

NO. 45236-7-II

COURT OF APPEALS OF THE STATE OF WASHINGTON,

DIVISION II

STATE OF WASHINGTON,

Respondent,

vs.

SYLVESTER TUGGLES,

Appellant.

BRIEF OF APPELLANT

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ASSIGNMENT OF ERROR

Assignment of Error

The trial court violated the defendant's right to a public trial under Washington Constitution, Article 1, § 22, and United States Constitution, Sixth Amendment, when it held eight separate sidebars during trial outside the hearing of the defendant, the jury and the public.

Issues Pertaining to Assignment of Error

Does a trial court violate a defendant's right to a public trial under Washington Constitution, Article 1, § 22, and United States Constitution, Sixth Amendment if it holds eight unrecorded "sidebars" during trial outside the hearing of the defendant, the jury and the public?

STATEMENT OF THE CASE

Factual History

Sometime in December of 2012, the defendant Sylvester Tuggles moved in with his sister Rochelle Wambach in her home at 4408 Edgewater in Lacey. RP 37-39. The defendant's sister provided him with his own room as well as a bicycle to use for transportation. RP 39-41. By the end of the next March the defendant moved out of his sister's house. *Id.* After he did, she noticed a number of items missing from her house, including the bicycle she had let the defendant use, a number of DVDs, a DVD player, and X-Box games belonging to her son. *Id.* She then reported the missing items to the police. RP 42-43. Ms Wambach later found the items at a local pawn shop and called the police, who went to the pawn shop with her and retrieved the items. RP 44-47. The police later returned them to Ms Wambach and eventually arrested the defendant. *Id.* In fact the defendant had pawned each of these items although he claimed that he had permission to do this and that a number of items were actually from a stack of discarded property in his sister's garage. RP 143-145.

Procedural History

On August 15, 2013, the Thurston County Prosecutor charged the defendant Sylvester Tuggles with one count of First Degree Trafficking in Stolen Property and one count of Second Degree Theft for taking and

pawning the items from his sister. CP 3. While held in jail the defendant made a number of recorded telephone calls to his sister Rochelle, another sister in Minnesota, and his brother in law. RP 51-52, 93-95, 97-102. During each of these conversations the defendant essentially stated that (1) the prosecutor had failed to give Rochelle a subpoena to appear at the continued trial date, (2) that since she had not been served with a subpoena she did not have to appear, and (3) that without her testimony the charges against him would have to be dismissed. *Id.* After listening to these recorded calls, the prosecutor added a charge of witness tampering to the defendant's charges. CP 24-25.

This case later came on for a trial before the jury with the state calling six witnesses, including the defendant's sister, a pawn shop employee, a jail officer with copies of the recordings of the defendant's jail calls, and a number of police officers. RP 37, 67, 86, 103, 114, 121. During this testimony the court held eight separate sidebars outside the hearing of the defendant, the jury and the public. RP 47, 64, 82, 92, 107, 117, 169-170, and 221. Although the sidebars were unrecorded, statements before and after do somewhat help when attempting to determine the substance of the arguments. *Id.*

The first sidebar occurred during the state's direct examination of Rochelle Wambach and included the following statements:

Q. Based on what is written in the letter, does it appear to be from your brother?

A. Yes.

MS. HOROWITZ: State moves to admit Exhibit No. 5.

MR. JIMERSON: Objection. The letter has not been authenticated.

THE COURT: I'm going to overrule that objection, unless you want to have a sidebar to talk about that in more detail.

MR. JIMERSON: I do.

THE COURT: Do you?

MR. JIMERSON: Yes, I do.

THE COURT: All right. Ladies and gentlemen, a sidebar again means that we're going to whisper over here. Don't try to overhear us. Front row may want to turn around and talk to the people behind you. Just don't try to eavesdrop.

(A sidebar conference was held outside the hearing of the jury.)

THE COURT: I'm overruling the objection. I will allow the admission of Exhibit No. 5.

RP 47-48.

The second sidebar occurred at the end of Ms Wambaugh's testimony at the prosecutor's request and went as follows:

MS. HOROWITZ: Your Honor, may I request a brief sidebar before I call the next witness?

