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Sep 12, 2012

Court of Appeals

Division III

State of Washington

NO. 28697-5-III

IN THE COURT OF APPEAL OF THE STATE OF WASHINGTON
DIVISION THREE

STATE OF WASHINGTON,

Respondent,

v.

PAUL BARR,

Appellant.

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

The Honorable James C. Lust, Judge

REPLY BRIEF OF APPELLANT

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A. ARGUMENT IN REPLY

1. BARR WAS DENIED HIS RIGHT TO A PUBLIC TRIAL.

The right at issue is the right to a public trial. Wash. Const. art. 1, §§ 10, 22; U.S. Const. amend. I, VI. “Justice must be conducted openly to foster the public’s understanding and trust in our judicial system and to give judges the check of public scrutiny. Secrecy fosters mistrust. This openness is a vital part of our constitution and our history.” Dreiling v. Jain, 151 Wn.2d 900, 903-904, 93 P.3d 861 (2004). It also ensures a fair trial. State v. Brightman, 155 Wn.2d 506, 514, 122 P.3d 150 (2005).

The State does not dispute that voir dire of prospective juror 20 was conducted at the bench in a manner preventing the public from hearing any portion of the process. Indeed, the court intentionally made this a private inquiry. See RP 375 (court assures juror all questions and answers were “all whited out so nobody hears anything”). Instead, the State focuses on one definition of a “closed courtroom,” described as “when the courtroom is completely and purposefully closed to spectators so that no one may enter and no one may leave.” Brief of

Respondent, at 7 (quoting State v. Lormor, 172 Wn.2d 85, 93, 257 P.3d 624 (2011)).

This type of closure, however, is not the only situation that violates the public trial right. For example, a closure also occurs when a juror is privately questioned in an inaccessible location. Lormor, 172 Wn.2d at 93 (citing State v. Momah, 167 Wn.2d 140, 217 P.3d 321 (2009), cert. denied, 131 S. Ct. 160 (2010); State v. Strode, 167 Wn.2d 222, 217 P.3d 310 (2009)); see also State v. Leyerle, 158 Wn. App. 474, 483, 242 P.3d 921 (2010) (moving questioning of juror to public hallway outside courtroom a closure despite the fact courtroom remained open to public).

Thus, whether a closure – and hence a violation of the right to public trial – has occurred does not turn strictly on whether the courtroom has been physically closed. Members of the public are no more able to approach the bench and listen to an intentionally private voir dire 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 impact is the same – the public is denied the opportunity to scrutinize events.

The State defends the private voir dire in this case by noting that juror 20 was upset and the trial judge was attempting to be

sensitive to her emotional state and privacy. Brief of Respondent, at 7. The State also cites to a trial court's statutory authority to manage the proceedings before it. Brief of Respondent, at 7 (citing RCW 2.28.010).

There is a simple answer. If a trial court believes a portion of trial should be conducted outside public scrutiny, it can simply assess the five factors set forth in State v. Bone-Club, 128 Wn.2d 254, 258-259, 906 P.2d 325 (1995), to determine whether privacy is truly warranted and permitted. But the court's total failure to conduct this analysis – regardless of its statutory authority to manage the proceedings – is constitutional error, is presumed prejudicial, and requires reversal. Strode, 167 Wn.2d at 231; State v. Easterling, 157 Wn.2d 167, 181, 137 P.3d 825 (2006); In the Matter of the Personal Restraint of Orange, 152 Wn.2d 795, 814, 100 P.3d 291 (2004). Reversal is required in this case.

2. THE FAILURE TO INCLUDE BARR IN THE PROCESS OF EXCUSING JUROR 20 VIOLATED HIS RIGHT TO BE PRESENT FOR TRIAL.

After the opening brief in this case was filed, the Washington Supreme Court decided State v. Irby, 170 Wn.2d 874, 246 P.3d 796 (2011), which addresses in detail the right to be present for all aspects of jury voir dire.

