

FILED

FEB 24, 2014
Court of Appeals
Division III
State of Washington

No. 31500-2-III
IN THE COURT OF APPEALS
FOR THE STATE OF WASHINGTON
DIVISION III

STATE OF WASHINGTON,

Plaintiff/Respondent,

vs.

DAMON L. MCCART,

Defendant/Appellant.

Appellant's Brief

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A. ASSIGNMENTS OF ERROR

1. The trial court erred in denying the motion for mistrial based on improper comments of prospective jurors.

2. The trial court erred in allowing the trial to continue past 4 p.m. on two days during the trial.

B. ISSUES PERTAINING TO ASSIGNMENTS OF ERROR

1. Was Mr. McCart denied a fair and impartial trial, as guaranteed by Const. art. I, § 22 and the Sixth and Fourteenth Amendments to the United States Constitution, when the jury pool was told he had served time in a corrections facility?

2. Did the trial court violate Mr. McCart's constitutional right to a public trial by allowing the trial to continue past 4 p.m. on two days during the trial, when a sign on the courthouse door indicated the courthouse closed at 4 p.m., thereby effectively excluding the public from portions of the trial without first doing a *Bone-Club* analysis?

C. STATEMENT OF THE CASE

Mr. McCart was convicted by a jury of second degree burglary and third degree theft. CP 52, 54. He appealed. CP 69. During jury voir dire defense counsel moved for a mistrial when Juror No. 46 stated he was a retired Department of Corrections officer and knew Mr. McCart when he

worked at Ahtanum View Youth Corrections Center, and Juror No. 19 stated she was an inmate supervisor and thought Mr. McCart looked familiar. RP 96-97, 102-03, 142. In denying the motion the Court said it was not worried about Juror No. 19's statements. "As far as Number 46, that's close, but I think he was cut off in time. And I—I don't think that it's enough to prejudice the entire jury." RP 144-45.

The bailiff then informed the Court that when Juror No. 46 mentioned Ahtanum View, it rang a bell in the mind of Juror No. 38. The Court decided to interview Juror No. 38. RP 146. Juror No. 38 stated:

Well, my concern was that what the gentleman [Juror No. 46] said, that when he asked to be excused because he had retired from the Ahtanum correctional facility . . . It -- I just immediately made the assumption that the Defendant had previously been serving time there . . . for possible prior criminal activity. So it just immediately put a shadow of doubt on whether he is presumed innocent or not . . . And just like, uh, now I got some prejudice in my brain that wasn't there.

RP 151.

At the time of Mr. McCart's trial the Yakima County Courthouse hours were 8 a.m. to 4 p.m. *Andy* 5/17/13 RP 14¹. Court was adjourned or the jury was excused at the following times on the following pertinent

¹ "Andy" citations refer to the verbatim report of proceedings of a supplemental evidentiary hearing in *State v. Joey A. Andy*, 31018-3-III, held 5/17/13, 5/22/13, and 6/7/13, to determine the Yakima County Courthouse hours and other relevant facts. That record is now included as part of the record in this appeal. See Commissioner's Ruling granting appellant's motion to supplement the record, dated February 20, 2014.

dates of Mr. McCart's trial with the ongoing event after 4 p.m. in parenthesis: 2/25/13 at 4:18 p.m. (jury voir dire) and 2/26/13 at 4:14 p.m. (testimony). RP 180, 396.

The policy in effect at the time of Mr. McCart's trial was if a trial was still ongoing past 4 p.m., the court would call courthouse security to let them know court was still in session. A security officer would then be available to admit people wishing to attend that particular court hearing. However, the courthouse was formally closed for all other purposes. *Andy* 5/17/13 RP 16-17. If court staff forgot to call security, the doors would be locked at 4 p.m. *Andy* 5/17/13 RP 22. The record does not indicate whether the security officer on duty received any telephone calls from the court during Mr. McCart's trial². RP 180, 396.

