

68808-1

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NO. 68808-1-I

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

STATE OF WASHINGTON,

Respondent,

v.

NICHOLAS PAYTON,

Appellant.

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

The Honorable Anita Farris, Judge

BRIEF OF APPELLANT

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A. ASSIGNMENTS OF ERROR

1. The trial court violated appellant's constitutional right to a public trial by taking challenges for cause during a private sidebar.

2. The trial court violated appellant's constitutional right to be present at all critical stages of trial by taking challenges for cause during a private sidebar.

Issues Pertaining to Assignments of Error

During jury selection, the parties made challenges for cause at a private sidebar. The court excused five jurors for cause and hardship after the sidebar ended. After the jury selection was completed, the court identified on the record those prospective jurors who had been challenged and excused during the sidebar.

1. Where the trial court did not analyze the Bone-Club¹ factors before conducting this portion of jury selection in private, did the court violate appellant's constitutional right to a public trial?

2. Did the appellant's absence from the sidebar violate his constitutional right to be present at all critical stages of trial?

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

B. STATEMENT OF THE CASE

The Snohomish County prosecutor charged appellant Nicholas Payton with one count each of attempted residential burglary, residential burglary, and attempting to elude a pursuing police vehicle, and three counts of second degree assault. CP 85-86.

During the State's initial voir dire of the juror venire, the prosecutor asked when the court would accept challenges for cause. 1RP² 20. The court stated it would accept challenges during questioning or at the end of voir dire. In response, the prosecutor asked to excuse juror 12. Defense counsel objected on the basis she had not yet had an opportunity to question the venire. The court sustained the objection, stating "I'll allow the other side to question and make a decision at the end." 1RP 20.

After questioning was complete, the court asked to see counsel at sidebar "regarding cause." 1RP 64. The court did not mention the Bone-Club factors on the record. Neither party objected to considering challenges for cause at the sidebar. Following the sidebar the court excused four jurors for cause and one for hardship. 1RP 66-67. The parties then exercised preemptory challenges. 1RP 67-71. The court then

² This brief refers to the verbatim report of proceedings as follows: 1RP – November 28, 2011 (voir dire); 2RP – November 28 (afternoon) and 29 (morning), 2011; 3RP – November 29 (afternoon) and 30 (morning), 2011; 4RP – November 30 (afternoon) and December 1, 2011; 5RP – April 27, 2012.

called the jurors who had been selected to the box and excused the remaining venire members. 1RP 71.

After the empanelled jury was released for the lunch recess, the trial court noted, "I do want to make just a brief record about the sidebar regarding excusals for cause and hardship." 1RP 74. The court then explained:

Ms. Trueblood [defense counsel] did ask to have 8 and 3 excused. Mr. Darrow [prosecutor] did not really oppose that is my recollection. Mr. Darrow asked to have 12 excused and the Court granted that request for excusal for cause on 12, as well as hardship. The court raised 27 and Ms. Trueblood asked to have 27 excused. That's the gentlemen whose son had been convicted of something. Mr. Darrow did not oppose that is my recollection. And then on 19, I raised 19 as to hardship and granted him a hardship excusal based on what he indicated.

1RP 74.

The jury found Payton guilty as charged. CP 41-46. The trial court imposed concurrent standard range sentences for attempted residential burglary, residential burglary, and each assault conviction. The court also imposed a 22-month sentence on the attempting to elude conviction to run consecutive to the other concurrent sentences. 5RP 47-49; CP 22-35. Payton timely appeals. CP 7-21.

