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DEC 09 2013

King County Prosecutor
Appellate Unit

NO. 70359-5-1

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

STATE OF WASHINGTON,

Respondent,

v.

JESUS GASPAR NAVARRO,

Appellant.

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

The Honorable Jeffrey M. Ramsdell, Judge

BRIEF OF APPELLANT

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King County
Appellate Unit
12/10/13
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A. ASSIGNMENTS OF ERROR

1. The trial court erred by denying Jesus Navarro's half-time motion to dismiss.

2. The trial court denied Navarro's constitutional right to a public trial.

Issues Pertaining to Assignments of Error

1. The State presented evidence only that Navarro possessed stolen property. Its only evidence to establish Navarro intended to traffic in the property came from Navarro's admissions. Did the State fail to present evidence sufficient to establish the corpus delicti for the charge of trafficking in stolen property? If so, did the trial court err by denying Navarro's half-time motion to dismiss?

2. The trial court took peremptory challenges at sidebar by having the parties write down which prospective juror they wanted to excuse. No record was made of these challenges. Did the trial court violate Navarro's right to a public trial?

B. STATEMENT OF THE CASE

On the morning of September 9, 2012, Frederick Ayre and his wife, Mary Ayre, awoke to find their home had been burglarized during the night. 4RP 9-10, 36-38. Missing were a purse, a desktop computer,

two laptop computers, four iPads, three cell phones, an iPod, a backpack, a leather bag, three cameras, a cell phone ear piece, and pill bottles belonging to the Ayres' son. 4RP 12-13, 38-43.

Based on information learned while investigating the burglary, Bellevue police obtained a search warrant for Navarro's house. 3RP 82-84. Officers waiting to execute the warrant observed Navarro leave the house, enter a vehicle, and drive off. They followed Navarro to a nearby gas station and arrested him. 3RP 47-50. They then transported him to a "staging area" near his home. 3RP 87.

An officer read Navarro his rights. Navarro waived his rights and agreed to speak with the officer. 3RP 88. The officer advised Navarro that he and his colleagues were interested in recovering stolen property at his house and asked him where the items were. Navarro asked what specifically they were looking for and he would tell them where it was. The officer asked whether anyone had brought electronics items to him. Navarro answered a friend named Luis and another person had brought him some electronics gear, which he put in a small room at his house. 3RP 89-91.

Navarro described Luis, which led the officer to believe Luis was a man who had been arrested for burglarizing the Ayres' home. 3RP 91.

Navarro specified he received two cameras, a laptop computer, and an iPod. 3RP 91-92. When asked where Luis had obtained the property, Navarro said he did not know, but that "everyone knows it was stolen." 3RP 93, 167. He said he paid about \$200 for the items. 3RP 93, 168. Navarro told the officer he put the two cameras on a shelf in the small room, sold the laptop to a friend, and pawned the iPod. 3RP 93-94.

The officer then went to Navarro's house and went into a small room with one other officer. 3RP 94. Therein they found a leather bag, two bottles of prescription pills, two cameras, and a "Bluetooth" cell phone earpiece. 3RP 96-97, 103-07, 112-17, 170-72. Also in the room was a social security card in the name of Betty Gordon. 3RP 97-98, 172. Gordon's purse had been taken out of her unlocked car around the time officers called to tell her they found it. 4RP 30-31. Gordon did not report the theft to police because the purse contained nothing of value. 4RP 32.

One of the two officers checked two pawn shops near Navarro's house to see if any of the stolen items had been pawned. 3RP 174. The officer found no record indicating Navarro had pawned any items at either shop. 3RP 174, 185.

Navarro was transported to the Bellevue police station, where the two officers conducted a recorded interview. 3RP 118, 175. The

audiotape, Exhibit 26, was played for the jury. 3RP 127. Most of Navarro's statements were consistent with those he provided at the staging area. 3RP 128. Rather than saying everyone knew the property was stolen, Navarro said maybe it was stolen but he did not know. 3RP 128-29, 140. Additionally, Navarro said he paid Luis \$180 and a bit of marijuana for the items. 3RP 128-29.