The Irby court distinguished between the federal and state standards. Under the federal Constitution, “the presence of a defendant is a condition of due process to the extent that a fair and just hearing would be thwarted by his absence.” Irby, 170 Wn.2d at 881 (quoting Snyder v. Massachusetts, 291 U.S. 97, 107-108, 54 S. Ct. 330, 78 L. Ed. 2d 674 (1934)). Under the state Constitution, which arguably provides even greater rights, the defendant must be present to participate “at every stage of the trial when his substantial rights may be affected.” Id. at 885 (quoting State v. Shutzler, 82 Wash. 365, 367, 144 P. 284 (1914)). Under both standards, a defendant has the right to be present and participate in the process of selecting his jury. Id.

Moreover, when a defendant is excluded from a portion of this process, reversal is required unless the State proves the violation was harmless beyond a reasonable doubt. Irby, 170 Wn.2d at 886. The only way in which to accomplish that task is to show that a juror excused in violation of the defendant’s rights had no chance to sit on the jury. If the prospective juror in question fell within the range of jurors who ultimately comprised the jury, reversal is required. Id.

As with the public's exclusion from the private voir dire conducted at the bench, the State does not and cannot claim that Barr was able to hear what was happening or that he participated. Instead, the State attempts to distinguish People v. Williams, 52 A.D.3d 94, 858 N.Y.S.2d 147 (2008), and points out that the record is silent on whether Barr was able to consult with his attorney during the process of excusing juror 20. Brief of Respondent, at 8-9.

Regarding Williams, the State notes that several jurors in that case were questioned at sidebar without the defendant present and, in contrast, the court in Barr's case "did not engage in discussions with prospective jurors which systematically excluded Mr. Barr." Brief of Respondent, at 8. In other words, the State seeks to distinguish Williams because there were a greater number of constitutional violations in that case.

Williams addressed sidebar conferences with three prospective jurors during voir dire.¹ Williams, 52 A.D.3d at 95-96.

¹ While several additional jurors also were examined at sidebar, Williams made no challenge regarding them. Williams, 52 A.D.3d at 97.

This process violated Williams' right to be present *each* time it occurred; there is no indication the New York Supreme Court premised its finding of error and decision to reverse on the number of violations. See Williams, 52 A.D.3d at 96 ("Exclusion of a defendant from such a sidebar discussion without first obtaining a knowing, intelligent and voluntary waiver of the right to be present constitutes per se reversible error where the prospective juror is either seated on the jury, excused on consent, or peremptorily challenged by the defense[.]") (emphasis added). There is no requirement that a defendant be "systematically excluded."

The same is true in Washington. Although the Irby court did not hold that a violation is per se reversible error, reversal is required if *any* prospective juror excused in violation of the defendant's right to be present could otherwise have made it on to the jury panel. There is no need to show multiple violations. See Irby, 170 Wn.2d at 802-803 (had the dismissed jurors "been subjected to questioning in Irby's presence . . . the questioning might have revealed that one or more of these potential jurors" could have served) (emphasis added).

The State's other claim – that the record is silent on whether “consultation between attorney and client was prevented” – does not impact the outcome, either. Even if there is a possibility of such consultation, the record must affirmatively reveal that such consultation actually took place. Irby, 170 Wn.2d at 884; see also Williams, 52 A.D.3d at 97-98 (rejecting “speculative suggestion” that defendant participated because she was able to hear what was said during sidebar).

3. THE ADMISSION OF PRIOR SEXUAL MISCONDUCT EVIDENCE ALSO REQUIRES A NEW TRIAL.

a. The Trial Court's Written Findings and Conclusions Have Not Properly Been Made Part of the Appellate Record.

