepting the state's revisionist view of the court's reason for closing the voir dire would frustrate the individualized analysis contemplated by the Court in Bone-Club and ignore the limited nature of Momah. See State v. Easterling, 157 Wn.2d 167, 171, 137 P.3d 825 (2006) ("trial court's failure to engage in the required case-by-case

weighing of the competing interests prior to directing the courtroom be closed rendered unfair all subsequent trial proceedings"); Bone-Club, 128 Wn.2d at 258 ("To assure careful, case-by-case analysis of a closure motion, the trial court must perform a weighing test consisting of five criteria[.]").

Nor did the court consider alternatives to the in-chambers questioning. This was reversible error in violation of the First Amendment right of the public to open court proceedings and the Sixth Amendment right of the accused to a public trial. Presley v. Georgia, \_\_\_ U.S. \_\_\_, 130 S. Ct. 721, 724, \_\_\_ L. Ed. 3d \_\_\_ (2010) ("The conclusion that trial courts are required to consider alternatives to closure even when they are not offered by the parties is clear not only from this Court's precedents but also from the premise that "[t]he process of juror selection is itself a matter of importance, not simply to the adversaries but to the criminal justice system.") (quoting Press-Enterprise Co. v. Superior Court, 464 U.S. 501, 505, 104 S. Ct. 819, 78 L. Ed. 2d 629 (1984)); see State v. Paumier, 155 Wn. App. 673, 230 P.3d 212, 219 (2010) ("By shutting out the public without first considering alternatives to closure and making appropriate findings explaining why closure was necessary, the trial court violated Paumier's and the public's right to an open proceeding."), petition for review pending.

In conclusion, it must be remembered closure is viewed as a last resort. See Bone-Club, 128 Wn.2d at 259 (protection of the right to public trial requires trial court “to resist a closure motion except under the most unusual circumstances”). The state proposes a system that would render closure a common alternative to public voir dire rather than an extraordinary recourse. For the aforesaid reasons, Banks asks this Court to reject the state's contentions, find the trial court violated Banks' right to a public trial, and remand for a new trial.

2. THERE ARE NO DE MINIMIS EXCEPTIONS TO THE CLOSURE REMEDY.

The state asks this Court to be the first to find private voir dire of a prospective juror can be viewed as "de minimis." BOR at 12-13. This Court must decline the state's invitation. A majority of our Supreme Court justices observed that "[t]rivial closures have been defined to be those that are brief and inadvertent." State v. Strode, 167 Wn.2d 222, 230, 217 P.3d 310 (2009).<sup>4</sup>

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<sup>4</sup> Justice Fairhurst, with Justice Madsen concurring, disagreed only with Justice Alexander's holding in the lead opinion that defendants can assert the public's right to open proceedings under article 1, § 10, and his waiver analysis. See Strode, 167 Wn.2d at 236 ("A defendant should not be able to assert the right of the public or the press in order to overturn his conviction when his own right to a public trial has been safeguarded as required under Bone-Club or has been waived.") (Fairhurst, J., concurring).

Other cases are in accord. See State v. Erickson, 146 Wn. App. 200, 209, 189 P.3d 245 (2008) ("Because the decision to remove individual questioning of prospective jurors outside the courtroom has more than an inadvertent or trivial impact on the proceedings, we hold that it acts as a closure for purposes of Bone-Club."), petition for review pending; State v. Duckett, 141 Wn. App. 797, 809, 173 P.3d 948 (2007) ("The closure here was deliberate, and the questioning of [some] prospective jurors concerned their ability to serve; this cannot be characterized as ministerial in nature or trivial in result."), petition for review pending; cf., State v. Price, 154 Wn. App. 480, 228 P.3d 1276, 1280 (2009) (prosecutor's request that spectator leave courtroom was not courtroom closure because there was no court order, implied or otherwise); Peterson v. Williams, 85 F.3d 39, 43 (2d Cir. 1996) (finding facts "more unique than rare," court held inadvertent, 20-minute, unjustified closure of courtroom during defendant's testimony was trivial, noting "public may not have missed much of importance as a result of the accidental closure, since just about all of the defendant's testimony that was relevant was repeated, soon after he testified, as part of the defense counsel's summation."); United States v. Al-Smadi, 15 F.3d 153, 154 (10th Cir. 1994) (finding inadvertent closure of courthouse for 20 minutes of defendant's trial was trivial, court holds public trial violation "requires

some affirmative act by the trial court meant to exclude persons from the courtroom.").

