FILED
Court of Appeals
Division III
State of Washington
1/16/2020 10:54 AM

NO. 36718-5-III

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

STATE OF WASHINGTON,

Respondent,

v.

JESSIE ALLERT,

Appellant.

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

The Honorable Scott D. Galina, Judge

REPLY BRIEF OF APPELLANT

ERIN MOODY
Attorney for Appellant

NIELSEN KOCH, PLLC
1908 E Madison Street
Seattle, WA 98122
(206) 623-2373

TABLE OF CONTENTS

Page

A. ISSUES IN REPLY 1

B. ARGUMENT IN REPLY 1

THE EX PARTE PROCEEDING AT ISSUE IN THIS APPEAL IMPLICATED FUNDAMENTAL, SUBSTANTIVE QUESTIONS ABOUT MR. ALLERT'S CAPACITY TO ASSIST COUNSEL AND WAIVE CONSTITUTIONAL RIGHTS; IT WAS NEITHER MINISTERIAL, NOR DE MINIMIS, NOR INVITED ERROR 1

1. In Order to Conclude that No Closure Occurred, the State Misrepresents Both the Record and Mr. Allert's Opening Brief 1

2. In Order to Conclude that the Violation was *De Minimis*, the State Misrepresents the Record 6

3. In Order to Argue that the Closed Proceeding at Issue Here was Invited Error, the State Misrepresents the Record and Relies on Inapposite Authority 8

D. CONCLUSION 10

TABLE OF AUTHORITIES

Page

WASHINGTON CASES

Det. of Morgan
180 Wn.2d 312, 330 P.3d 774 (2014) 5

PRP of Salinas
189 Wn.2d 747, 408 P.3d 344 (2018) 8, 9

PRP of Thompson
141 Wn.2d 712, 10 P.3d 380 (2000) 8

State v. Coley
180 Wn.2d 543, 326 P.3d 702 (2014) 4

State v. Easterling
157 Wn.2d 167, 137 P.2d 825 (2006) 7

State v. Howard
noted at 199 Wn. App. 1001, 2017 WL 2117044 (2017) 4

State v. Jones
185 Wn.2d 412, 372 P.3d 755 (2016) 4

State v. Momah
167 Wn.2d 140, 217 P.3d 321 (2009) 9

State v. Parks
190 Wn. App. 859, 363 P.3d 599 (2015) 4

State v. Rhodes
noted at 9 Wn. App. 1073, 2019 WL 3413643
review denied, 2019 WL 6607160 (2019) 4

State v. Smith
181 Wn.2d 508, 334 P.3d 1049 (2014) 4

A. ISSUES IN REPLY

1. The proceeding at issue in this appeal was a courtroom closure that violated the right to a public trial.

2. That violation was not de minimis.

3. The closure was not invited error.

B. ARGUMENT IN REPLY

THE EX PARTE PROCEEDING AT ISSUE IN THIS APPEAL IMPLICATED FUNDAMENTAL, SUBSTANTIVE QUESTIONS ABOUT MR. ALLERT'S CAPACITY TO ASSIST COUNSEL AND WAIVE CONSTITUTIONAL RIGHTS; IT WAS NEITHER MINISTERIAL, NOR DE MINIMIS, NOR INVITED ERROR

Mr. Allert appreciates the State's concessions as to the instructional error and the improper restitution award. He agrees that the conviction for hit-and-run should be reversed and the restitution order vacated insofar as it reimburses the State for trial expenses. See Br. of Resp. at 23.

Mr. Allert disagrees, however, with the State's arguments on the public trial issue. This court should reject those arguments because they misrepresent the record, Mr. Allert's opening brief, and relevant precedent.

1. In Order to Conclude that No Closure Occurred, the State Misrepresents Both the Record and Mr. Allert's Opening Brief

The State asserts that the proceeding at issue in this appeal occurred "prior to trial," that it addressed Mr. Allert's "cold," and that defense counsel stated definitively during this proceeding that Mr. Allert's

illness "'didn't factor into his ability to testify.'" Br. of Resp. at 6, 9. The State is wrong. Each of these assertions minimizes the significance of the proceeding and the consequences of conducting it in chambers, and each is contradicted by the record.

