

80727-2

No. 25043-1-III

IN THE COURT OF APPEALS  
FOR THE STATE OF WASHINGTON  
DIVISION III

STATE OF WASHINGTON,

Plaintiff/Respondent,

vs.

BRIAN WILLIAM FRAWLEY,

Defendant/Appellant.

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Appellant's Supplemental Brief

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**TABLE OF CONTENTS**

A. ASSIGNMENT OF ERROR.....2

B. SUPPLEMENTAL ISSUE.....2

C. STATEMENT OF THE CASE.....2

D. ARGUMENT.....4

Since the trial court did not analyze the Bone-Club factors before conducting the private jury voir dire, it violated appellant’s constitutional public trial right by excluding the public from voir dire.....4

D. CONCLUSION.....12

**TABLE OF AUTHORITIES**

<u>Cases</u>	<u>Page</u>
<u>In re Oliver</u> , 333 U.S. 257, 68 S.Ct. 499, 92 L.Ed. 682 (1948).....	10
<u>Neder v. United States</u> , 527 U.S. 1, 119 S.Ct. 1827, 144 L.Ed.2d 35 (1999).....	6
<u>Press-Enter. Co. v. Superior Court</u> , 464 U.S. 501, 104 S.Ct. 819, 78 L.Ed.2d 629 (1984).....	4
<u>Waller v. Georgia</u> , 467 U.S. 39, 104 S.Ct. 2210, 81 L.Ed.2d 31 (1984).....	4, 5, 6
<u>In re Personal Restraint of Orange</u> , 152 Wn.2d 795, 100 P.3d 291 (2004).....	4, 5, 6, 7, 9, 10, 12

<u>State v. Brightman</u> , 155 Wn.2d 506, 122 P.3d 150 (2005).....	5, 6, 7, 12
<u>State v. Bone-Club</u> , 128 Wn.2d 254, 906 P.2d 325 (1995).....	5, 6, 7, 8, 10, 11
<u>State v. Easterling</u> , 157 Wn.2d 167, 137 P.3d 825 (2006).....	4
<u>State v. Marsh</u> , 126 Wash. 142, 217 P. 705 (1923).....	7

**Statutes**

U.S. Const. amend. I.....	4
U.S. Const. amend. VI.....	4
WA Const. art 1, § 10.....	4

**Other Resources**

Thomas M. Cooley, Constitutional Limitations 647 (8 <sup>th</sup> ed. 1927).....	10
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**A. SUPPLEMENTAL ASSIGNMENT OF ERROR**

The trial court erred in excluding the public from jury voir dire, thus violating appellant's constitutional right to a public trial.

**B. SUPPLEMENTAL ISSUE**

Where the trial court did not analyze the Bone-Club<sup>1</sup> factors before conducting the private jury voir dire, did the trial court violate appellant's constitutional public trial right by excluding the public from jury voir dire?

**C. STATEMENT OF THE CASE**

The Statement of the Case is set forth in the initial brief. The following additional facts are pertinent to this supplemental issue.

The trial court proposed, and the parties agreed, to submit a questionnaire to the venire panel followed by individual voir dire in chambers of each prospective juror who answered "yes" to any of the questions in the questionnaire. (RP 64-65, 423) In a colloquy with Mr. Frawley, the court indicated, "...we're trying to determine if there's potential pretrial publicity that would be damaging in this case; and we're trying to determine what experience people have had with these issues to, ultimately, make a decision whether they're the type of people that could be fair and impartial and be a member of this jury." (RP 64-65)

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<sup>1</sup> State v. Bone-Club, 128 Wn.2d 254, 906 P.2d 325 (1995).

The court suggested “jurors are willing and able to disclose more fully if members of the State aren’t there, if the defendant isn’t there...I honestly think the jurors answer more honestly and both sides need to know that before you select those jurors.” (RP 66) Mr. Frawley then orally agreed to waive his presence during the individual voir dire. (RP 66-68)

After reviewing the results of the questionnaire, the court conducted individual voir dire in chambers of 35 prospective jurors over the course of two days in the presence of only the respective counsel and the court reporter. (RP 424-25, 437, 462-74, 493-648, 651-857) Challenges for cause were conducted and either granted or denied in chambers following the voir dire of each individual prospective juror. (RP 427, 462-74, 493-648, 651-857) Eleven prospective jurors were stricken for cause. (RP 857-58)

The court next proposed that the general voir dire and jury selection process be conducted without the public being present. “And the reason I have to do that is I don’t have any room to put the public in here. Otherwise, I’m going to have to locate a larger courtroom somewhere.” (RP 859) Mr. Frawley then orally agreed to waive having the public present for the remainder of the voir dire process. (RP 864-67)

The general voir dire and jury selection process was conducted without the public being present. (RP 885-1036)

**D. ARGUMENT**

**Since the trial court did not analyze the Bone-Club<sup>2</sup> factors before conducting the private jury voir dire, it violated appellant's constitutional public trial right by excluding the public from jury voir dire.**

A criminal defendant has a right to a public trial, including during the jury selection process. Under both the Washington and United States Constitutions, a defendant has a constitutional right to a speedy and public trial. WA Const. art 1, § 22; U.S. Const. amend. VI; In re Personal Restraint of Orange, 152 Wn.2d 795, 804, 100 P.3d 291 (2004).