The trial court's written findings and conclusions concerning its admission of R.H.'s testimony are not properly before this Court. Barr's opening brief was filed on June 25, 2010. In that brief, Barr challenged the admission of R.H.'s testimony on the only grounds discussed by the trial court in its oral ruling – RCW 10.58.090. See Brief of Appellant, at 7-8, 22-41; see also RP (10/31/08) 175-178 (court only discusses statute when making ruling).

In his opening brief, Barr noted that no findings had been filed. See Brief of Appellant, at 8. This was not entirely surprising,

however, because there is no requirement for written findings following a ruling under ER 404(b) or RCW 10.58.090. Compare CrR 3.5(c), CrR 3.6(b), CrR 6.1(d), and JuCR 7.11(d) (mandating written findings and conclusions).

On February 9, 2011 – in response to Barr’s opening brief and after the Supreme Court’s decision in State v. Gresham, 173 Wn.2d 405, 269 P.3d 207 (2012) – the State proposed in the trial court written findings and conclusions admitting N.H.’s testimony under *both* RCW 10.58.090 and the “common scheme or plan” exception to ER 404(b). Although the trial judge signed the proposed findings and conclusions, the State did not seek permission to make them part of the record on appeal. CP 167-170.

On March 20, 2012, Barr filed a supplemental brief addressing Gresham and noted that the State had not sought permission to make the extremely tardy written findings and conclusions part of the record. See Supplemental Brief of Appellant, at 1-2 (noting the absence of any motion under RAP 7.2(e) and discussing tailoring).

Not until the State filed its Brief of Respondent in July 2012 did the Yakima County Prosecutor’s Office attempt to make the

findings and conclusions part of the record. Rather than seek permission to do so, however, the State merely designated the findings as supplemental clerk's papers. See Brief of Respondent, at 5 n.1. This was improper.

Under RAP 7.2, if the trial court takes any action to modify a decision, and

the trial court determination will change a decision then being reviewed by the appellate court, the permission of the appellate court must be obtained prior to the formal entry of the trial court decision. A party should seek the required permission by motion.

...

RAP 7.2(e); State v. J-R Distributors, Inc., 111 Wn.2d 764, 768-771, 765 P.2d 281 (1988). The remedy for a violation of the rule is for this Court to vacate the offending trial court action. See State ex rel. Shafer v. Bloomer, 94 Wn. App. 246, 250, 973 P.2d 1062 (1999).

The State has not asked this Court for permission to formally enter the written findings and conclusions, which certainly change the decision being reviewed by expanding the trial court's ruling beyond RCW 10.58.090 to include the common scheme or plan exception to ER 404(b). Thus, the improper findings and conclusions should be vacated and/or not considered.

Moreover, the findings should not be considered because they are tailored. Generally, the failure to enter mandatory written findings and conclusions is a clerical error that may be corrected after an appeal is filed. State v. Pruitt, 145 Wn. App. 784, 794, 187 P.3d 326 (2008); State v. Vailencour, 81 Wn. App. 372, 378, 914 P.2d 767 (1996). Of course, the findings entered in this case were not mandatory. The State apparently obtained them in an attempt to avoid having to rely on RCW 10.58.090 in this Court.

The late entry of written findings and conclusions can warrant a sanction as severe as reversal where a defendant demonstrates prejudice. And one way of demonstrating prejudice is showing that “the belated findings were tailored to meet the issues raised in the appellant’s opening brief.” Pruitt, 145 Wn. App. at 794.

As noted above, in its oral ruling, the trial judge did not mention the common scheme or plan exception. Rather, the court focused solely on RCW 10.58.090. The State suggests otherwise by noting the court’s statement “I have in mind all the factors that both of you raised,” implying the court was referring to factors relevant to common scheme or plan. See Brief of Respondent, at 5 (citing RP (10/31/08) 175). This is incorrect.