The trial court's closure of the voir dire in Jackson's case was not inadvertent. And while it may have been of relatively short duration, the private questioning was neither ministerial nor trial in result. This court should reject the state's argument that the closure was de minimis.

3. A DESIRE TO PROTECT PROSPECTIVE JURORS' PRIVACY INTERESTS DOES NOT EXCUSE THE FAILURE TO APPLY THE BONE-CLUB FACTORS.

The state asks this Court to fashion a remedy short of retrial where a private inquiry was warranted to protect the prospective juror's privacy interests. The state cites GR 31(j),<sup>5</sup> a juror handbook, and recommendations from the Washington State Jury Commission and American Bar Association as support for a new rule that would transform a juror's privacy interest from one factor to be considered under Bone-Club into a sort of talisman that would dictate the result and render Bone-Club meaningless. BOR at 15-18. There are several reasons why this Court should deny the State's request.

First, promotion of juror privacy is only one consideration in determining whether or not to conduct private voir dire. See Duckett, 141

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<sup>5</sup> GR 31(j) provides in pertinent part that "[i]ndividual juror information, other than name, is presumed to be private."

Wn. App. at 808 ("The privacy interests of jurors acknowledged by GR 31 are simply part of the Bone-Club analysis."); State v. Frawley, 140 Wn. App. 713, 720, 167 P.3d 593 (2007) ("[W]hile court rules, specifically GR 31(j), or other considerations of jury privacy can and should influence the judge's decision to exclude the public from certain phases of a trial, they do not trump constitutional requirements that the trial be public."); State v. Coleman, 151 Wn. App. 614, 622-23, 214 P.3d 158 (2009) (citing Duckett with approval).

Second, the state's request to apply a different remedy every time a reviewing court can justify a closure order by concluding a juror's privacy request was reasonable conflicts with settled Supreme Court precedent. In Allied Daily Newspapers v. Eikenberry, 121 Wn.2d 205, 211, 848 P.2d 1258 (1993), a unanimous Court invalidated a statute that prohibited a trial court from disclosing to the public or media the identities of child victims of sexual assault, either by disseminating court records or by allowing the public access to court proceedings. Allied Daily, 121 Wn.2d at 211. The Court found the interests of protecting a child sexual assault from further harm and ensuring the child's privacy right under article I, section 7 were compelling. Id. Nevertheless, those interests were not in and of themselves sufficient to warrant closure; instead, they were to be considered in each case under the Bone-Club analysis. Id.

An appellate court panel used the same rationale in In re Detention of D.F.F., 144 Wn. App. 214, 183 P.3d 302 (2008), review granted, 164 Wn.2d 1034 (2008). At issue was the constitutionality of MPR 1.3, which closed mental health involuntary commitment proceedings to the public unless the potential committed person or his attorney filed a written request for public proceedings. D.F.F., 144 Wn. App. at 218. The court concluded the rule was unconstitutional because (1) it did not permit case-by-case weighing of the competing interests of the proponent of closure and the public and (2) the presumption of closure of every proceeding was broader in its application or duration than necessary to serve the purpose of protecting privacy. D.F.F., 144 Wn. App. 214, 225-26.

Third, the state's reliance on GR 31 is misplaced. First, the Supreme Court has rejected the state's analysis. See State v. Strode, 167 Wn.2d 222, 239, 217 P.3d 310 (2009) (in a dissent joined by only two colleagues, Justice Johnson cited the same language in a failed attempt to convince colleagues the private voir dire there was not error). Dissenting opinions are not binding authority. In re Personal Restraint of Domingo, 155 Wn.2d 356, 367, 119 P.3d 816 (2005).

So have two divisions of the Court of Appeals. See Coleman, Duckett, and Frawley, supra.

Fourth, insofar as the state suggests a court rule or statute may supplant constitutional requirements, it is wrong, as illustrated by the discussion of Allied Daily and D.F.F., supra.

Fifth, the state's reliance on the juror handbook suffers the same fate as its use of GR 31: it appeared only in Justice Johnson's dissent in Strode, and was therefore rejected by a majority of the Court. See Strode, 167 Wn.2d at 239-40 (citing *Washington Courts: A Juror's Guide*, which "acknowledges juror privacy interests and assures them that courts provide protective measures to ensure confidentiality.").

Sixth, the state speculates juror response rates "could drop further" than the "notoriously low" present level if prospective jurors "are not offered the modicum of privacy granted by an in camera screening process." BOR at 17. The state also contends a juror should not be "forced to disclose intensely private information to the general public simply because he or she received a jury summons." BOR at 17.

