

Original

No. 36468-9-II

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

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STATE OF WASHINGTON,

Respondent,

v.

CHAMROEUM NAM,

Appellant.

FILED  
COURT OF APPEALS  
DIVISION II  
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STATE OF WASHINGTON  
BY DEPUTY

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

The Honorable Richard D. Hicks, Judge  
Cause No. 04-1-00606-0

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BRIEF OF RESPONDENT

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A. ISSUES PERTAINING TO ASSIGNMENTS OF ERROR.

1. Whether Nam was deprived of his right to a public trial because the court closed the courtroom during the trial and questioned a juror regarding his health problems.

2. Whether the court erred by ruling that Nam could question the victim in general terms about a statement she may have made to a third party that could show she was biased.

3. Whether Nam was denied effective assistance of counsel.

4. Whether there was an accumulation of errors such as to render Nam's trial unfair.

B. STATEMENT OF THE CASE.

1. The State accepts Nam's statement of the facts of the case.

C. ARGUMENT.

1. There was no violation of Nam's right to a public trial.

a. Right to a public trial.

Article 1, section 22 of the Washington State Constitution guarantees criminal defendants the right to a speedy, public trial. Similarly, article 1, section 10 provides that "[j]ustice in all cases shall be administered openly. . . ."

When a party requests closure of the courtroom, the trial court must weigh five factors to balance the competing constitutional interests. State v. Bone-Club, 128 Wn.2d 254, 258-

59, 906 P.2d 325 (1995); State v. Brightman, 155 Wn.2d 506, 516, 122 P.3d 150 (2005); State v. Easterling, 157 Wn.2d 167, 137 P.3d 825 (2006). To overcome the presumption of openness, the party seeking closure must show an overriding interest that is likely to be prejudiced and that the closure is narrowly tailored to serve that interest. In re Personal Restraint of Orange, 152 Wn.2d 795, 806, 100 P.3d 291 (2004), (citing Waller v. Georgia, 467 U.S. 39, 45, 104 S. Ct. 2210, 81 L. Ed. 2d 31 (1984); Press-Enterprise Co. v. Superior Court of Cal., 464 U.S. 501, 510, 104 S. Ct. 819, 78 L. Ed. 2d 629 (1984)). The trial court must consider alternatives and balance the competing interests on the record. Orange, at 809-11. The remedy for a violation under article 1, section 22, is to remand for a new trial. Bone-Club, *supra*, at 260-61.

b. Not every courtroom closure affects a defendant's right to a public trial.

The public trial right applies to the evidentiary phases of the trial and to other "adversary proceedings." Ayala v. Speckard, 131 F.3d 62, 69 (2d Cir. 1997) Thus, a defendant has a right to an open court whenever evidence is taken, during a suppression hearing, and during voir dire. Id.; [Press-Enterprise, *supra*.]

State v. Rivera, 108 Wn. App. 645, 652-53, 32 P.3d 292 (2001). In Rivera, one juror had complained about the hygiene of another juror, and the court conducted a closed courtroom hearing, with the

parties present, to inquire into the matter, which was resolved by moving the complaining juror to a different seat. Division I of the Court of Appeals said:

This was a ministerial matter, not an adversarial proceeding. It did not involve any considerations of evidence, or any issue related to the trial. The hearing was akin to a chambers hearing or bench conference, and not part of a trial. Opening such conferences to the public would not further the aims of the public trial guarantee. . . . Because the defendant has no constitutional right to be present during a chamber conference, there can be no constitutional right to have the public present. Whether a chambers hearing is held in chambers or in a closed courtroom is immaterial. The defendant's right to a public trial is not implicated in either situation. Accordingly, the trial court was not required to engage in balancing the merits of closing the courtroom on the record.

Rivera, *supra*, at 653.