As shown by both the summary in Mr. Allert's brief and the long block quote in the State's response, the ex parte proceeding at issue here occurred after the State rested its case and defense counsel proposed a jury instruction on the defendant's right not to testify. Br. of App. at 3-5 (citing RP 236, 247, 251-56); Br. of Resp. at 8 (citing RP 254-55). At this time, the defense had already decided to proceed with trial, albeit with "misgivings"; the State had presented its evidence; and the only remaining question was whether Mr. Allert would take the stand. RP 247, 253.

Contrary to the assertions in the State's brief, defense counsel did not "state[], on the record, that the defendant's cold 'didn't factor into his ability to testify.'" Br. of Resp. at 9. Instead, counsel stated only that she told the judge in chambers that she "want[ed] to make sure" that Mr. Allert's "sickness"—which was so severe that "he couldn't have conversations" with counsel prior to jury selection—"didn't impair his . . . or factor into his ability to testify or not testify." RP 252-54 (emphasis added).

This statement is alarming in part because, moments before this ex parte, non-transcribed communication took place, counsel had stated in open court that Mr. Allert was knowingly waiving that constitutional right. RP 247-48. It is not clear why, after that waiver occurred in open court, defense counsel still felt the need to "make sure" it was not induced by Mr. Allert's severe illness.

It *is* clear—and contrary to the State's brief—that the closed proceeding resulted in a determination about Mr. Allert's "capacity to assist in his defense." Br. of Resp. at 13. After that proceeding, trial proceeded as scheduled and Mr. Allert did not testify. RP 256, 262. We can therefore infer that the court determined Mr. Allert's illness did not impair his capacity. But as Mr. Allert pointed out in his opening brief, the ambiguous memorialization does not clarify the basis for that determination. RP 253 (counsel explaining that the in-chambers proceeding occurred because she "just . . . want[ed] to make sure that [Mr. Allert's illness] didn't . . . factor into his ability as to testify or not testify," but failing to explain how she "ma[d]e sure" of this fact before going back on the record).

It is also clear that a determination about a defendant's capacity is not a "scheduling matter," or "akin to a sidebar," despite the State's desire to characterize it as such. Br. of Resp. at 12. Therefore, none of the

authority on which the State relies is apposite. See Br. of Resp. at 13-17 (citing State v. Parks, 190 Wn. App. 859, 363 P.3d 599 (2015);[1] State v. Jones, 185 Wn.2d 412, 372 P.3d 755 (2016);[2] State v. Smith, 181 Wn.2d 508, 334 P.3d 1049 (2014);[3] State v. Rhodes, 9 Wn. App. 1073, 2019 WL 3413643, review denied, 2019 WL 6607160 (2019);[4] State v. Howard, 199 Wn. App. 1001, 2017 WL 2117044 (2017)[5]).

As Mr. Allert argued in his opening brief, the unusual proceeding at issue here is substantively most like a competency hearing: it addressed the defendant's ability to meaningfully assist counsel. Br. of App. at 9-10 (citing State v. Coley, 180 Wn.2d 543, 551-52, 326 P.3d 702 (2014)). For purposes of the experience and logic test, that is the proper analogy. See

---

[1] Parks held that swearing in the venire is an "administrative component of the jury selection process to which the public trial right does not attach" under the experience prong of the experience and logic test. 190 Wn. App. at 866-67.

[2] Jones held that the public trial right does not attach to the selection of alternate jurors by random drawing after that selection procedure was identified and assented to in open court. 185 Wn.2d at 422-25.

[3] Smith held that the public trial right does not attach to "[p]roper sidebars, . . . [which] deal with the mundane issues implicating little public interest" and are simultaneously recorded. 181 Wn.2d at 516-18.

[4] Rhodes held that the public trial right was not violated when the court entered orders of continuance, on which no hearings occurred, due to counsel's or the court's scheduling conflict. 2019 WL 3413643, at *3, *11.

[5] Howard is an unpublished opinion holding, without reference to any relevant facts and without addressing the logic prong of the experience and logic test, that the defendant did not meet his burden to show that the public trial right has historically attached to continuance hearings. 2017 WL 2117044, at *7-*8.