THE COURT: Yes.

Another sidebar, ladies and gentlemen. I think you're learning

the drill.

THE WITNESS: Your Honor, I also wanted to know if I can request if the no-contact order can be dropped.

THE COURT: Now is not the appropriate time to talk about that. Thank you.

(A sidebar conference was held outside the hearing of the jury.)

. . . .

(The following proceedings were held in open court outside the presence of the jury.)

THE COURT: We're taking this recess at Mr. Jimerson's request. And so I said it was short but I'm also going to put on the record a sidebar that we had because I might otherwise forget it. And so there was an objection to the authentication of the letter, Exhibit No. 5, and there was a sidebar in which Mr. Jimerson said that the witness had not recognized handwriting of the defendant. I reminded him that she had testified that based upon what's in the letter she knows it was from the defendant, and so I overruled his objection. Is there anything else we need to put on the record about that?

RP 63-65.

The third unrecorded bench conference occurred after the testimony of Pawn Shop Manager again at the request of the prosecutor. However just after the sidebar the court stated on the record that the parties had merely discussed the logistics of playing the jail telephone calls to the jury. RP 82.

During the fourth unrecorded bench conference the parties and the court apparently discussed an objection made by the defense. RP 92. The statements surrounding this unrecorded, unheard conference were as follows:

Your Honor, I'm going to renew my previous objection and I'd like to sidebar, please.

THE COURT: All right. We'll have a sidebar, ladies and gentlemen. Play along with us. Thank you.

(A sidebar conference was held outside the hearing of the jury.)

THE COURT: All right, ladies and gentlemen, we're ready to continue. I have overruled the objection.

You may continue, Ms. Horowitz.

RP 92.

The fifth unrecorded sidebar occurred after the state's fourth witness ended her testimony. RP 107. As with the third, the court later put on the record what had been said during the sidebar. RP 107-109. However, the sixth unrecorded sidebar was not followed by any explanation about what was discussed or argued. RP 117. It occurred during the testimony of the state's fifth witness and went as follows:

Q. Did she tell you a value of \$800 for the bike?

A. Yes.

MR. JIMERSON: Objection.

MS. HOROWITZ: Your Honor, it's being offered for impeachment.

THE COURT: I will allow the witness to testify as to what he told – was told the value was. It will be for the jury to evaluate.

MR. JIMERSON: Your Honor, may we have a sidebar?

THE COURT: Yes, we can have a sidebar. Excuse us, ladies and gentlemen while we talk.

(A sidebar conference was held outside the hearing of the jury.)

THE COURT: All right. Ladies and gentlemen, that was fast, so let me just tell you that I am going to allow this testimony for a specific purpose, and that is called impeachment. It is for you to consider the credibility of Ms. Wambach; however, the amount that you're going to hear from this officer is not proof of the value of the property. It's only for your evaluation of the credibility of Ms. Wambach.

You may answer.

RP 117-118.

The seventh unrecorded sidebar occurred during the state's cross-examination of the defendant and apparently concerned an objection by the defense:

Q. Would it help refresh your memory about the conversation to hear that call again?

A. That would be lovely.

MR. JIMERSON: Your Honor, I'm going to object.

THE COURT: And the basis for your objection or do you want to have a sidebar?

MR. JIMERSON: Sidebar, please.

THE COURT: Excuse us, ladies and gentlemen.

(A sidebar conference was held outside the hearing of the jury.)

THE COURT: All right, ladies and gentlemen, I've overruled the objection. I will allow the state to play the CD that they were

questioning Mr. Tuggles about just a moment ago.

RP 169-170.

The final unrecorded sidebar occurred just before the state presented closing argument and went as follows:

THE COURT: Thank you, Ms. Horowitz. Now, ladies and gentlemen, please give your attention to Mr. Jimerson as he presents closing argument on behalf of Mr. Tuggles.

MR. JIMERSON: Your Honor, may I have a quick sidebar?

THE COURT: Yes.