C. ARGUMENT

1. THE TRIAL COURT VIOLATED PAYTON'S RIGHT TO A PUBLIC TRIAL BY CONDUCTING CAUSE CHALLENGES AT SIDEBAR.

The Sixth Amendment to the United States Constitution and article I, section 22 of the Washington Constitution guarantee the accused a public trial by an impartial jury.³ Presley v. Georgia, 558 U.S. 209, ___, 130 S. Ct. 721, 724, 175 L. Ed. 2d 675 (2010); State v. Wise, ___ Wn.2d ___, 288 P.3d 1113, 1117-18 (2012); Bone-Club, 128 Wn.2d at 261-62. Additionally, article I, section 10 of the Washington Constitution provides that “[j]ustice in all cases shall be administered openly, and without unnecessary delay.” This latter provision gives the public and the press a right to open and accessible court proceedings. Seattle Times Co. v. Ishikawa, 97 Wn.2d 30, 36, 640 P.2d 716 (1982).

The public trial right applies to jury selection. Wise, 288 P.3d at 1118. The public’s presence contributes to the fairness of the proceedings by discouraging deviations from established procedures, reminding the participants of the importance of their functions, and subjecting judges to

³ The Sixth Amendment provides in pertinent part that “[i]n all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury” Article I, section 22 provides that “[i]n criminal prosecutions the accused shall have the right . . . to have a speedy public trial by an impartial jury”

public scrutiny. State v. Slert, 169 Wn. App. 766, 772, 282 P.3d 101 (2012).

A trial court may restrict the right only “under the most unusual circumstances.” Bone-Club, 128 Wn.2d at 259. Before a judge can close any part of a trial, he or she must first apply the five factors set forth in Bone-Club.⁴ In re Pers. Restraint of Orange, 152 Wn.2d 795, 806-07, 809, 100 P.3d 291 (2004). “Violation of the public trial right, even when not preserved by objection, is presumed prejudicial to the defendant on direct appeal.” Wise, 288 P.3d at 1120 (citing Bone-Club, 128 Wn.2d at 261-62).

⁴ The factors are:

1. The proponent of closure or sealing must make some showing [of a compelling interest], and where that need is based on a right other than an accused’s right to a fair trial, the proponent must show a serious and imminent threat to that right.
2. Anyone present when the closure motion is made must be given an opportunity to object to the closure.
3. The proposed method for curtailing open access must be the least restrictive means available for protecting the threatened interests.
4. The court must weigh the competing interests of the proponent of closure and the public.
5. The order must be no broader in its application or duration than necessary to serve its purpose.”

Bone-Club, 128 Wn.2d at 258-59.

Washington courts have repeatedly held that jury selection conducted in chambers violates the right to public trial. See, e.g., Wise, 288 P.3d 1113; State v. Paumier, ___ Wn.2d ___, 288 P.3d 1126 (2012); State v. Strode, 167 Wn.2d 222, 217 P.3d 310 (2009) (Alexander, C.J., lead opinion); 167 Wn.2d at 231-36 (Fairhurst, J., concurring); State v. Heath, 150 Wn. App. 121, 125-29, 206 P.3d 712 (2009), rev. dismissed, 173 Wn.2d 1001 (2011); State v. Frawley, 140 Wn. App. 713, 718-21, 167 P.3d 593 (2007). Because the challenge for cause process is an integral part of voir dire, the constitutional public trial right also extends to that portion of criminal proceedings. See State v. Vreen, 99 Wn. App. 662, 68, 994 P.2d 905 (2000) (recognizing “it is the interplay of challenges for cause and peremptory challenges that assures the fair and impartial jury”), aff’d, 143 Wn.2d 923, 26 P.3d 236 (2001); People v. Harris, 10 Cal.App.4th 672, 684, 12 Cal.Rptr.2d 758 (1992) (deciding peremptory challenges at sidebar violates public trial right, even where such proceedings are reported).

The trial court in Payton’s case violated the right to a public trial to the same extent any in-chambers conference or other courtroom closure would have. Even though the sidebar occurred in an otherwise open courtroom, it by definition occurred privately, outside the public’s scrutinizing eyes and ears, and thus violated Payton’s right to a fair and

public trial. Slert, 169 Wn. App. at 774 n. 11 (rejecting argument that no violation occurred where jurors were dismissed at sidebar rather than in chambers because the private discussion would have involved dismissal for case-specific reasons, thereby calling for public review).

