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OCTOBER 31, 2014
Court of Appeals
Division III
State of Washington

NO. 32466-4-III

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

STATE OF WASHINGTON,

Respondent,

v.

MARGARITO CRUZ,

Appellant.

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

The Honorable Brian Altman, Judge

BRIEF OF APPELLANT

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A. ASSIGNMENT OF ERROR

The trial court violated appellant's constitutional right to a public trial.

Issue Pertaining to Assignment of Error

During jury voir dire, peremptory challenges were made in a manner that prevented the public from scrutinizing the process. Did this procedure violate appellant's constitutional right to public trial?

B. STATEMENT OF THE CASE

The Klickitat County Prosecutor's Office charged Margarito Cruz with (count 1) Rape of a Child in the Second Degree and (count 2) Child Molestation in the Second Degree. CP 46-48. A jury found Cruz guilty, but the convictions were reversed on appeal due to a violation of his right to public trial during jury selection. CP 3-13, 19-21. Following remand, Cruz was convicted again and sentenced to a high-end standard range sentence of 198 months. CP 51-59.

Once again, there is an issue with jury selection and the right to public trial. The trial judge used a procedure for peremptory challenges whereby the prosecutor and defense counsel privately passed a sheet of paper back and forth, taking turns writing down

their peremptory challenges. RP¹ 81-82. Once the attorneys had completed their challenges, the court filled the jury box with the individuals who had been selected to decide the case, plus one alternate. RP 82. At no time did the court announce which party had removed which potential jurors. RP 81-82. Instead, the following day, the court merely filed a document containing this information. That document reveals that the prosecution struck seven jurors and the defense struck six. See CP 62.

Cruz timely filed his Notice of Appeal. CP 60-61.

C. ARGUMENT

THE COURT VIOLATED CRUZ'S RIGHT TO A PUBLIC TRIAL WHEN IT CONDUCTED A PORTION OF JURY SELECTION IN PRIVATE.

Under both the Washington and United States Constitutions, a defendant has a constitutional right to a speedy and public trial. Const. art. 1, § 22; U.S. Const. amend. VI. Additionally, article I, section 10 expressly guarantees to the public and press the right to open court proceedings. State v. Easterling, 157 Wn.2d 167, 174, 137 P.3d 825 (2006). The First Amendment implicitly protects the

¹ "RP" refers to the verbatim report of proceedings for April 9, 2014.

same right. Waller v. Georgia, 467 U.S. 39, 46, 104 S. Ct. 2210, 81 L. Ed. 2d 31 (1984).

The right to a public trial is the right to have a trial open to the public. In re Pers. Restraint of Orange, 152 Wn.2d 795, 804-05, 100 P.3d 291 (2004). This is a core safeguard in our system of justice. State v. Wise, 176 Wn.2d 1, 5, 288 P.3d 1113 (2012). The open and public judicial process is a check on the judicial system, provides for accountability and transparency, and assures that whatever transpires in court will not be secret or unscrutinized. Wise, 176 Wn.2d at 6. The public trial requirement also is for the benefit of the accused: "that the public may see he is fairly dealt with and not unjustly condemned, and that the presence of interested spectators may keep his triers keenly alive to a sense of their responsibility and to the importance of their functions." State v. Bone-Club, 128 Wn.2d 254, 259, 906 P.2d 325 (1995) (quoting In re Oliver, 333 U.S. 257, 270 n. 25, 68 S. Ct. 499, 92 L. Ed. 682 (1948)).

The right to a public trial encompasses jury selection. Presley v. Georgia, 558 U.S. 209, 723-24, 130 S. Ct. 721, 175 L. Ed. 2d 675 (2010); Wise, 176 Wn.2d at 11. Before a trial judge can close any part of voir dire, it must analyze the five factors identified

in State v. Bone-Club, Orange, 152 Wn.2d at 806-07, 809; see also State v. Brightman, 155 Wn.2d 506, 515-16, 122 P.3d 150 (2005) (a trial court violates a defendant's right to a public trial if the court orders the courtroom closed during jury selection but fails to engage in the Bone-Club analysis).

Under the Bone-Club test, (1) the proponent of closure must show a compelling interest for closure and, when closure is based on a right other than an accused's right to a fair trial, a serious and imminent threat to that compelling interest; (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; and (5) the order must be no broader in its application or duration than necessary to serve its purpose. Bone-Club, 128 Wn.2d at 258-260; Wise, 176 Wn.2d at 12.