MR. JIMERSON: Thank you.

THE COURT: A sidebar, ladies and gentlemen, hopefully you're not surprised. We'll get back to you in a moment.

(A sidebar conference was held outside the hearing of the jury.)

THE COURT: We're going to have a short recess, so would you please remember not to discuss this case, don't share your notes with anyone else. I anticipate this break will be probably only five to ten minutes. We'll be in recess.

RP 221.

After the end of the state's case the court granted a defense motion to dismiss the Second Degree Theft charges on the basis that the state had failed to present substantial evidence of value. RP 126-130. However, the court did allow the state to amend that charge to third degree theft. *Id.* The court then instructed the jury without objection, after which the parties presented their closing arguments. RP 187-205, 205-237.

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The jury eventually returned guilty verdicts on the charges of First Degree Trafficking in Stolen Property, Third Degree Theft, and Second Degree Witness Tampering. CP91-93. The court later sentenced the defendant within the standard range after which the defendant filed timely notice of appeal. CP 161-171, 149-160.

ARGUMENT

THE TRIAL COURT VIOLATED THE DEFENDANT'S RIGHT TO A PUBLIC TRIAL UNDER WASHINGTON CONSTITUTION, ARTICLE 1, § 22, AND UNITED STATES CONSTITUTION, SIXTH AMENDMENT, WHEN IT HELD EIGHT UNRECORDED SIDEBARS DURING TRIAL OUTSIDE THE HEARING OF THE DEFENDANT, THE JURY AND THE PUBLIC.

Under Washington Constitution, Article 1, § 22, and United States Constitution, Sixth Amendment, every person charged with a crime is guaranteed the right to a public trial. *State v. Easterling*, 157 Wn.2d 167, 137 P.3d 825 (2006). In addition, Washington Constitution, Article 1, § 10, also guarantees the public the right to open accessible proceedings. *Id.* This latter constitutional provision states: “Justice in all cases shall be administered openly.” *State v. Easterling*, 157 Wn.2d at 174. The right to a public trial under these constitutional provisions ensures the defendant a fair trial, reminds officers of the court of the importance of their functions, encourages witnesses to come forward, and discourages perjury.” *State v. Brightman*, 155 Wn.2d 506, 514, 122 P.3d 150 (2005).

Although a defendant's right to a public trial is not absolute, the “protection of this basic constitutional right clearly calls for a trial court to resist a closure motion except under the most unusual circumstances.” *State v. Bone-Club*, 128 Wn.2d 254, 259, 906 P.2d 325 (1995). Thus, under the decision in *Bone-Club*, a court must weigh the following five factors to

determine whether it may properly close a portion of a trial:

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.

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

When ordering a hearing closed, the court must also enter specific findings of fact justifying the decision to close the courtroom. *State v. Easterling*, 157 Wn.2d at 175. These rules also apply when the plain language or the effect of the trial court's ruling imposes a closure, and the burden is on the State to overcome the strong presumption that the courtroom was closed. *State v. Brightman*, 155 Wn.2d at 516; *see e.g., State v. Duckett*, 141 Wn.App. 797, 807 n. 2, 173 P.3d 948 (2007) (On appeal, the burden is on the state to show that the closing did not occur where the "trial judge stated he/she intended to interview the selected jurors in a jury room.").

For example, in *State v. Heath*, 150 Wn.App.151, 206 P.3d 712

(2009), the state charged the defendant with two counts of unlawful possession of a firearm. When the case came on for trial before a jury, the court held portions of pretrial motions and portions of voir dire in chambers without performing any analysis under *Bone-Club*. The judge, the prosecutor, the defense attorney, and the defendant, were the only persons present in chambers during these hearings (except for the various prospective jurors who were examined). At one point, the defense attorney stated that he had no objection to this procedure. Following conviction, the defendant appealed, arguing that the trial court had violated her right to a public trial under Washington Constitution, Article 1, § 22, and United States Constitution, Sixth Amendment, when it held portions of the pretrial motions and portions of voir dire in chambers to the exclusion of those sitting in the courtroom.