By failing to first apply the Bone-Club factors before hearing the cause challenges at sidebar, the trial court violated Payton's constitutional right to a public trial. And while there is no Washington case containing identical facts, the private sidebar was no less a violation than the closed voir dire sessions that have repeatedly been invalidated. Because the error is structural, prejudice is presumed, and thus reversal is required. Strode, 167 Wn.2d at 231.

2. THE TRIAL COURT VIOLATED PAYTON'S RIGHT TO BE PRESENT AT ALL CRITICAL STAGES BY CONSIDERING CAUSE CHALLENGES AT SIDEBAR.

"A criminal defendant has a fundamental right to be present at all critical stages of a trial." State v. Irby, 170 Wn.2d 874, 880, 246 P.3d 796 (2011). This includes the right to be present during voir dire and empanelling of the jury. Irby, 170 Wn.2d at 884 (citing Gomez v. United States, 490 U.S. 858, 873, 109 S. Ct. 2237, 104 L. Ed. 2d 923 (1989); Diaz v. United States, 223 U.S. 442, 455, 32 S. Ct. 250, 56 L. Ed. 500 (1912)). The right to be present derives from the Confrontation Clause of

the Sixth Amendment and the Due Process Clauses of the Fifth and Fourteenth Amendments. Diaz, 223 U.S. at 455.⁵

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, 490 U.S. at 873). “[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.’” Irby, 170 Wn.2d at 883 (quoting Snyder v. Massachusetts, 291 U.S. 97, 105-06, 54 S. Ct. 330, 78 L. Ed. 674 (1934), overruled on other grounds by Malloy v. Hogan, 378 U.S. 1, 84 S. Ct. 1489, 12 L. Ed. 2d 653 (1964))).

Irby requires reversal in this case. There, Irby and the State agreed to the trial court’s suggestion that neither party attend the first day of jury selection, but appear and begin questioning jurors the following day. Irby, 170 Wn.2d at 877.

⁵ In situations in which the accused is not actually confronting witnesses or evidence against him, this right is protected by the Due Process Clause. Irby, 170 Wn.2d at 880-81 (quoting United States v. Gagnon, 470 U.S. 522, 526, 105 S. Ct. 1482, 84 L. Ed. 2d 486 (1985)).

As agreed, on the first day of jury selection, the judge swore in the venire members and gave them a questionnaire. After the potential jurors completed questionnaires, the judge sent an email to the prosecutor and defense counsel suggesting that 10 venire members be removed from the panel for various reasons. The judge asked for input, indicating that if any jurors were going to be released, he would like to do it that day. Irby, 170 Wn.2d at 877.

Irby's counsel agreed to release all 10 potential jurors. The prosecutor objected to the release of three. The court then released the remaining seven. Irby, however, was in custody at the time of the exchange and there was no indication he was consulted about the dismissal of any potential jurors. Irby, 170 Wn.2d at 878-79.

Jury selection continued on the following day in Irby's presence. Irby, 170 Wn.2d at 878. At the conclusion of trial, the jury convicted Irby as charged. Irby, 170 Wn.2d at 879. Irby appealed to this Court, arguing that the trial court's dismissal of the seven potential jurors via email violated his right to be present at all critical stages. This Court agreed, and was affirmed by the Supreme Court. Irby, 170 Wn.2d at 887.

This case is like Irby in all important respects. The court took challenges for cause at sidebar and there is no indication Payton was present or permitted to participate. See Lewis v. United States, 146 U.S.