Security officers sometimes do a "sweep" checking to make sure no courts are still in session before locking the doors. *Andy* 5/17/13 RP 65-66. The record does not indicate whether the security officer on duty did a "sweep" during Mr. McCart's trial. RP 180, 396.

The security officer on duty after 4 p.m. does not stand by the entrance doors. Instead, he or she stands near the metal detector. A person approaching the entrance doors from the street would only see the

closed sign, not the security officer. The person could only see the security officer if he or she peered through the door at a certain angle. *Andy* 5/17/13 RP 64.

The sign on or near the entrance door has been updated three times since the shortened hours were implemented around October 3, 2011. *Andy* 5/22/13 RP 148. The sign in place during Mr. McCart's trial said, "The courthouse closes at 4:00 p.m. Office hours, auditor 9:00 to 3:30, HR, which was human resources, 9:00 to 4:00, district court clerks 8:00 to 4:00, superior court clerks 8:30 to 4:00, all others 8:00 to 4:00. The bottom line on the [sign] says court closes at 5:00 p.m." *Andy* 5/22/13 RP 150, 152. The current sign, installed 3/4/13, after Mr. McCart's trial, added the phrase, "Courtrooms are open while in session." *Andy* 5/22/13 RP 150, 165.

² It is extremely doubtful any telephone calls were made since the trial judge stated on

D. ARGUMENT

1. Mr. McCart was denied a fair and impartial trial, as guaranteed by Const. art. I, § 22 and the Sixth and Fourteenth Amendments to the United States Constitution, when the jury pool was told he had served time in a corrections facility.

A trial court's denial of a motion for a mistrial is reviewed for an abuse of discretion. *State v. Greiff*, 141 Wn.2d 910, 921, 10 P.3d 390 (2000) (citing *State v. Lewis*, 130 Wn.2d 700, 707, 927 P.2d 235 (1996)). A trial court abuses its discretion when no reasonable person would adopt the trial court's view. *Greiff*, 141 Wn.2d at 921. The trial court's decision on a motion for mistrial will be overturned if there is a substantial likelihood that the prejudice affected the verdict. *Greiff*, 141 Wn.2d at 921 (quoting *State v. Russell*, 125 Wn.2d 24, 85, 882 P.2d 747 (1994)).

a. A defendant is constitutionally entitled to an unbiased jury. The accused in a criminal trial has a constitutional right to have a fair and impartial jury. U.S. Const. amends. VI, XIV § 1; Wash. Const. art. I, §§ 3, 21, 22; *State v. Brett*, 126 Wn.2d 136, 157, 892 P.2d 29 (1995). Where a juror's views would "prevent or substantially impair the performance of his duties" as a juror, the juror must be excused for cause. *State v. Hughes*,

the record that he believed the courthouse stayed open until 4:30 p.m. RP 179.

106 Wn.2d 176, 721 P.2d 902 (1986) (quoting *Wainwright v. Witt*, 469 U.S. 412, 424, 105 S.Ct. 844, 83 L.Ed.2d 841 (1985)). If a biased juror is permitted to deliberate, the accused is denied his constitutional right to trial by an impartial jury, requiring reversal. *State v. Parnell*, 77 Wn.2d 503, 507, 463 P.2d 134 (1969); *State v. Gonzales*, 111 Wn.2d 276, 282, 45 P.3d 205 (2002). Moreover, due process requires that a person accused of a crime be tried only by a jury willing to decide the case solely on the evidence presented. *Smith v. Phillips*, 455 U.S. 209, 217, 102 S.Ct. 940, 71 L.Ed.2d 78 (1981).

b. Jury misconduct occurs when the jury considers facts not in evidence. One guarantee of jury impartiality is that the jury is constrained to determine factual issues only on the basis of the evidence introduced at trial. *Bayramoglu v. Estelle*, 806 F.2d 880, 887 (9th Cir. 1986). See also *Turner v. Louisiana*, 379 U.S. 466, 13 L.Ed.2d 424, 85 S.Ct. 546, 549-50 (1965); WPIC 1.01A. The interjection of extraneous evidence into the jury's deliberations violated this principle as well as an accused's right to due process of law. *Richards v. Overlake Hospital*, 59 Wn. App. 266, 270, 796 P.2d 737 (1990); *Halvorson v. Anderson*, 82 Wn.2d 746, 752, 513 P.2d 8267 (1973).