Det. of Morgan, 180 Wn.2d 312, 326, 330 P.3d 774 (2014) (analogizing unique proceeding "concern[ing] the procedure for hearing additional evidence regarding the need for involuntary medication" to a status conference, for purposes of conducting experience prong analysis, because proceedings were similar "[i]n substance").

The State's analogy to administrative proceedings involving scheduling matters is inapt. It simply repeats the trial court's and the parties' attempts to retroactively justify the closure. See, e.g., RP 254-56 (prosecutor stating, "there was a closure . . . [and] I think it's bigger than counsel recognizes," yet also stating that, "I believe the Court treated it as a - - a ministerial issue concerning scheduling"). As Mr. Allert explained in his opening brief, those justifications are belied by the record. Br. of App. at 8-9. This court should reject the State's attempts to minimize the proceeding at issue here.

Finally, this court should also reject the State's assertion that Mr. Allert "cannot establish the logic prong, nor has he attempted to do so." Br. of Resp. at 16. Mr. Allert addressed both the experience and logic prongs of the public trial analysis at pages 10-11 of his opening brief.

2. In Order to Conclude that the Violation was *De Minimis*, the State Misrepresents the Record

As Mr. Allert explained in his opening brief, the closure that occurred here does not meet the narrow exception for de minimis violations of the public trial right. Br. of App. at 11-13. The State's contrary argument appears to stem from its fundamental misunderstanding of the facts in this case.

The State contends that during the closed proceeding, "defense counsel approached the court about her client's health to put the court on notice that a continuance may be requested." Br. of Resp. at 19. It is not clear what the State is referring to; this portion of the State's brief contains no citation to the record and there is no mention of a continuance in any of the transcripts quoted elsewhere in the brief. Br. of Resp. at 6-8, 19.[6]

Consistent with its mistaken assertion that the closed proceeding merely "put the court on notice" about a possible continuance, the State

[6] At certain points in its brief, the State appears to conflate two separate proceedings recounted in the memorialization at RP 252-55. The first occurred "prior to jury selection" and involved defense counsel, the court, and the prosecutor. RP 253. This was the proceeding during which defense counsel expressed "misgivings" about beginning trial while Mr. Allert was sick but agreed to go ahead when the prosecutor suggested a delay might result in extra costs. RP 253. The second—which is at issue here—occurred right after the parties agreed on the jury instructions and the court went off the record for five minutes. RP 252. It was held in order to, in defense counsel's words, "make sure that [illness] didn't impair . . . or factor into [Mr. Allert's] ability as to testify or not testify." RP 253. The prosecutor was not present for this proceeding until he "wandered back to let the Court know we were ready to proceed." RP 255.

also contends that "no factual determinations . . . were made" during this proceeding. Br. of Resp. at 18-19. But as Mr. Allert has repeatedly explained, the closed proceeding addressed the fact of his capacity to voluntarily waive the right to testify. See supra and Br. of App. at 9. The immediate resumption of trial after this proceeding implies a determination about that fact.

As discussed at length in the opening brief, a defendant's capacity to assist counsel and waive rights is a fundamental to a fair trial. See Br. of App. at 11-12 (citing State v. Easterling, 157 Wn.2d 167, 137 P.2d 825 (2006)). And as our supreme court recognized in Easterling, a factual determination about that capacity is neither trivial nor mundane. 157 Wn.2d at 180-81. Even when such a determination is made *on the record* in a closed proceeding, the closure violates the right to a public trial and requires reversal. Id. at 180-81 ("Even if we were to indicate a tolerance for so called 'trivial closures,' the closure here could not be placed in that category because it was deliberately ordered and was neither ministerial in nature nor trivial in result."). The non-transcribed, ambiguously memorialized proceeding in Mr. Allert's case is plainly reversible error.

3. In Order to Argue that the Closed Proceeding at Issue Here was Invited Error, the State Misrepresents the Record and Relies on Inapposite Authority

Finally, the State relies on PRP of Salinas, 189 Wn.2d 747, 757, 408 P.3d 344 (2018), to argue that defense counsel invited the erroneous closure in this case. The State is wrong.