The state responded to these claims by arguing that no *Bone-Club* analysis was necessary because (1) the trial court did not explicitly close the hearings, and (2) neither party had moved to close the hearings. The State also argued that even if there was a closure, the defendant either invited the error or waived her right to public hearings. In addressing these arguments, this division of the Court of Appeals first addressed the standard of review that applied, and the claim of waiver. This court held:

Whether a trial court procedure violates the right to a public trial

is a question of law we review de novo. *State v. Brightman*, 155 Wn.2d 506, 514, 122 P.3d 150 (2005). The remedy for such violation is reversal and remand for new trial. *In re Pers. Restraint of Orange*, 152 Wn.2d 795, 814, 100 P.3d 291 (2004). A defendant who fails to object at the time of the closure does not waive the right.

State v. Heath, 206 P.3d at 714.

The court then went on to address the applicability of *Bone-Club* by first noting that in *State v. Erickson*, 146 Wn.App. 200, 11, 189 P.3d 245 (2008), the court specifically held that conducting *voir dire* out of the courtroom constitutes a “closure” that mandates a *Bone-Club* analysis even when the trial court has not explicitly closed the proceedings. The court also noted ^{that} the Division III was in accord but that Division I was contrary. See *State v. Frawley*, 140 Wn.App. 713, 720, 167 P.3d 593 (2007) (Division III holding the same); *but see State v. Momah*, 141 Wn.App. 705, 714, 171 P.3d 1064 (2007), *affirmed*, (filed October 8, 2009) (Court properly balance need for fair trial with need for public trial in closing part of *voir dire*). In accordance with its prior ruling in *Erickson*, the court held that *Bone-Club* applied. As a result, it reversed the defendant’s convictions and remanded for a new trial. The court also held the following on the state’s claim that (1) the trial court’s *sua sponte* decision to close a portion of the trial did not invoke *Bone-Club*, and (2) that the defense attorney’s statement that he did not object to the procedure constituted a waiver by the defendant. The court stated:

The State argues that the trial court was not required to engage

in a *Bone-Club* analysis because neither party moved to close the hearings, thereby triggering the need for such an analysis. This argument fails because a trial court's sua sponte decision to close public hearings triggers the need for a *Bone-Club* analysis.

The State also argues that Heath waived her right to public hearings on the disputed issues. But a defendant, by failing to object, does not waive her constitutional rights to a public trial. Heath did not waive the right by failing to object.

We conclude that the trial court violated Heath's right to a public trial by hearing pretrial motions and interviewing juror eight in chambers without first engaging in a *Bone-Club* analysis. Because we presume prejudice, we reverse and remand for a new trial.

State v. Heath, 206 P.3d at 716 (citations and footnote omitted).

The Washington Supreme Court has reaffirmed the application of these principles in *State v. Strode*, 167 Wn.2d 222, 217 P.3d 310 (2009). In this case, the state charged the defendant with first degree rape of a child, first degree attempted rape of a child, and first degree child molestation. During *voir dire*, the court gave the prospective jurors a confidential juror questionnaire, which included a question as to whether or not they or someone close to them, had ever been the victim of sexual abuse. At least 11 prospective jurors answered in the affirmative and were taken one at a time into chambers to determine whether or not their past experiences would preclude them from impartiality. The judge, the prosecutor, the defense attorney, and the defendant were the only people allowed into chambers along with the prospective juror. The trial judge held no *Bone-Club* hearing prior

to holding this portion of *voir dire* in chambers. Following convictions on all counts, the defendant appealed, arguing that the trial court had denied him the right to a public trial.

On appeal, the state argued that (1) the trial was not closed because it did not begin until after *voir dire*, (2) the court on appeal could itself perform the *Bone-Club* analysis in the place of the trial court, (3) the defendant invited or waived his right to challenge the closure when he failed to object and when he participated in the procedure the court used, and (4) that the error was harmless beyond a reasonable doubt. The court rejected the state's first argument, noting that *voir dire* is part of a jury trial and is subject to the public trial requirements of the state and federal constitutions. The court also rejected the state's second argument, noting that when the trial court did not address any of the *Bone-Club* factors, an appellate court has no basis upon which to perform the analysis itself.