c. Prospective jurors' comments may irreparably prejudice a jury panel against the accused. In *Mach v. Stewart*, 137 F.3d 630 (9th Cir. 1998), the Ninth Circuit Court of Appeals reversed a defendant's conviction where prejudicial comments by a prospective juror so infected the remaining jury panel members that reversal was the only proper remedy. In *Mach*, the defendant was accused of sexually assaulting a young girl. *Id.* at 631. One prospective juror was a social worker with Arizona's Child Protective Service. *Id.* at 632. The prospective juror readily questioned her ability to be impartial, explaining, in front of the jury panel, that in her experience, every claim of sexual assault by a child had later been confirmed. *Id.* She additionally stated she was unaware of a child ever lying about such a situation. *Id.* Later, the juror disclosed that she had taken classes in child psychology, lending an air of expertise to her remarks. *Id.* at 632-33. The court denied Mach's motion for a mistrial which was based on concerns that the prospective juror had tainted the jury pool, but the court did strike the prospective juror for cause. *Id.* at 632.

The Ninth Circuit took issue with the court's failure to follow up with the remaining panel:

At a minimum, when Mach moved for a mistrial, the court should have conducted further *voir dire* to determine whether the panel had in fact been infected by [the juror's] expert-like statements.

Given the nature of [the juror's] statements, the certainty with which they were delivered, the years of experience that led to them, and the number of times that they were repeated, we presume that at least one juror was tainted and entered into jury deliberations with the conviction that children simply never lie about being sexually abused. The bias violated Mach's right to an impartial jury.

Id. at 633. Under a harmless-error standard, the Court found the error had a "substantial and injurious effect or influence in determining the jury's verdict" since the remarks were straight to the heart of Mach's case – whether the jury believed the accused or the accuser. *Id.* (quoting *Brecht v. Abrahamson*, 507 U.S. 619, 623, 113 S.Ct. 1710, 123 L.Ed.2d 353 (1993)). The Court found "no doubt" that the prospective juror's comments "had to have had a tremendous impact on the jury's verdict." *Mach*, 127 F.3d at 633. The Court concluded the juror's comments substantially affected or influenced the verdict, and reversed Mach's conviction. *Id.*

d. Juror Nos. 19's and 46's statements during voir dire tainted the jury pool and require reversal. The right to a fair trial includes the right to the presumption of innocence. *Estelle v. Williams*, 425 U.S. 501, 503, 96 S.Ct. 1691, 48 L.Ed.2d 126 (1976); *State v. Crediford*, 130 Wn.2d 747, 759, 927 P.2d 1129 (1996). This constitutionally guaranteed presumption is the bedrock foundation in every criminal trial. *Morissette v. United*

States, 342 U.S. 246, 275, 72 S.Ct. 240, 96 L.Ed. 288 (1952). It is the duty of the court to give effect to the presumption by being alert to any factor that could "undermine the fairness of the fact-finding process."

Williams, 425 U.S. at 503, 96 S.Ct. 1691. Courts must evaluate the likely effects of an alleged violation "based on reason, principle, and common human experience." *Williams*, 425 U.S. at 504, 96 S.Ct. 1691. The presumption of innocence guarantees every criminal defendant all "the physical indicia of innocence," including that of being "brought before the court with the appearance, dignity, and self-respect of a free and innocent man." *State v. Finch*, 137 Wn.2d 792, 844, 975 P.2d 967 (1999).