In Salinas, our supreme court held that defense counsel invited an erroneous courtroom closure when he drafted a juror questionnaire inviting private voir dire, did not object when prompted and instead repeatedly advocated for closed interviews, and where the defendant benefitted from the closure. 189 Wn.2d at 757-58. Defense counsel's actions in Salinas fit squarely within the doctrine of invited courtroom closure error, which exists to prevent counsel from deliberately setting up an error that, despite causing no prejudice, can nevertheless be raised on appeal. Id. at 757 (citing PRP of Thompson, 141 Wn.2d 712, 723-24, 10 P.3d 380 (2000)). But Salinas is readily distinguishable from Mr. Allert's case.

The invited error doctrine applies to courtroom closures only where two conditions are met: (1) defense counsel actively seeks the closure and (2) the closure furthers the defendant's interest in a fair trial.

Id.; State v. Momah, 167 Wn.2d 140, 151-52, 156, 217 P.3d 321 (2009). In this case, neither condition is met.

First, we cannot tell from the existing record who initiated the ex parte proceeding. The State asserts that "defense counsel approached the court about her client's health to put the court on notice that a continuance may be requested." Br. of Resp. at 19. But the State provides no citation to support that claim and, as noted above, it conflicts with the transcript. See supra, note 7 and accompanying text. From a proper reading of the transcript, one can glean only that the court reached the conclusion, off the record and behind closed doors, that Mr. Allert's illness did not impact his decision to waive his constitutional right to testify. RP 252-55. The transcript does not indicate who initiated the proceeding in which that determination was made.

Second, and even more significant to the invited error analysis, the closure in no way benefitted Mr. Allert. The private juror questioning at issue in Salinas and Momah promoted fair trials because it made potential jurors more willing to disclose relevant biases. Salinas, 189 Wn.2d at 757; Momah, 167 Wn.2d at 156. Here, there is no comparable benefit to Mr. Allert. At best, the closure was unconsidered; at worst, it concealed serious constitutional problems from public oversight. See RP 252-53 ("I

just . . . want to make sure that [illness] didn't impair his . . . ability as to testify or not testify.").

D. CONCLUSION

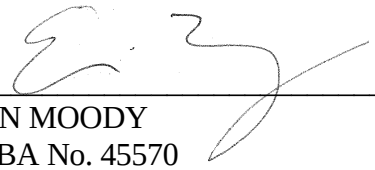
The closed proceeding in this case resolved a factual question about Mr. Allert's capacity to assist counsel and waive his constitutional right to testify in his own defense. Those are substantive issues fundamental to a fair trial, not ministerial matters resolvable behind closed doors. The State's contrary argument, like its arguments that this closure was either de minimis or invited error, misrepresents the record and controlling precedent.

This court should reject the State's flawed arguments and remedy the constitutional violation that occurred in this case. Mr. Allert's convictions must be reversed.

DATED this 16th day of January, 2020.

Respectfully submitted,

NIELSEN KOCH, PLLC



ERIN MOODY
WSBA No. 45570
Attorneys for Appellant

NIELSEN, BROMAN & KOCH P.L.L.C.

January 16, 2020 - 10:54 AM

Transmittal Information

Filed with Court:	Court of Appeals Division III
Appellate Court Case Number:	36718-5
Appellate Court Case Title:	State of Washington v. Jessie Mark Allert
Superior Court Case Number:	17-1-00186-6

The following documents have been uploaded:

- 367185_Briefs_20200116105315D3383043_1978.pdf
  This File Contains:
  Briefs - Appellants Reply
  The Original File Name was RBOA 36718-5-III.pdf

A copy of the uploaded files will be sent to:

- bnichols@co.asotin.wa.us
- gverhoef@spokanecounty.org
- scpaappeals@spokanecounty.org

Comments:

Copy mailed to: Jessie Allert 415501 Airway Heights Corrections Center PO Box 2049 Airway Heights, WA 99001

Sender Name: John Sloane - Email: Sloanej@nwattorney.net
Filing on Behalf of: Erin Irene Moody - Email: MoodyE@nwattorney.net (Alternate Email: MoodyE@nwattorney.net)

Address:
1908 E. Madison Street
Seattle, WA, 98122
Phone: (206) 623-2373

Note: The Filing Id is 20200116105315D3383043