A violation of the public trial right is structural error, presumed prejudicial, and not subject to harmless error analysis. State v. Shearer, ___ Wn.2d ___, 334 P.3d 1078 (2014); Wise, 176 Wn.2d at 13-15; State v. Strode, 167 Wn.2d 222, 231, 217 P.3d 310 (2009); Easterling, 157 Wn.2d at 181; Orange, 152 Wn.2d at

814. Moreover, the error can be raised for the first time on appeal. State v. Njonge, ___ Wn.2d ___, 334 P.3d 1068 (2014), Wise, 176 Wn.2d at 13 n.6; Strode, 167 Wn.2d at 229; Orange, 152 Wn.2d at 801-02; Brightman, 155 Wn.2d at 517-518.

In Cruz's case, that portion of jury selection when counsel exercised their peremptory challenges was closed to the public. The public was unable to see or hear what was happening when the attorneys made peremptory challenges and had no access to that information. A closure does not require that the courtroom doors be shut and locked; there is a closure when a proceeding occurs in an inaccessible location, such as the judge's chambers. State v. Lormor, 172 Wn.2d 85, 93, 257 P.3d 624 (2011) (citing Momah, 167 Wn.2d at 146; Strode, 167 Wn.2d at 224); 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); cf. State v. Smith, ___ Wn.2d ___, 334 P.3d 1049 (2014) (sidebar conferences do not violate public trial right if limited to "traditional subject areas").

There is no indication the trial court considered the Bone-Club factors before permitting the private process that led to dismissal of

13 potential jurors. By employing its chosen procedure, the court violated Cruz's right to public trial. Wise, 288 P.3d at 1119 ("The trial court's failure to consider and apply Bone-Club before closing part of a trial to the public is error."). Reversal is the only proper course.

Cruz acknowledges this Court's contrary decision in State v. Love, 176 Wn. App. 911, 309 P.3d 1209 (2013) (petition for review pending).² In Love, this Court held, under the experience and logic test, that exercising "for cause" and peremptory challenges outside the public view does not constitute a closure or violate the right to public trial. Love, 176 Wn. App. at 915-920. Cruz respectfully asserts that Love is wrongly decided.

Under the "experience" prong of the test, the court asks "whether the place and process have historically been open to the press and general public." State v. Sublett, 176 Wn.2d 58, 73, 292 P.3d 715 (2012). The "logic" prong asks "whether public access plays a significant positive role in the functioning of the particular process in question." Id. If the answer to both is "yes," the public trial right attaches. Id.

² Division Two has adopted the decision in Love. See State v. Dunn, 180 Wn. App. 570, 574-575, 321 P.3d 1283 (2014).

Historically, it is well established that the right to a public trial extends to jury selection. See, e.g., Sublett, 176 Wn.2d at 71; State v. Strode, 167 Wn.2d 222, 226-227, 217 P.3d 310 (2009). This includes “the process of juror selection.” In re Orange, 152 Wn.2d 795, 804, 100 P.3d 291 (2004) (quoting Press-Enter. Co. v. Superior Court, 464 U.S. 501, 505, 104 S. Ct. 819, 78 L. Ed. 2d 629 (1984)). “For-cause” and peremptory challenges are an integral part of this process. Strode, 167 Wn.2d at 230 (for-cause challenges of six jurors in chambers not de minimus violation of public trial right); State v. Wilson, 174 Wn. App. 328, 342, 298 P.3d 148 (2013) (unlike potential juror excusals governed by CrR 6.3, exercise of peremptory challenges, governed by CrR 6.4, constitutes part of “voir dire,” to which the public trial right attaches).

Moreover, logically, openness in the process of excluding jurors clearly enhances core values of the public trial right – “both the basic fairness of the criminal trial and the appearance of fairness so essential to public confidence in the system.” Sublett, 176 Wn.2d at 75; see also In re Personal Restraint of Orange, 152 Wn.2d 795, 804, 100 P.3d 291 (2004) (the process of jury selection “is itself a matter of importance, not simply to the adversaries but to the criminal justice system”).

Without the ability to hear and see the selection of jurors as it occurs, the public has no ability to assess whether challenges are being handled fairly and within the confines of the law or, for example, in a manner that discriminates against a protected class. See Gomez v. United States, 490 U.S. 858, 873, 109 S. Ct. 2237, 104 L. Ed. 2d 923 (1989) (jury selection primary means to “enforce a defendant’s right to be tried by a jury free from ethnic, racial, or political prejudice.”).