The court then rejected the state's third argument, noting as follows concerning the waiver argument:

[T]he public trial right is considered an issue of such constitutional magnitude that it may be raised for the first time on appeal. We have held that a "defendant's failure to lodge a contemporaneous objection at trial [does] not effect a waiver." Strode's failure to object to the closure or his counsel's participation in closed questioning of prospective jurors did not, as the dissent suggests, constitute a waiver of his right to a public trial. The right to a public trial is set forth in the same provision as the right to a trial by jury, and it is difficult to discern any reason for affording it less protection than we afford the

right to a jury trial. It seems reasonable, therefore, that the right to a public trial can be waived only in a knowing, voluntary, and intelligent manner.

Additionally, Strode cannot waive the public's right to open proceedings. As we observed in *Bone-Club*, the public also has a right to object to the closure of a courtroom, and the trial court has the independent obligation to perform a *Bone-Club* analysis. The record reveals that the public was not afforded the opportunity to object to the closure, nor was the public's right to an open courtroom given proper consideration.

State v. Strode, at 229-230/

Finally, the court rejected the state's fourth argument, finding that the error in closing a trial without a proper *Bone-Club* analysis was a structural error that was conclusively presumed to be prejudicial. Thus, the court reversed the defendant's convictions and remanded for a new trial.

The right to a public trial under Washington Constitution, Article 1, § 22, also includes each defendant's right to "to appear and defend in person" as well as the public's right to open court proceedings. This constitutional guarantee is embodied in the rule that a defendant has the right to be present at "every critical stage of a criminal proceeding." *In re the Personal Restraint of Lord*, 123 Wn.2d 296, 868 P.2d 835 (1994). In *State v. Chappel*, 145 Wn.2d 210, 36 P.3d 1025 (2001), the Washington Supreme Court stated this rule as follows:

A criminal defendant has a constitutional right to be present in the courtroom at all critical stages of the trial arising from the confrontation clause of the Sixth Amendment to the United States

Constitution, applied to the states through the Fourteenth Amendment. The Washington State Constitution also provides a criminal defendant with “the right to appear and defend in person.” Wash. Const. Art. I, § 22. Additionally, Washington’s criminal rules state that “[t]he defendant shall be present ... at every stage of the trial ... except ... for good cause shown.” CrR 3.4(a).

State v. Chapple, 145 Wn.2d at 318.

At a minimum, “critical stages” in a criminal trial include any hearing at which “evidence is being presented or whenever the defendant’s presence has a relation, reasonably substantial, to the opportunity to defend against the charge.” *State v. Bremer*, 98 Wn.App 832, 991 P.2d 118 (2000). Normally, conferences about the admissibility of jury instructions are not deemed a “critical stage” in the proceedings that require the defendant’s presence because they only involve the resolution of legal issues. Such discussions many times occur off the record and in chambers outside of the defendant’s presence. For example, in *State v. Bremer, supra*, a defendant convicted of attempted residential burglary appealed, arguing that the court’s decision to hold a discussion about jury instructions in chambers outside his presence denied him the right to be present in all critical stages of the proceedings. However, noting that the discussion in chambers dealt solely with the legal issues surrounding the use of certain jury instructions, the court found no constitutional violation. The court states as follows on this issue:

The crux of a defendant’s constitutional right to be present at all critical stages of the proceedings is the right to be present when

evidence is being presented or whenever the defendant's presence has "a relation, reasonably substantial," to the opportunity to defend against the charge. A defendant does not have a right to be present during in-chambers or bench conferences between the court and counsel on legal matters, at least when those matters do not require the resolution of disputed facts.