Courts have rejected similar boilerplate claims in the context of closed live voir dire. In Presley v. Georgia, the Supreme Court emphasized the "generic risk of jurors overhearing prejudicial remarks, unsubstantiated by any specific threat or incident" does not support voir dire closure. 130 S. Ct. at 725. Instead, the trial court must specify the particular interest, and threat to that interest, and make factual findings to

facilitate a review of whether the closure order was properly entered. Id.; see Commonwealth v. Long, 592 Pa. 42, 64, 922 A.2d 892, 905-06 (Pa. 2007) ("general concerns for harassment or invasion of privacy would exist in almost any criminal trial").

In Paumier, this Court held that under Presley, a prospective juror's claim for privacy under the Health Insurance Portability and Accountability Act (HIPAA) does not alone justify closure but rather is one of the factors the trial court must consider when exploring reasonable alternatives to closure and making proper findings to justify closure. 155 Wn. App. 673, 230 P.3d 212, 219 (2010), petition for review pending. In D.F.F., the court rejected the notion of automatic closure, even of mental illness civil commitment hearings. 144 Wn. App. at 225-26.

In addition, the state's assertions are mere truisms that provide no substantive reasons to excuse the sealing of jury questionnaires from the constitutional scrutiny called for by Bone-Club. Indeed, the state's platitudes illustrate the utility of the Bone-Club factors; by requiring their application, this Court will ensure trial courts faced with a request for closure will balance the public's right of access to open court proceedings and records against a juror's privacy interests.

In any event, Banks does not argue for blanket prohibition of private voir dire. Rather, he contends private voir dire must be preceded

by consideration of the Bone-Club factors. Other courts agree. See Commonwealth v. Cohen, 456 Mass. 94, 111, 921 N.E.2d 906, 921 (Mass. 2010) (court must apply factors similar to Bone-Club before closing part of voir dire); Forum Communications Co. v. Paulson, 752 N.W.2d 177, 183 (N.D. 2008) ("public and the media have a presumptive right of access to juror questionnaires that is not absolute and must be balanced against a defendant's right to a fair trial and jurors' privacy interests;" presumption can only be overcome by overriding interest and must be articulated with specific findings, and any closure must be narrowly tailored to serve the competing interests); Long, 592 Pa. at 64, 922 A.2d at 905-06 (trial court's denial of access to jurors' names to protect their privacy was unwarranted; closure must be supported by specific findings showing there is "substantial probability that an important right will be prejudiced by publicity and that reasonable alternatives to closure cannot adequately protect the right."); NBC Subsidiary (KNBC-TV), Inc. v. Superior Court, 20 Cal.4th 1178, 1217-18, 980 P.2d 337, 365, 86 Cal.Rptr.2d 778, 809 (Cal. 1999) (before closing substantive courtroom proceedings, trial court must find: overriding interest supporting closure; substantial probability interest will be prejudiced without closure; proposed closure is narrowly tailored to serve the overriding interest; and there is no less restrictive means of achieving overriding interest).

In summary, Banks does not contend protection of a prospective juror's right to privacy is not a compelling interest. He instead argues that interest must be weighed against his right to public proceedings. Privacy, like other features of a particular case, must be considered when applying the Bone-Club factors. The error in Banks' case was that the trial court did not employ those factors. The error requires reversal and remand for a new trial.

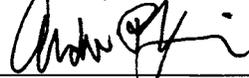
B. CONCLUSION

The trial court did not use the constitutionally required test before closing part of Banks' trial. As in cases cited in this brief, the error was not de minimis. Banks is entitled to reversal of his conviction and a remand for a new trial.

DATED this 23 day of June, 2010.

Respectfully submitted,

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

STATE OF WASHINGTON, )

Respondent, )

v. )

CHANCEY BANKS, )

Appellant. )

COA NO. 60153-9-1

**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 23<sup>RD</sup> DAY OF JUNE, 2010, I CAUSED A TRUE AND CORRECT COPY OF THE **REPLY BRIEF OF APPELLANT** TO BE SERVED ON THE PARTY / PARTIES DESIGNATED BELOW BY DEPOSITING SAID DOCUMENT IN THE UNITED STATES MAIL.

[X] CHANCEY BANKS  
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**SIGNED** IN SEATTLE WASHINGTON, THIS 23<sup>RD</sup> DAY OF JUNE, 2010.

x Patrick Mayovsky