370, 372, 13 S. Ct. 136, 36 L. Ed. 1011 (1892) (“[W]here the [defendant’s] personal presence is necessary in point of law, the record must show the fact.”), overruled on other grounds by Illinois v. Allen, 397 U.S. 337, 342, 90 S. Ct. 1057, 25 L. Ed. 2d 353 (1970); see also People v. Williams, 858 N.Y.S.2d 147, 52 A.D.3d 94, 96-97 (2008) (exclusion of defendant from sidebar conference where jurors excused by agreement violates right to be present; court refuses to speculate that defendant could overhear conversations).

The fundamental purpose of a defendant’s right to be present during jury selection is to allow him to give advice or suggestions to counsel or even to supersede counsel’s decisions. Here, as in Irby, Payton’s absence prevented his participation in this process. The court thus violated Payton’s right to be present. See Commonwealth v. Owens, 414 Mass. 595, 602, 609 N.E.2d 1208 (1993) (defendant “has a right to be present when jurors are being examined in order to aid his counsel in the selection of jurors and in the exercise of his peremptory challenges”) (citing Lewis, 146 U.S. at 372).

Violation of the right to be present, in contrast to the public trial right, is subject to harmless error analysis. Irby, 170 Wn.2d at 885. The State bears the burden of proving beyond a reasonable doubt that the error is harmless. Irby, 170 Wn.2d at 886.

The Court found Irby's absence from the portion of jury selection 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 Had [those jurors] been subjected to questioning in Irby's presence . . . the questioning might have revealed that one or more of these potential jurors were not prevented by reasons of hardship from participating on Irby's jury Therefore, the State cannot show beyond a reasonable doubt that the removal of several potential jurors in Irby's absence [was harmless].

Irby, 170 Wn.2d at 886-87.

Thus, the Irby Court considered whether the same jurors would have inevitably sat on the jury regardless of Irby's participation and concluded the answer was no. Accordingly, the State could not show the error was harmless. Irby, 170 Wn.2d at 886-87.

As in Irby, the State cannot show that the venire members excused as a result of the challenges at sidebar had no chance to sit on this jury. The prospective jurors dismissed for cause fell within the range of jurors who ultimately comprised the jury. See 1RP 66-71 (last individual chosen is juror 22). Moreover, "in order to remove a juror for cause, a party must be able to state on the record a legally sufficient reason for the challenge." Vreen, 99 Wn. App. at 668. Because the challenges were

made at sidebar, the record is silent as to the basis for each challenge, whether that basis was in fact “legally sufficient,” and whether defense counsel objected to any of the prosecutor’s challenges. Nor does the record show Payton was consulted about the anticipated challenges or agreed with them. The State cannot show that Payton’s absence during this critical stage was harmless beyond a reasonable doubt. Irby, 170 Wn.2d at 886.

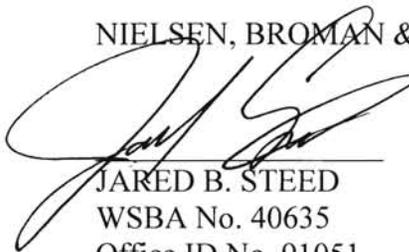
D. CONCLUSION

The trial court violated Payton’s constitutional rights to a public trial and to be present by taking challenges for cause at sidebar. This Court should reverse Payton’s convictions and remand for a new trial.

DATED this 15th day of January, 2013.

Respectfully submitted,

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

STATE OF WASHINGTON)	
)	
Respondent,)	
)	
vs.)	COA NO. 68808-1-I
)	
NICHOLAS PAYTON,)	
)	
Appellant.)	

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 15TH DAY OF JANUARY, 2013, I CAUSED A TRUE AND CORRECT COPY OF THE **BRIEF OF APPELLANT** TO BE SERVED ON THE PARTY / PARTIES DESIGNATED BELOW BY DEPOSITING SAID DOCUMENT IN THE UNITED STATES MAIL AND/OR EMAIL.

- [X] SNOHOMISH COUNTY PROSECUTOR'S OFFICE
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SIGNED IN SEATTLE WASHINGTON, THIS 15TH DAY OF JANUARY, 2013.

x *Patrick Mayovsky*