Mr. Bremer contends that he was not allowed to be present when the court, the State and his attorney discussed proposed jury instructions. This was not a hearing at which evidence was being presented. Jury instructions involve resolution of legal issues, not factual issues. In the absence of some extraordinary circumstance in which Mr. Bremer's presence would have made a difference, a discussion involving proposed jury instructions is not a critical stage of the proceedings. Because Mr. Bremer was fully represented by counsel at the hearing, he would not have had an opportunity to speak. As such, Mr. Bremer's presence had no relation to the opportunity to defend against the charge of attempted residential burglary. Pursuant to the holding in *Lord*, Mr. Bremer's absence from the jury instruction hearing was not a violation of his constitutional rights.

State v. Bremer, 98 Wn.App. at 834-35.

In the case at bar appellant claims that the trial court violated both the public right to an open court as well as the defendant's right to be present during every critical stage in the trial when it held eight separate bench conferences in the court room without allowing the defendant or the public to hear what was discussed. Although the substance of a number of the conferences is unknown, at least a few involved the defense objections to the admission of evidence and offers of proof concerning either the admission or exclusion of evidence. Under *Bremer* the discussion concerning the admission or exclusion of evidence constitutes a critical stage in the

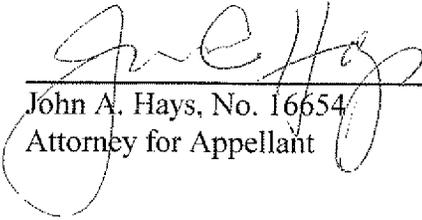
proceedings during which the defendant and the public have a right to be present. Thus, in the case at bar, the court's decision to call for these unrecorded, secret arguments outside the hearing of the defendant and the public constituted a closure of the courtroom in violation of the defendant and the public's constitutional right to be present. Consequently this court should reverse the defendant's convictions and remand for a new trial.

CONCLUSION

The trial court's improper closure of a portion of the proceedings during trial in this case violated the defendant's constitutional right to be present and the public's constitutional right to an open court. As a result this court should reverse the defendant's convictions and remand for a new trial

DATED this 7th day of February, 2014.

Respectfully submitted,



John A. Hays, No. 16654
Attorney for Appellant

APPENDIX

WASHINGTON CONSTITUTION ARTICLE 1, § 10

Justice in all cases shall be administered openly, and without unnecessary delay.

WASHINGTON CONSTITUTION ARTICLE 1, § 22

In criminal prosecutions the accused shall have the right to appear and defend in person, or by counsel, to demand the nature and cause of the accusation against him, to have a copy thereof, to testify in his own behalf, to meet the the witnesses against him face to face, to have compulsory process to compel the attendance of witnesses in his own behalf, to have a speedy public trial by an impartial jury of the county in which the offense is charged to have been committed and the right to appeal in all cases: Provided, The route traversed by any railway coach, train or public conveyance, and the water traversed by any boat shall be criminal districts; and the jurisdiction of all public offenses committed on any such railway car, coach, train, boat or other public conveyance, or at any station of depot upon such route, shall be in any county through which the said car, coach, train, boat or other public conveyance may pass during the trip or voyage, or in which the trip or voyage may begin or terminate. In no instance shall any accused person before final judgment be compelled to advance money or fees to secure the rights herein guaranteed.

UNITED STATES CONSTITUTION, SIXTH AMENDMENT

In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed, which district shall have been previously ascertained by law, and to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor, and to have the assistance of counsel for his defense.

COURT OF APPEALS OF WASHINGTON, DIVISION II

STATE OF WASHINGTON,
Respondent,

vs.

SYLVESTER TUGGLES,
Appellant.

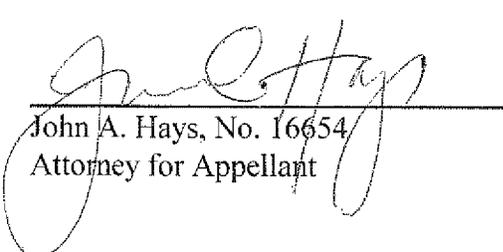
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**AFFIRMATION OF
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The under signed states the following under penalty of perjury under the laws of Washington State. On this, I personally e-filed and/or placed in the United States Mail the Brief of Appellant with this Affirmation of Service Attached with postage paid to the indicated parties:

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Dated this 7th day of February, 2014, at Longview, Washington.



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