The Ninth Circuit Court of Appeals, applying a Sixth Amendment analysis, reached a similar conclusion in United States v. Ivester, 316 F.3d 955, 2003 Cal. Daily Op. Service 444 (2003). During the trial of this case from the District of Hawaii, the court became aware that some jurors were concerned for their safety because of the intimidating appearance of spectators in the courtroom. In the open courtroom, but in the absence of the jury, a discussion was held with the parties and the court decided to question one of the jurors. Over Ivester's objection, the court sent

the spectators out of the courtroom. The judge then questioned first one juror and then the jury as a whole, and resolved the concerns regarding security. Ivester was convicted and appealed, arguing that the court's exclusion of the spectators violated his right to a public trial. The Ninth Circuit, while acknowledging that some courts and treatises find that the Sixth Amendment right to a public trial applies to the entire trial, noted that recent decisions "demonstrate that the right to a public trial does not extend to every moment of trial." Ivester, 316 F.3d at 958-59. The court said that if the questioning of the jurors has been done in chambers, with neither the defendant nor the spectators present, there would not have been a constitutional violation, and thus because a judge could question a juror alone in chambers, he or she could do so in a closed courtroom with the parties and counsel present. ". . . [A] trivial closure does not violate the Sixth Amendment." Id., at 959.

To determine whether a closure was too trivial to implicate the Sixth Amendment guarantee, we must determine whether the closure involved the values that the right to a public trial serves. These values have been articulated in Peterson and Waller as:

- (1) to ensure a fair trial, (2) to remind the prosecutor and judge of their responsibility to the accused and the importance of their functions, (3) to encourage witnesses to come forward; and (4) to discourage perjury.

(Cites omitted.) We hold that these four values are not implicated by routine jury administrative matters that have no bearing on Ivester's ultimate guilt or innocence. Here, questioning the jurors to determine whether they felt safe is an administrative jury problem. The closure here did not infect any witness's testimony. It did not even infect counsel's opening or closing arguments to the jurors. . . . Additionally, the questioning of the jury was very brief in duration. This further supports our conclusion that the closure does not implicate Ivester's right to a public trial.

Id., at 960. While, as mentioned above, this was a Sixth Amendment analysis, the Washington Supreme Court has concluded that the Bone-Club requirements "mirror the United States Supreme Court's Sixth Amendment public right analysis as set forth in [Waller v. Georgia, 467 U.S. 39, 45-47, 104 S. Ct. 2210, 81 L. Ed. 2d 31 (1984)]". Bone-Club, *supra*, at 515, fn 5. Waller was cited in the Ivester opinion. Ivester, 316 F.3d at 958, 960.

The leading Washington cases dealing with public trial issues are Bone-Club, Orange, Brightman, and Easterling, *supra*. In Bone-Club, a pretrial suppression hearing had been closed to the public, and the court there found a violation of the right to a public trial. Orange and Brightman involved closure of the courtroom during jury voir dire, also found to be a violation. In Easterling the courtroom was not only closed, but Easterling and his counsel were excluded for a hearing in which a co-defendant moved to sever and

dismiss his charges, there was further negotiation with the State, and the co-defendant ultimately entered a guilty plea and testified against Easterling. This was also a violation. These facts, however, are very different from the situation in Nam's case, where the judge, bailiff, and both attorneys had apparently noticed problems with the juror in question. It was to Nam's benefit to make certain that the juror was capable of continuing to hear the case, and it was certainly in the best interests of everyone to conduct the inquiry in such a manner as to minimize embarrassment to the juror. There was nothing adversarial about this process, and Nam neither objected to the proceedings nor questioned the juror.

It is true that failure to object does not necessarily constitute a waiver. Rivera, supra, at 652. However, it can be taken as evidence that at the time Nam did not believe the closed courtroom would prejudice him. Nam cites to Bone-Club and Brightman for the principle that a constitutional error can be raised for the first time on appeal. However, these cases simply applied the general rule that manifest constitutional error *may* be considered for the first time on review. There is no rule stating that any "public trial" claim may be raised without objection at the trial court level. Under RAP

2.5(a), an error is waived if not preserved below. An exception exists for a “manifest error affecting a constitutional right.” RAP 2.5(a)(3); State v. Scott, 110 Wn.2d 682, 686-87, 757 P.2d 492 (1988); State v. Lynn, 67 Wn. App. 339, 342, 835 P.2d 251 (1992). RAP 2.5(a)(3) is not intended to afford defendants a means for obtaining new trials whenever they can identify a constitutional issue not raised before in the trial court. Scott, *supra*, at 688. The question, then, is whether public trial claims are always “manifest.”