Based on the above evidence, the State charged Navarro with first degree trafficking in stolen property and identity theft. CP 15-16. At the close of the State's case, Navarro moved to dismiss both charges. With respect to trafficking, Navarro contended the only evidence showing his intent to sell stolen property came from his admissions made at the staging area and police station. Therefore, he maintained, the state failed to establish the corpus delicti of the charged crime. 4RP 59-60.

The trial court summarized the corpus delicti rule thusly: "[S]o long as you have sufficient corroboration of the commission of the crime the use of the defendant's own statements to shore up the conviction doesn't violate the corpus delicti rule." 4RP 62. The court denied the motion. 4RP 63.

After being admonished of his right to testify, Navarro rested. 4RP 70-71. The jury received instructions on the lesser offense of second

degree trafficking in stolen property. CP 33-36. The jury did not reach verdicts with respect to either charged crime. Instead, the jury found Navarro guilty of second degree trafficking in stolen property. CP 43-45. The trial court imposed a standard range sentence. CP 47-52.

C. ARGUMENT

1. THE STATE FAILED TO PRESENT SUFFICIENT EVIDENCE, INDEPENDENT OF NAVARRO'S ADMISSIONS, TO PROVE THE CORPUS DELICTI OF TRAFFICKING IN STOLEN PROPERTY.

The State failed to present, independent of Navarro's admissions, prima facie proof that Navarro knowingly trafficked in stolen property. In other words, the State failed to sufficiently prove the corpus delicti of trafficking in stolen property. The trial court's decision to the contrary should be reversed.

Where evidence presented to the jury includes a defendant's admissions, the State must establish the corpus delicti of the charged offense through evidence independent of the admissions. State v. Brockob, 159 Wn.2d 311, 329, 150 P.3d 59 (2006). The independent evidence is sufficient only if it provides "prima facie corroboration of the crime described in a defendant's incriminating statement." Id. Prima facie corroboration exists if the independent evidence supports a "logical and

reasonable inference" of the facts to be proved. City of Bremerton v. Corbett, 106 Wn.2d 569, 578-79, 723 P.2d 1135 (1986).

The corpus delicti doctrine is a rule that tests the sufficiency or adequacy of evidence, other than a defendant's confession, to corroborate the confession. State v. Dow, 168 Wn.2d 243, 249, 227 P.3d 1278 (2010). Its purpose is "to ensure that other evidence supports the defendant's statement and satisfies the elements of the crime." Id. This is because a defendant's incriminating statement alone is insufficient to prove a crime occurred. Brockob, 159 Wn.2d at 328.

The crime at issue in Navarro's case is first degree trafficking in stolen property. As charged, the offense occurs when a person "knowingly traffics in stolen property[.]" CP 15; RCW 9A.82.050(1). "'Traffic' means to sell, transfer, distribute, dispense, or otherwise dispose of stolen property to another person, or to buy, receive, possess, or obtain control of stolen property, *with intent to* sell, transfer, distribute, dispense, or otherwise dispose of the property to another person." RCW 9A.82.010(19) (emphasis added).

Other than Navarro's confession, the State proved Navarro knowingly possessed items of property that had been stolen during a burglary that occurred 19 days earlier. The items were a leather bag, two

bottles of prescription pills, two cameras, and a "Bluetooth" cell phone headpiece. 3RP 96-97, 103-07, 112-17.

In assessing whether this is sufficient evidence of the corpus delicti, this Court reviews the evidence in the light most favorable to the State. State v. Aten, 130 Wn.2d 640, 658, 927 P.2d 210 (1996). If the independent evidence supports hypotheses of both guilt and innocence, it is insufficient to corroborate a defendant's admission of guilt. Id. at 660.