In the case at bar, Mr. McCart's presumption of innocence was shattered by Juror No. 46's statement that he was a retired DOC officer and knew Mr. McCart when he worked at Ahtanum View Youth Corrections Center. The presumption of innocence was further eroded when Juror No. 19 stated she was an inmate supervisor and thought Mr. McCart looked familiar. RP 96-97, 102-03, 142. In denying the motion, the court failed to consider the lingering effects of the damaging remarks, even though those effects were made obvious by the comments to the court from Juror No. 38. That juror told the Court that upon hearing the remarks of Juror No. 46, "I just immediately made the assumption that the

Defendant had previously been serving time there . . . for possible prior criminal activity. So it just immediately put a shadow of doubt on whether he is presumed innocent or not . . . And just like, uh, now I got some prejudice in my brain that wasn't there.” RP 151.

Juror No. 38’s statements make it clear that the remarks of Juror Nos. 19 and 46 were highly prejudicial remarks against Mr. McCart. The remarks of those two prospective jurors served to taint the jury pool, and encouraged other jurors to give credence to the State’s as-yet unheard and unproven case. The effect of these comments prejudiced the jurors who ultimately deliberated in Mr. McCart’s case. Therefore, reversal is required. *Mach*, 137 F.3d at 633; *Gonzalez*, 111 Wn. App. at 282.

2. The trial court violated Mr. McCart’s constitutional right to a public trial by allowing the trial to continue past 4 p.m. on two days during the trial, when a sign on the courthouse door indicated the courthouse closed at 4 p.m., thereby effectively excluding the public from portions of the trial without first doing a *Bone-Club* analysis.

A person accused of crime is entitled to a public trial. U.S. Const. amend. VI; Wash. Const. art I, § 22; *State v. Bone-Club*, 128 Wn.2d 254, 257, 906 P.2d 325 (1995). This includes the entire jury selection process. *In re Personal Restraint of Orange*, 152 Wn.2d 795, 804, 100 P.3d 291

(2004). The public and press also have a First Amendment right to public trials. U.S. Const. Amend. I; *Waller v. Georgia*, 467 U.S. 39, 46, 104 S. Ct. 2210, 81 L. Ed. 2d 31 (1984); Wash. Const. art 1, § 10; *State v. Easterling*, 157 Wn.2d 167, 179, 137 P.3d 825 (2006).

The court may not close the courtroom “except under the most unusual circumstances.” *Bone-Club*, 128 Wn.2d at 259. Even where only a part of the jury voir dire is improperly closed, it can violate a defendant’s constitutional public trial right. *Orange*, 152 Wn.2d at 812. Violations of this right may be raised for the first time on appeal. *Bone-Club*, 128 Wn.2d at 257; *State v. Brightman*, 155 Wn.2d 506, 517, 122 P.3d 150 (2005).

A public trial right is considered an issue of such constitutional magnitude that it may be raised for the first time on appeal and a "defendant's failure to lodge a contemporaneous objection at trial [does] not effect a waiver." *State v. Strode*, 167 Wn.2d 222, 229, 217 P.3d 310 (2009) (citations omitted). Moreover, a defendant cannot waive the public's right to open proceedings. *Strode*, 167 Wn.2d at 230. “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.” *Id.* (citations omitted).

To overcome the presumption of openness, the trial court must find on the record that closure is the only way to preserve a specific, more important, interest and that the closure is narrowly tailored to serve that interest. The findings must be specific enough to enable this court to determine whether closure was proper. *Orange*, 152 Wn.2d at 806; *Waller*, 467 U.S. at 45. The court must perform five steps:

1. The proponent of closure must make some showing of a compelling interest. If that interest is an accused’s right to a fair trial, the proponent must show a likelihood of jeopardy.
2. Anyone present must be given an opportunity to object to the closure.
3. The protective method must be the least restrictive means available to protect the threatened interest.
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.

Bone-Club, 128 Wn.2d at 258-89; *Federated Publications, Inc. v. Kurtz*, 94 Wn.2d 51, 62, 615 P.2d 440 (1980). Failure to follow these steps violates the public trial clause of Wash. Const. art I, § 22. *Orange*, 152 Wn.2d at 812.