We do not review on appeal an alleged error not raised at trial unless it is a “manifest error affecting a constitutional right.” RAP 2.5(a)(3); State v. Scott, 110 Wn.2d 682, 686-87, 757 P.2d 492 (1988). An appellant must show actual prejudice in order to establish that the error is “manifest.” . . . . It is not enough that the Defendant allege prejudice[;] actual prejudice must appear on the record.” State v. Contreras, 92 Wn. App. 307, 312, 966 P.2d 915 (1998) (quoting) State v. McFarland, 127 Wn.2d 322, 334, 899 P.2d 1251 (1995)). . . . But “[i]f the facts necessary to adjudicate the claimed error are not in the record on appeal, no actual prejudice is shown and the error is not manifest.” . . . .

State v. McNeal, 98 Wn. App. 585, 594-95, 991 P.2d 649 (1999).

Even if the trial court had erred, Nam has not even claimed any prejudice, and therefore there is no manifest error. Since he did not object at the trial level, he should not be able to raise the issue on appeal.

Where the ruling is discretionary, a defendant who does not object when the ruling is made waives his right to raise the issue thereafter. . . . A trial court is entitled to know that its exercise of discretion is being challenged; otherwise, it may well believe that both sides have acquiesced in its ruling.

State v. Collins, 50 Wn.2d 740, 748, 314 P.2d 660 (1957).

Nam should not be able to raise this issue for the first time on appeal, but even if the court considers it, the trial court did not err in questioning the juror in a closed courtroom.

2. The court did not err by ruling that Nam could question the victim in general terms about a statement she may have made to a third party that could indicate bias.

In the first trial of this matter, Nam attempted to ask the victim, Harris, about a statement he alleged she made to his sister, Sharmane Berry. The gist of the statement was that Harris would do anything to make sure Nam went to jail. The trial court ruled that the question called for hearsay and sustained the State's objection. On appeal, this court reversed, holding that because it was relevant regardless of the truth of the matter asserted, it was not hearsay. Because the attempted kidnapping charge hinged entirely on Harris's credibility, the error was not harmless.

In the second trial, the alleged statement again did not get into evidence, but not because the trial court excluded it, and thus

the trial court did not err. A review of the transcript of June 6, 2007, reveals the following:

The defense attorney, Mr. Jefferson, asked to make an offer of proof outside the presence of the jury that Harris had told Berry she was willing to do anything to see that Nam went to jail. However, Mr. Jefferson had nothing to offer except his vague recollection that Berry had indeed made such a statement. He did not know the whereabouts of Ms. Berry, and the phone number he had for her was disconnected, so he could not produce her as a witness. He could point to Exhibit 14, a phone call between Nam and a female apparently referencing a conversation between Berry and Harris about the case. Mr. Jefferson had a note in his file from 2005 that said, "She called my sister," from which he concluded that Nam had told him that Harris had called Berry. [06/06/07 RP 162-63] In response, the prosecutor indicated that there had been a number of conversations between Harris and Berry, and merely asked for some offer of proof that such a statement had been made. Mr. Jefferson was unwilling to rely on his notes for such proof, which the court would have accepted. The court was aware of the ruling of the Court of Appeals in the first appeal of this matter, and was making every effort to give Nam as much latitude as

possible. It ruled that Nam could ask questions of Harris about conversations with Berry as long as they didn't suggest the answer, The prosecutor put Nam and the court on notice that the State had evidence that Berry had made a number of statements about Harris that were demonstrably not true, and should Nam elicit the evidence that Berry had made the statement about Harris's determination to see Nam in jail, the State would produce evidence of Berry's other statements that could be proven untrue. [06/06/07 RP 163-66]

The trial court then reiterated its ruling that Nam could ask general questions of Harris, but cautioned both sides that they should be careful of opening doors they didn't want to walk through. [06/06/07 RP 167] The trial then resumed, and during the questioning of Harris, Nam did not raise the issue. [06/06/07 RP 200-206, 210-211]