Examined in context, it is apparent the court was referring to the eight factors listed in RCW 10.58.090(6)(a)-(h). The statute mandates consideration of these factors. See RCW 10.58.090(6) (“the trial judge shall consider the following factors”). And both the prosecutor and defense counsel focused on them. See RP (10/30/08) 157-173. The only reference to common scheme or plan by the prosecutor was very brief and in the context of statutory factor (e) – the necessity of the evidence. Among other arguments, the prosecutor suggested the evidence was “probative” of a common scheme or plan.² RP (10/30/08) 165-166. Not surprisingly, the court only mentioned the statute in finding the evidence concerning N.H. admissible. It did not engage in an analysis under ER 404(b) generally or common scheme or plan specifically. See RP (10/31/08) 175-178.

² Defense counsel asserted that the prosecutor had conceded the evidence concerning N.H. was inadmissible under ER 404(b). See CP 143. The prosecutor’s position was that RCW 10.58.090 was itself an exception to ER 404(b). RP (10/30/08) 172. In other words, the State believed it did not have to demonstrate the evidence fell within some other exception to ER 404(b). Thus, it is not surprising the State never addressed common scheme or plan in any detail.

Because the State tailored the written findings and conclusions in response to Barr's opening brief, they should not be considered on appeal.³

b. Even If This Court Were To Consider the Written Findings and Conclusions, They Do Not Save Barr's Convictions.

Even if this Court were to find N.H.'s testimony admissible to demonstrate a common scheme or plan under ER 404(b), it would not save Barr's convictions. As discussed in Barr's "Supplemental Brief of Appellant," jurors were never instructed that they must only consider the evidence for common scheme or plan and never told they could not consider it for propensity. Rather, they were merely instructed they could consider the evidence for "similarity of the charged acts," leaving it up to jurors how they chose to use that

³ The State also asserts that the findings signed in February 2011 were first "submitted to the court during the pendency of the case." See Brief of Respondent, at 5 n.1 (citing RP 392-401). Although this suggests the 2011 findings are identical to those originally proposed in 2008, the State has not established that the original proposed findings admitted the evidence under common scheme or plan. The findings were not entered as initially proposed (nor were they made part of the record), and there is no mention of common scheme or plan in the discussion about them. See RP 392-401. Moreover, that admissibility under "common scheme or plan" is a handwritten addition on the 2011 findings certainly suggests that conclusion is new. See CP 170.

similarity (as contemplated under RCW 10.58.090). See Brief of Appellant, at 2-5.

The State does not even acknowledge this critical circumstance. Nor does it contend that the failure to give an adequate limiting instruction was harmless error. It was not. In State v. Gresham, the Supreme Court declined to find harmless error where much of the evidence at trial focused on the prior sexual misconduct, there were no eyewitnesses (beyond the accuser), and there was no physical evidence.⁴ 173 Wn.2d at 433.

The evidence concerning N.H. played a similar role, and would have had a similar impact, at Barr's trial. The trial court found the evidence concerning N.H. admissible precisely because there was no other evidence supporting R.H.'s claims. RP (10/31/08) 175 ("There is no forensic evidence available in this case. Basically, it's the testimony of the alleged victim and that's

⁴ The Gresham Court was examining whether evidence erroneously admitted under RCW 10.58.090 could be deemed harmless, whereas the issue here is whether the failure to give a proper limiting instruction was harmless. This is a distinction without a difference, however, because the harmless error standard is the same. See Gresham, 173 Wn.2d at 425, 433 (for both situations, standard is whether, within reasonable probabilities, error affected outcome of trial).

all. For that reason the Court's entitled to look at the testimony of other offenses.").

As discussed at length in Barr's supplemental brief, N.H.'s testimony was key to the State's ability to obtain convictions against Barr because:

- Barr denied any inappropriate contact with R.H. RP 979-980, 1023;
- R.H.'s father, mother, and brother never saw anything concerning despite clear opportunities to do so. RP 709-710, 719, 727-728, 756, 1133-1134;
- No one at the Dojo could corroborate R.H.'s claims of abuse on the premises. RP 1024;
- There was a dispute whether some of the alleged acts were possible. RP 585, 825, 1141, 1145-1146, 1155-1156;
- R.H. was sometimes inconsistent in her allegations. RP 600-601, 635-636, 655-656, 1017-1018, 1057-1059;
- R.H. claimed Barr was circumcised and may have only one testicle, both of which proved untrue. RP 601-602, 658-659, 900, 1025-1026; and
- Based on R.H.'s claims, certain items were tested for the presence of semen and none was found. RP 585, 621-623, 985-993, 1003-1005.

