

NO. 40646-2-II

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

STATE OF WASHINGTON, Respondent

v.

MICHAEL ALLEN HERSH, Appellant

FROM THE SUPERIOR COURT FOR CLARK COUNTY
CLARK COUNTY SUPERIOR COURT CAUSE NO.08-1-02077-1

SUPPLEMENTAL BRIEF OF RESPONDENT

Attorneys for Respondent:

ANTHONY F. GOLIK
Prosecuting Attorney
Clark County, Washington

ANNE M. CRUSER, WSBA #27944
Deputy Prosecuting Attorney

Clark County Prosecuting Attorney
1013 Franklin Street
PO Box 5000
Vancouver WA 98666-5000
Telephone (360) 397-2261

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A. RESPONSE TO ASSIGNMENT OF ERROR

I. No Court Closure Occurred

B. STATEMENT OF THE CASE

At Mr. Hersh's trial, the trial court determined that several prospective jurors needed to be questioned outside the presence of the rest of the venire. See Supplemental RP at pages 87-113, 185-202. The questioning was done in open court, on the record. Id. The only parties excluded from the courtroom during this time were the other prospective jurors. Id. Mr. Hersh asserts in his statement of the case that witnesses were excluded from the proceedings. Although he does not cite to the record for this assertion, the State has no reason to doubt this assertion. The exclusion of witnesses is standard procedure so as to prevent witnesses from being unduly influenced by the testimony of other witnesses or from tailoring their testimony to comport with the testimony of other witnesses. The exclusion of witnesses is permitted by court rule. ER 615.

C. ARGUMENT

Until not very long ago, trial judges routinely questioned prospective jurors outside the courtroom when doing so served an

important purpose. Sometimes the purpose would be to save the potential juror from having to discuss humiliating information in front of strangers, and sometimes the purpose would be to avoid having a potential juror taint the entire venire where, for example, he or she possessed information about the case. Trial judges have since learned that such a practice is impermissible unless a *Bone-Club* analysis is performed prior to doing so. See *State v. Bone-Club*, 128 Wn.2d 254, 906 P.2d 325 (1995). Because doing a *Bone-Club* analysis each time this issue arises in voir dire would be unworkably time consuming, some judges have since begun the practice of removing other potential jurors from the courtroom to conduct individual voir dire rather than simply leaving the courtroom with the affected juror and the lawyers as they did in the past. Although this new practice is no doubt very annoying to the prospective jurors who have to leave the courtroom, it is necessary so that both the defendant's and the public's right to a public trial can be preserved.

Here, Mr. Hersh asserts that his "convictions must be reversed because the trial court erroneously closed jury voir dire without conducting the requisite inquiry under *Bone-Club* in violation of the constitutional guarantee of a public trial." See Supplemental Brief of Appellant at page 2. First, it is unclear whether Mr. Hersh is arguing that a court closure occurred because the trial witnesses and potential jurors that

were temporarily removed from the courtroom are members of the "public," such that their temporary removal constituted a court closure, or whether Mr. Hersh misunderstands the record and believes that some jurors were questioned outside of open court in chambers. Indeed, Mr. Hersh states under subsection "c" of his assignment or error: "The trial court did not apply the five-part Bone-Club test before questioning jurors in chambers." See Supplemental Brief of Appellant at p. 6. The trial court did not question any jurors in chambers. Mr. Hersh cites to pages 87-113 and 185-202 of the supplemental verbatim report of proceedings as the source for this assignment of error. On those pages, it is clear that the trial court remained on the bench, in open court, when he and the lawyers conducted individual voir dire of several prospective jurors while the remaining prospective jurors were escorted by the bailiff to an ante-room. Assuming Mr. Hersh's assignment of error is based on this incorrect assertion, no further response by the State is necessary. This claim is easily dispatched by reading the aforementioned pages of the transcript.

Assuming, however, that Mr. Hersh is asserting that the trial court closed the courtroom by temporarily removing trial witnesses prior to their testimony and temporarily removing prospective jurors so that some jurors (such as Mr. Holtman, who had read a newspaper article about the case prior to coming to court that morning) can be questioned without risking

that the entire panel will be tainted, he fails in the first step in the analysis: Demonstrating that trial witnesses and prospective jurors are members of the "public" as contemplated by article 1, sec. 10 and sec. 22. The exclusion of witnesses is authorized by ER 615. Mr. Hersh does not assert that ER 615 is unconstitutional. Further, the Supreme Court recently recognized in dicta that the exclusion of witnesses is within the discretion of the trial court and will be analyzed under an abuse of discretion standard rather than the de novo standard applied to the question of court closure:

The discretion exercised in such an instance is similar to an evidentiary ruling. In fact, the trial court has a similar power of exclusion under ER 615: "At the request of a party the court may order witnesses excluded so that they cannot hear the testimony of other witnesses, and it may make the order of its own motion." Evidentiary rulings are reviewed for abuse of discretion and reversed only if the "exercise of its discretion is manifestly unreasonable or based upon untenable grounds or reasons." *In re Det. of Post*, 170 Wn.2d 302, 309, 241 P.3d 1234 (2010) (quoting *State v. Powell*, 126 Wn.2d 244, 258, 893 P.2d 615 (1995)). Because the exclusion of one spectator is similar to the exclusion of a witness, we adopt this well-settled and widely understood standard of review.

State v. Lormor, 172 Wn.2d 85, 94, 257 P.2d 624 (2011).

Additionally, prospective jurors are unquestionably not members of the public. Division III of the Court of Appeals considered and rejected a similar claim in *State v. Vega*, 144 Wn.App. 914, 917, 184 P.3d 677

(2008), *review denied* 165 Wn.2d 1024 (2009). The Court held that prospective jurors take an oath and are officers of the court until discharged. Thus, they are not members of the general public. *Id.*

In sum, no court closure occurred in this case. The trial court did not conduct any portion of voir dire in chambers. Further, trial witnesses and prospective jurors are not members of the public and their temporary exclusion from the courtroom does not constitute a closure.

D. CONCLUSION

Mr. Hersh's trial was not closed to the public at any time. This assignment of error should be rejected and his conviction affirmed.

DATED this 6 day of October, 2011.

Respectfully submitted:

ANTHONY F. GOLIK
Prosecuting Attorney
Clark County, Washington

By: Anne M. Cruser
ANNE M. CRUSER, WSBA #27944
Deputy Prosecuting Attorney

CLARK COUNTY PROSECUTOR

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Sender Name: Jennifer M Casey - Email: jennifer.casey@clark.wa.gov

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