While the trial court was perhaps overly cautious in ruling that the defense could not go fishing, (see State v. Spencer, 111 Wn. App. 401, 410-11, 45 P.3d 209 (2002)), the fact remains that Nam was permitted under the court's ruling to ask Harris about statements she made to Berry that would indicate bias. However, had she denied them, Nam had no extrinsic evidence to produce,

and he ran the risk that he would open the door to prosecution evidence that Berry was the liar, not Harris, which would only serve to bolster Harris's credibility and harm him. It was a good tactical decision on the part of his attorney to forego asking questions that carried a minimal chance of benefiting his case but a substantial risk of hurting it. It was not an error of the court that kept this evidence from the jury. It was a defense decision.

3. Nam was not denied effective assistance of counsel.

To prevail on a claim of ineffective assistance of counsel, an appellant must show that (1) counsel's performance was deficient; and (2) the deficient performance prejudiced him. State v. Thomas, 109 Wn.2d 222, 225-26, 743 P.2d 816 (1987). Deficient performance occurs when counsel's performance falls below an objective standard of reasonableness. State v. Stenson, 132 Wn.2d 668, 705, 940 P.2d 1239 (1997), *cert. denied*, 523 U.S. 1008 (1998). An appellant cannot rely on matters of legitimate trial strategy or tactics to establish deficient performance. State v. Hendrickson, 129 Wn.2d 61, 77-78, 917 P.2d 563 (1996). Prejudice occurs when but for the deficient performance, the outcome would have been different. In the Matter of the Personal Restraint Petition of Pirtle, 136 Wn.2d 467, 487, 965 P.2d 593

(1996). There is great judicial deference to counsel's performance and the analysis begins with a strong presumption that counsel was effective. Strickland v. Washington, 466 U.S. 668, 689, 104 S. Ct. 2052, 80 L. Ed. 2d 674 (1984); State v. McFarland, 127 Wn.2d 332, 335, 899 P.2d 1251 (1995). A reviewing court is not required to address both prongs of the test if the appellant makes an insufficient showing on one prong. State v. Fredrick, 45 Wn. App. 916, 923, 729 P.2d 56 (1989). Moreover, counsel's failure to offer a frivolous objection will not support a finding of ineffective assistance. State v. Briggins, 11 Wn. App. 687, 692, 524 P.2d 694, *review denied*, 84 Wn. 2d 1012 (1974).

a. Failure to renew hearsay objection to excited utterance testimony.

Nam does not assign error to the court's admission of Deputy Oplinger's testimony, recounting Harris's statements to him under the excited utterance exception to the hearsay rule. He does argue that his counsel was ineffective for failing to renew his initial objection to the testimony.

After the court expressed its discomfort with the detail included in the statement Harris made to the deputy, defense counsel explained that he understood the court to have ruled on the

objection, and thus made no further objection. Nam does not explain how this falls below an objective standard of reasonableness. His initial objection was sufficient to preserve the issue for appeal, but he has not assigned error to it. Nor has he shown prejudice, since Harris testified to the same information. Given that the deputy was merely repeating what she told him, it is unlikely that any “special aura of reliability” attached to the testimony.

Nam argues that defense counsel acknowledged, and the court agreed, that the testimony was admitted in error. That isn't borne out by the record. The court was uncomfortable with the detail of the statement, but nevertheless found that Harris's statement was spontaneous and “under the event.” [06/06/07 RP 53] The court also found that if it were error it was cured by the fact that Harris would (and did) testify. [06/06/07 RP 55] The confrontation clause concerns regarding admission of testimonial statements apply when the declarant does not testify at trial. State v. Ohlson, 162 Wn.2d 1, 10-11, 168 P.3d 1273 (2007). Because Harris testified and was subject to cross examination about her statements, there was no confrontation clause violation.

b. Hearsay evidence of uncharged crime.