Mere possession of stolen property is not enough to show intent to traffic under the corpus delicti rule. See Brockob, 159 Wn.2d at 332-33 (possession of between 15 and 30 packages of stolen Sudafed insufficient to show intent to manufacture methamphetamine). The possession gave Navarro the opportunity to traffic stolen property, but the mere opportunity to commit a criminal act provides no proof the defendant committed the criminal act. State v. Ray, 130 Wn.2d 673, 681, 926 P.2d 904 (1996).

For these reasons, the State failed to establish the corpus delicti of trafficking in stolen property. The trial court erred by denying Navarro's motion to dismiss. Without Navarro's statements, the State cannot prove the charge. This Court should reverse the trial court's ruling and remand with an order to dismiss with prejudice. See Brockob, 159 Wn.2d at 352 ("without Brockob's incriminating statement there was insufficient

evidence to support Brockob's conviction. We reverse Brockob's conviction[.]").

2. THE TRIAL COURT VIOLATED NAVARRO'S RIGHT TO A PUBLIC TRIAL BY TAKING PEREMPTORY CHALLENGES IN PRIVATE.

The trial court took peremptory challenges of prospective jurors at sidebar. A record was not made of the proceeding. Because exercising peremptory challenges is part of voir dire, and because the trial court failed to apply the Bone-Club¹ factors, the court violated Navarro's constitutional right to a public trial.

The Sixth Amendment and article I, section 22 guarantee the accused a public trial by an impartial jury. Presley v. Georgia, 558 U.S. 209, 213, 130 S. Ct. 721, 724, 175 L. Ed. 2d 675 (2010); 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 media a right to open and accessible court proceedings. Seattle Times Co. v. Ishikawa, 97 Wn.2d 30, 36, 640 P.2d 716 (1982). There is a strong presumption courts must be open at all stages of the trial. State v. Sublett, 176 Wn.2d 58, 70, 292 P.3d 715 (2012).

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

Whether a trial court has violated the defendant's public trial right violation is a question of law this Court reviews de novo. State v. Brightman, 155 Wn.2d 506, 514, 122 P.3d 150 (2005). A trial court may restrict the right only "under the most unusual circumstances." Bone-Club, 128 Wn.2d at 259. Before a court can close any part of a trial, it must first apply the five factors set forth in Bone-Club. In re Personal Restraint of Orange, 152 Wn.2d 795, 806-07, 809, 100 P.3d 291 (2004). Violation of this right is presumed prejudicial even when not preserved by objection. State v. Wise, 176 Wn.2d 1, 16, 288 P.3d 1113 (2012).

"The process of juror selection is itself a matter of importance, not simply to the adversaries but to the criminal justice system." Press-Enterprise Co. v. Superior Court, 464 U.S. 501, 505, 104 S. Ct. 819, 78 L. Ed. 2d 629 (1984) (Press-Enterprise I). Washington courts have repeatedly held that jury voir dire conducted in private violates the right to public trial. See, e.g., Wise, 176 Wn.2d at 15; State v. Paumier, 176 Wn.2d 29, 35, 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. Erickson, 146 Wn. App. 200, 211, 189 P.3d 245 (2008), review denied, 176 Wn.2d 1031 (2013).

Navarro's trial judge explained he would draw two columns on a sheet of paper, one for each party. The prosecutor would write down the number of the juror it wished to excuse, then hand the paper to defense counsel to do the same thing. The court would then excuse the two specified jurors. That way, the court explained, no juror would know which side rejected him or her. 1RP 188. It would continue this process until both parties accepted the jury. 1RP 189-90.

The prosecutor asked whether the court would file the sheet. The court said no, but that the clerk would write the challenges down for her records. 1RP 190-91. It is not clear what the court meant by the clerk's records. The clerk did not set forth the parties' challenges in the minute entries. Supp. CP __ (sub. no. 38A, Minute Entry at 4 of 10).