The trial court herein effectively closed the courtroom on its own motion by conducting portions of the trial after 4 p.m. when the courthouse was formally closed. The fact that the courtroom itself was open or that the courthouse was unlocked with a security officer available to allow entry makes no difference because the sign on the entrance door effectively barred the public from entering the courtroom. The public cannot be expected to know it may enter the courthouse on its own volition contrary to the public posting that the courthouse is closed.

The first line on the sign says the courthouse closes at 4 p.m. The sign then lists five sets of office hours all closing at 4 p.m. or earlier. The bottom line on the sign says court closes at 5:00 p.m., an apparent contradiction to the other lines. How many members of the public will read beyond the first line, or assuming they do, how many will comprehend the meaning of the last line? Considering the unambiguous message of the first line that the courthouse closes at 4 p.m., common sense dictates that most people would logically assume admittance is barred after 4 p.m. and leave.

Furthermore, even assuming the security guard followed the implemented policies and was available to admit court attendees, the public would not be aware of his presence. The security officer on duty after 4

p.m. does not stand by the entrance doors. Instead, he stands near the metal detector. A person approaching the entrance doors from the street would only see the closed sign, not the security officer unless that person peered through the door at a certain angle. *Andy* 5/17/13 RP 64.

Due process guarantees the right to an open and public trial. If the public is not “aware” of the open and public proceedings, this right loses all meaning. *Press-Enter. Co. v. Superior Court*, 464 U.S. 501, 509, 104 S. Ct. 819, 78 L. Ed. 2d 629 (1984). Even if a courthouse is technically unlocked, secret proceedings unfairly diminish or eliminate this public trial right. *Id.* The law requires “reasonable measure to accommodate public attendance” at court proceedings. *State v. Leyerle*, 158 Wn. App. 474, 478, 242 P.3d 921 (2010); *Presley v. Georgia*, 558 U.S. 209, 130 S.Ct. 721, 175 L.Ed.2d 675 (2010). Moreover, court proceedings must not only be open, but they must be “accessible.” *Leyerle*, 158 Wn. App. at 479-80; *Easterling*, 157 Wn.2d at 174.

Yakima County’s policy of closing the courthouse at 4:00 p.m. while unlocking the courthouse doors during times of trial, with no additional direction to the public that proceedings remain open, is not a reasonable measure to accommodate public attendance. Seeing the sign outside the courthouse that the building is closed, the public is unlikely to

be “aware” of ongoing public proceedings afterhours. Although the courthouse may be technically unlocked, it is not sufficiently “accessible.” Unlocking the courthouse door, without more, cannot constitute “reasonable measures” to “accommodate public attendance.” The proceedings in this case may as well have been behind locked doors. It is difficult to imagine many members of the general public who would be brave enough to assert the public trial right and enter the courthouse when all posted hours announce that the courthouse is in fact closed.

The measures taken in this case by the Yakima County Superior Court did not make the courthouse sufficiently “accessible,” did not make the public “aware” of the ongoing public trial, and were not “reasonable” to “accommodate public attendance.” Significant portions of Mr. McCart’s trial were effectively closed and his conviction should be reversed in favor of a new and public trial.

Finally, the denial of the constitutional right to a public trial is not subject to harmless error analysis. *Bone-Club*, 128 Wn.2d at 261-62; *Neder v. United States*, 527 U.S. 1, 8, 119 S. Ct. 1827, 144 L. Ed. 2d 35 (1999). Since denial of the public trial right is deemed to be a structural error, prejudice is presumed. *Bone-Club*, 128 Wn.2d at 261-62; *Orange*,

152 Wn.2d at 812. The only appropriate remedy is to remand for a new trial. *Brightman*, 155 Wn.2d at 518.

E. CONCLUSION

For the reasons stated, the convictions should be reversed, and the case remanded for a new trial.

Respectfully submitted February 24, 2014,

s/David N. Gasch, WSBA #18270
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PROOF OF SERVICE (RAP 18.5(b))

I, David N. Gasch, do hereby certify under penalty of perjury that on February 24, 2014, I mailed to the following by U.S. Postal Service first class mail, postage prepaid, or e-mailed by prior agreement (as indicated), a true and correct copy of the brief of appellant:

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