Again, Nam does not assign error to the admission of Deputy Oplinger's testimony that Harris had told him Nam grabbed her purse as he exited her vehicle, only that defense counsel was ineffective for failing to object. He further argues that there could have been no legitimate trial strategy to avoid drawing the jury's attention to the evidence. The State disagrees.

A review of the record shows that during the entire trial the only mention of Nam taking Harris's purse were those nine words: ". . . . Mr. Nam had exited the vehicle with her purse . . ." . [06/06/07 RP 48] It is highly unlikely that the jury even noticed that the taking of the purse might have been another crime. It was included in the general description of the melee that occurred in Harris's car. Had defense counsel objected, the jury most certainly would have paid attention to it. Nam argues his counsel should have moved for a mistrial, but he fails to demonstrate any reasonable probability that a mistrial would have been granted.

A mistrial should be granted only when the defendant is so prejudiced by an error that nothing short of a new trial can insure he or she will be tried fairly. State v. Stone, 133 Wn. App. 120, 126, 134 P.3d 1217 (2006). Here, even had there been error, the court could have instructed the jury to disregard it rather than declaring a

mistrial. Defense counsel may well have concluded that letting it pass unremarked was the more prudent way of handling it.

4. There was no accumulation of errors warranting reversal.

Under the cumulative error doctrine, a defendant may be entitled to a new trial when errors, taken together, resulted in a trial that was fundamentally unfair. In re Personal Restraint of Lord, 123 Wn.2d 296, 332, 868 P.2d 835 (1994). The defendant bears the burden of proving an accumulation of error of such magnitude that retrial is necessary. Id., at 332. Where no prejudicial error is shown to have occurred, cumulative error cannot be said to have deprived the defendant of a fair trial. State v. Stevens, 58 Wn. App. 478, 498, 794 P.2d 38 (1990). The doctrine does not apply where the errors are few and have little or no effect on the outcome of the trial. State v. Greiff, 141 Wn.2d 910, 929, 10 P.3d 390 (2000).

Here, at most, the only error was in the deputy's statement that Harris had told him that Nam took her purse when he left the car. Any prejudice from that would have to be very small, particularly since it was never mentioned again. The jurors most likely would think that if the purse were a big deal, there would have been further evidence and argument concerning it. It certainly does not amount to reversible error. A defendant is entitled to a fair

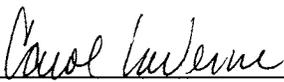
trial, not a perfect one. Delaware v. Van Arsdall, 475 U.S. 673, 681, 106 S. Ct. 1431, 89 L. Ed. 2d 674 (1986).

D. CONCLUSION.

There was no violation of Nam's right to a public trial. The court did not impermissibly limit his ability to cross-examine the victim regarding potential bias. His counsel was not ineffective by failing to renew an objection to the excited utterance testimony nor by failing to object to mention by the investigating officer that Nam had taken the victim's purse when he left the car. There was no cumulative error which requires a new trial

The State respectfully asks this court to affirm Nam's conviction for first degree attempted kidnapping, domestic violence.

Respectfully submitted this 13<sup>th</sup> of February, 2008.

  
\_\_\_\_\_  
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CERTIFICATE OF SERVICE

I certify that I served a copy of the Respondent's Brief, No. 36468-9-II, on all parties or their counsel of record on the date below as follows:

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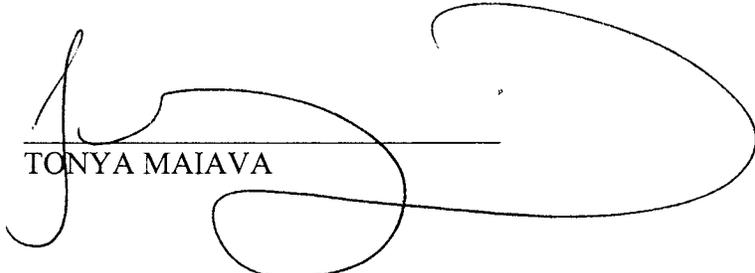
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STATE OF WASHINGTON  
BY DEPUTY

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

Dated this 13<sup>th</sup> day of February, 2008, at Olympia, Washington.

  
\_\_\_\_\_  
TONYA MAIAVA