N.H. was the first witness called, she provided lengthy and detailed testimony on her inappropriate relationship with Barr, and the prosecutor focused on her during the State's closing argument. RP 477-508, 1181-1189, 1210-1212. Jurors' ability to use this

evidence – in violation of ER 404(b) – as proof that Barr had a propensity to commit sex crimes against young women, i.e., he was the “child-molesting type,” ensured Barr’s conviction for the charged acts.

4. INADEQUATE JURY INSTRUCTIONS VIOLATED BARR’S RIGHT TO BE FREE FROM DOUBLE JEOPARDY.

The State concedes the jury instructions did not protect Barr against a double jeopardy violation. Citing State v. Mutch, 171 Wn.2d 646, 254 P.3d 803 (2011), however, the State argues harmless error because it is “manifestly apparent” jurors based each child molestation on a separate and distinct act. Brief of Respondent, at 13-14.

But Mutch involved an unusual combination of several events creating “a rare circumstance where, despite deficient jury instructions,” it was manifestly apparent jurors based each conviction on a separate and distinct act. Mutch, 171 Wn.2d at 665 (emphasis added).

These events were as follows: (1) the victim testified to precisely the same number of rape episodes (five) as there were counts charged and “to convict” instructions; (2) during its cross-examination of the victim, the defense focused on consent (rather

than a challenge to whether the acts occurred); (3) the defendant admitted to a detective engaging in multiple sex acts with the victim; and (4) during closing argument, the prosecutor individually discussed each of the five alleged acts and defense counsel did not challenge the number of episodes, but merely argued consent. Mutch, 171 Wn.2d at 665. The Supreme Court concluded that, “[i]n light of all of this, we find it was manifestly apparent to the jury that each count represented a separate act; if the jury believed J.L. regarding one count, it would as to all.” Id. at 665-666 (emphasis added).

In contrast, R.H. did not allege the same number of episodes as counts [RP 581-601]; the defense was not consent, Barr vigorously contested every allegation of inappropriate contact, and he made no admissions [RP 979-980, 1023, 1193-1209]; and – consistent with the defense examination of trial witnesses – during closing argument, the defense argued the State had failed to prove the charged conduct occurred. RP 1193-1209 Lastly, it was not true in Barr’s case that “if the jury believed R.H. regarding one count, it would as to all.” Indeed, at least some jurors did not believe that Barr and R.H. ever had sexual intercourse, convicting Barr of molestation rather than rape. CP 64, 66.

In short, Barr's case does not present all (or even most) of the circumstances that created the "rare circumstance" in Mutch where this instructional error can be deemed harmless. One of Barr's molestation convictions must be vacated.

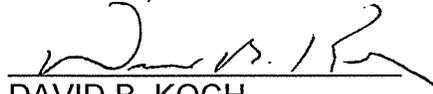
B. CONCLUSION

For the reasons discussed in Barr's opening brief, his supplemental briefs, and above, this Court should reverse his convictions and order a new trial.

DATED this 12th day of September, 2012.

Respectfully submitted,

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State v. Paul Barr

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Certificate of Service by email

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 12th day of September, 2012, I caused a true and correct copy of the **Reply Brief of Appellant** to be served on the party / parties designated below by email per agreement of the parties pursuant to GR30(b)(4) and/or by depositing said document in the United States mail.

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Signed in Seattle, Washington this 12th day of September, 2012.

X *Patrick Mayovsky*