This Court must first determine whether a criminal defendant's public trial right applies to the exercise of peremptory challenges. To decide whether a particular process must be open, this Court uses the "experience and logic" test formulated by the United States Supreme Court in Press-Enterprise Co. v. Superior Court, 478 U.S. 1, 8, 106 S. Ct. 2735, 92 L. Ed. 2d 1 (1986) (Press-Enterprise II). State v. Sublett, 176 Wn.2d at 73.

State v. Jones² is illuminating in this regard. In that case, during a trial recess, the court clerk randomly pulled names of four sitting jurors from a rotating cylinder to determine which would be alternates. The court announced the names of the four alternate jurors following closing arguments and excused these jurors. Jones, 175 Wn. App. at 95. The alternate juror drawing happened off the record and outside of the trial proceedings. Jones, 175 Wn. App. at 96.

Jones challenged this process on appeal. Following Sublett, the court concluded that the Washington experience of alternate juror selection is connected to voir dire. Alternate juror selection, the court held, must be open to the public. Jones, 175 Wn. App. at 101.

As for the logic prong, the court wrote, "The issue is not that the drawing in this case was a result of manipulation or chicanery on the part of the court staff member who performed the task, but that the drawing could have been." Jones, 175 Wn. App. at 102. The court found that two of the purposes for the public trial right -- basic fairness to the defendant and reminding the trial court of the importance of its functions -- were implicated. Id. The court held the secret random drawing raised important

² State v. Jones 175 Wn. App. 87, 303 P.3d 1084, petition for review pending, No. 89321-7 (2013).

questions about "the overall fairness of the trial, and indicates that court personnel should be reminded of the importance of their duties." Id. The court therefore concluded that under the experience and logic test, a closure occurred. Id.

Finally, the court held that because the trial court did not apply the Bone-Club factors, it violated Jones' public trial right. Because such error is presumed prejudicial, a new trial was required. Id. at 1192-93.

Applying the Jones reasoning to Navarro's case dictates the same result. Under the "experience" prong, the court asks whether the process has historically been open to the press and general public. Sublett, 176 Wn.2d at 73. Washington's experience of providing for and exercising peremptory challenges is one "connected to the voir dire process for jury selection." See White v. Territory, 3 Wash. Terr. 397, 406, 19 P. 37 (1888) ("Our system provides for examination of persons called into the jury-box as to their qualifications to serve as such. The evidence is heard by the court, and the question of fact is decided by the court."); State v. Rutten, 13 Wash. 203, 204, 43 P. 30 (1895) (discussing remedy if trial court wrongfully compelled accused to exhaust peremptory challenges on prospective jurors who should have been dismissed for cause); State v. Rivera, 108 Wn. App. 645, 649-50, 32 P.3d 292 (2001) ("[P]eremptory

challenge is a part of our common law heritage, and one that was already venerable in Blackstone's time."), review denied, 146 Wn.2d 1006 (2002), overruled on other grounds, Sublett, 176 Wn.2d at 71-72.

Voir dire must be open to the public. Wise, 176 Wn.2d at 11. It follows the exercise of peremptory challenges, a traditional component of voir dire, must also take place before public eyes and ears.

Under the logic prong, courts consider the values served by open court proceedings, and ask "whether public access plays a significant positive role in the functioning of the particular process in question." Sublett, 176 Wn.2d at 73 (quoting Press-Enterprise, 478 U.S. at 8). Open proceedings serve to ensure a fair trial, to remind the prosecutor and judge of their responsibility to the defendant and the importance of their duties, to encourage witnesses to come forward, and to discourage perjury. Brightman, 155 Wn.2d at 514.

Just as did the secret random alternate juror selection in Jones, the secret peremptory challenge process used at Navarro's trial involved the first two purposes. The public lacked the assurance that Navarro and the excused prospective jurors were treated fairly. As well, requiring the parties to voice their peremptory challenges in public at the time they are

made reminds them of the importance of the process and its effect on the panel chosen to sit in judgment.