Open peremptory challenges are critical to guard against inappropriate discrimination. This can only be accomplished if they are made openly in a manner allowing the public to determine whether one side or the other is targeting and eliminating jurors for impermissible reasons. See State v. Sadler, 147 Wn. App. 97, 107, 109-118, 193 P.3d 1108 (2008) (private Batson³ hearing following State’s use of peremptory challenges to remove only African-American jurors from panel denied defendant his right to public trial), review denied, 176 Wn.2d 1032, 299 P.3d 19 (2013), overruled on other grounds Sublett, 176 Wn.2d at 71-73.

At Cruz’s trial, while members of the public could discern, *after*

³ Batson v. Kentucky, 476 U.S. 79, 106 S. Ct. 1712, 90 L. Ed. 2d 69 (1986).

the fact, which prospective jurors had been removed by whom (generously assuming they knew to look in the court file the day after jury selection), the public could not tell at the time the challenges were made which party had removed any particular juror, making it impossible to determine whether a particular side had improperly targeted any protected group based on gender or race. See State v. Burch, 65 Wn. App. 828, 833-834, 830 P.2d 357 (1992) (identifying both as protected classes); see also State v. Saintcalle, 178 Wn.2d 34, 309 P.3d 326 (2013) (lead opinion, concurrence, and dissent underscore harm resulting from improper race-based exercises of peremptory challenges and difficulty of prevention).

Regarding experience, the Love court noted the absence of evidence that, historically, these challenges were made in open court. Love, 176 Wn. App. at 918-919. But history would not necessarily reveal common practice unless the parties made an issue of the employed practice. History does not tell us these challenges were commonly done in private, either. Moreover, prior to State v. Bone-Club, there were likely many common, but unconstitutional, practices that ceased with issuance of that decision.

The Love court cites to one case – State v. Thomas, 16 Wn. App. 1, 553 P.2d 1357 (1976) – as “strong evidence that peremptory challenges can be conducted in private.” Love, 176 Wn. App. at 918. Thomas rejected the argument that “Kitsap County’s use of secret – written – peremptory jury challenges” violated the defendant’s right to a fair and public trial where the defendant had failed to cite to any supporting authority. Thomas, 16 Wn. App. at 13. Notably, Thomas predates Bone-Club by nearly 20 years. Moreover, the fact Thomas challenged the practice suggests it was atypical even at the time.⁴ Labeling Thomas “strong evidence” is a vast overstatement.

Regarding logic, the Love court could think of no manner in which exercising juror challenges in public furthered the right to fair trial, concluding instead that a written record of the challenges sufficed. Love, 176 Wn. App. at 919-920. The court failed, however, to consider that an after-the-fact record removes the

⁴ Citing to a Bar Association directory, the Thomas court noted that “several counties” had employed Kitsap County’s practice. Thomas, 16 Wn. App. at 13 n.2. Even ignoring the questionable methodology of what appears to be some type of informal poll, that only “several counties” had used the method certainly leaves open the possibility a majority of Washington’s 39 counties did not even before Bone-Club and subsequent cases requiring an open process.

public's ability to scrutinize what is occurring at a time when error can still be avoided. The court also failed to mention or consider the increased risk of discrimination against protected classes of jurors resulting from late disclosure. The subsequent filing of documents from which the source of a challenge might be deciphered is not an adequate substitute for simultaneous public oversight. See also Sadler, 147 Wn. App. at 116 ("Few aspects of a trial can be more important . . . than whether the prosecutor has excused jurors because of their race, an issue in which the public has a vital interest.").

Indeed, Cruz's case is a prime example of those inadequacies. As previously noted, even those in the courtroom during the peremptory challenges could not determine which side was challenging which jurors. Moreover, while some of the excused jurors were apparently already in the jury box (and could therefore be seen as they left the box), those challenged jurors in the general seating area were never identified in any way. They simply left the courtroom with the rest of the jurors not chosen. See RP 82. Thus, it would have been impossible to determine their gender or race, for example. And although the sheet listing the

challenges was filed the following day, that sheet only lists names. It does not reveal race. See CP 62.

The practice employed in this case, and in Love, insulates the jury selection process from public scrutiny, constitutes a closure, and violates the right to public trial. Reversal is required.

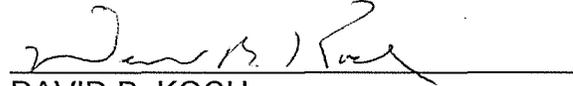
D. CONCLUSION

Cruz's convictions must be reversed and the case remanded for a new trial.

DATED this 31st day of October, 2014.

Respectfully Submitted,

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State v. Margarito Cruz

No. 32466-4-III

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 31st day of October, 2014, I caused a true and correct copy of the **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.

Klickitat County Prosecutor
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Signed in Seattle, Washington this 31st day of October, 2014.

x 