Peremptory challenges permit the parties to strike prospective jurors "who are not challengeable for cause but in whom the parties may perceive bias or hostility-thereby eliminating extremes of partiality on both sides-and to assure the parties that the jury will decide on the basis of the evidence at trial and not otherwise." Rivera, 108 Wn. App. at 649-50 (citing United States v. Annigoni, 96 F.3d 1132, 1137 (9th Cir. 1996), overruled on other grounds, Rivera v. Illinois, 556 U.S. 148, 161-62, 129 S. Ct. 1446, 173 L. Ed. 2d 320 (2009)). Regardless whether there are objections that require making a record, a transparent peremptory challenge process guards against arbitrary use of challenges for nefarious reasons that are not necessarily race- or gender-based, such as age or educational level.

The public nature of trials is a check on the judicial system, provides for accountability and transparency, and assures that whatever transpires in court will not be secret or unscrutinized. Wise, 176 Wn.2d at 6. "Essentially, the public-trial guarantee embodies a view of human nature, true as a general rule, that judges [and] lawyers . . . will perform their respective functions more responsibly in an open court than in secret

proceedings." Id. at 17 (quoting Waller v. Georgia, 467 U.S. 39, 46 n.4, 104 S. Ct. 2210, 81 L. Ed. 2d 31 (1984)). The peremptory challenge process squarely implicates those values.

Under the "experience and logic" test, therefore, the secret ballot method of exercising peremptory jurors in Navarro's case implicated his right to a public trial and constituted an unlawful closure.

Navarro anticipates the State may assert the proceeding did not implicate the public trial right because it occurred in the open courtroom. This reasoning ignores the purposes of the public trial right.

Though the courtroom itself remained open, the proceedings were not. Jurors were allowed to remain in the courtroom while the peremptory challenges were exercised, which demonstrates they were done in a way that those present would not be able to overhear. A proceeding the public can see but not hear adds nothing to its fairness. If the participants can communicate in code, by whispering, by speaking a foreign language, or under the cone of silence, the "public" nature of the proceeding is rendered a farce.

Furthermore, a closure occurs even when the courtroom is not physically closed if the proceeding at issue takes place in a manner that renders it inaccessible to public scrutiny. See State v. Slert, 169 Wn. App.

766, 774 n.11, 282 P.3d 101 (2012) ("if a side-bar conference was used to dismiss jurors, the discussion would have involved dismissal of jurors for case-specific reasons and, thus, was a portion of jury selection held wrongfully outside Slert's and the public's purview."), review granted, 176 Wn.2d 1031 (2013). Members of the public are no more able to approach the bench and listen to an intentionally private jury selection process than they are able to enter a locked courtroom, access the judge's chambers, or participate in a private hearing in a hallway. The practical effect is the same — the public is denied the opportunity to scrutinize events.

Finally, the public had no other way to know what happened during the process. Although the trial court told the prosecutor the clerk would make a record of the challenges, there is no such record in the minutes or the court file.

The trial court did not consider the Bone-Club factors before conducting the private jury selection process at issue here. A trial court errs when it fails to conduct the Bone-Club test before closing a court proceeding to the public. Wise, 176 Wn.2d at 5, 12. The error violated Navarro's public trial right, which requires automatic reversal because it affects the framework within which the trial proceeds. Id. at 6, 13-14.

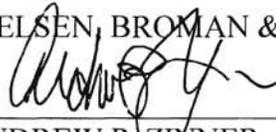
D. CONCLUSION

For the above reasons, this Court should reverse Navarro's conviction and remand for dismissal with prejudice.

DATED this 9 day of December, 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. 70359-5-1
)	
JESUS NAVARRO,)	
)	
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 9TH DAY OF DECEMBER, 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.

[X] JESUS NAVARRO
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TACOMA, WA 98421

SIGNED IN SEATTLE WASHINGTON, THIS 9TH DAY OF DECEMBER, 2013.

x *Patrick Mayovsky*