Additionally, the public and press have an implicit First Amendment right to a public trial. U.S. Const. amend. I; WA Const. art 1, § 10; Waller v. Georgia, 467 U.S. 39, 46, 104 S.Ct. 2210, 81 L.Ed.2d 31 (1984); State v. Easterling, 157 Wn.2d 167, 179, 137 P.3d 825 (2006).

The guaranty of open criminal proceedings extends to “the process of juror selection,” which “is itself a matter of importance, not simply to the adversaries but to the criminal justice system.” Press-Enter. Co. v. Superior Court, 464 U.S. 501, 505, 104 S.Ct. 819, 78 L.Ed.2d 629 (1984). “[A]lthough the public trial right may not be absolute, 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) (emphasis added). Even when only a part of jury voir dire is improperly closed to the public, it can violate a defendant’s constitutional public trial right. Orange, 152 Wn.2d at 812, 100 P.3d 291. “Moreover, the defendant’s failure to lodge a contemporaneous objection at trial [does] not effect a waiver of the public trial right.” State v. Brightman, 155 Wn.2d 506, 517, 122 P.3d 150 (2005).

“ ‘The presumption of openness may be overcome only by an overriding interest based on findings that closure is essential to preserve higher values and is narrowly tailored to serve that interest. The interest is to be articulated along with findings specific enough that a reviewing court can determine whether the closure order was properly entered.’ ” Orange, 152 Wn.2d at 806 (*quoting* Waller, 467 U.S. at 45, 104 S.Ct. 2210).

The Washington Supreme Court requires compliance with five standards before the court can properly close any part of a trial to the public:

1. The proponent of closure or sealing must make some showing [of a compelling interest], and where that need is based on

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<sup>2</sup> State v. Bone-Club, 128 Wn.2d 254, 906 P.2d 325 (1995).

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.

Bone-Club, 128 Wn.2d at 258-89.

The holding in Bone-Club has been adopted verbatim in subsequent Supreme Court cases. Orange, 152 Wn.2d at 812, 100 P.3d 291. A trial court's failure to follow the five-step closure test violates a defendant's right to a public trial under section 22 of the Washington Constitution. Id. When the record "lacks any hint that the trial court considered [the defendant's] public trial right as required by Bone-Club, [the court on appeal] cannot determine whether the closure was warranted." Brightman, 155 Wn.2d at 518, 122 P.3d 150.

The denial of the constitutional right to a public trial is one of the limited classes of fundamental rights not subject to harmless error analysis. Bone-Club, 128 Wn.2d at 261-62, 906 P.2d 325; Neder v. United States, 527 U.S. 1, 8, 119 S.Ct. 1827, 144 L.Ed.2d 35 (1999) (*citing* Waller v. Georgia, 467 U.S. 39, 104 S.Ct. 2210, 81 L.Ed.2d 31

(1984)). “[P]rejudice is presumed where a violation of the public trial right occurs.” Bone-Club, 128 Wn.2d at 261-62 (citing State v. Marsh, 126 Wash. 142, 146-47, 217 P. 705 (1923)).

In Brightman, the trial court *sua sponte* told counsel that for reasons of security, “we can’t have any observers while we are selecting the jury.” Brightman, 155 Wn.2d at 511. The Supreme Court ruled that where jury selection or a part of the jury selection is closed, the closure is not *de minimis* or trivial. Id. at 517. The trial court had failed to analyze the five Bone-Club factors. Unable to determine from the record below whether the closure was warranted, the Court remanded for a new trial. Id. at 518.

In Orange, the trial court closed the courtroom during more than half of the time spent on jury voir dire, because of limited courtroom space and for security reasons. Orange, 152 Wn.2d at 808-10. The Orange Court held the trial court’s failure to analyze the five Bone-Club factors before ordering the courtroom closed violated Orange’s right to a public trial. Orange, 152 Wn.2d at 812. The Orange Court also held the constitutional violation was presumptively prejudicial and would have resulted in a new trial had the issue been raised in Orange’s direct appeal. Id.

Herein, the entire voir dire and jury selection was closed to the public. Considering the first Bone-Club factor, the trial court as the proponent of closure of the individual voir dire did not make any showing of a compelling interest that posed a serious and imminent threat to Mr. Frawley's right to a fair trial. In a colloquy with Mr. Frawley, the court indicated, "...we're trying to determine if there's potential pretrial publicity that would be damaging in this case; and we're trying to determine what experience people have had with these issues to, ultimately, make a decision whether they're the type of people that could be fair and impartial and be a member of this jury." (RP 64-65) The court also suggested "jurors are willing and able to disclose more fully if members of the State aren't there, if the defendant isn't there...I honestly think the jurors answer more honestly and both sides need to know that before you select those jurors." (RP 66) But this statement of purpose and the court's personal belief does not constitute a compelling interest for closure, nor did the court indicate as such.

Similarly, as the proponent of closure of the general voir dire, the trial court did not make any showing of a compelling interest. The court merely indicated, "And the reason I have to do that is I don't have any room to put the public in here. Otherwise, I'm going to have to locate a

larger courtroom somewhere.” (RP 859) This justification for closure is remarkably similar to that offered by the trial court in Orange, which the Supreme Court rejected. Orange, 152 Wn.2d at 808-10, 812. All the trial judge needed to do to keep the general voir dire open to the public was to switch courtrooms with another judge in a larger courtroom, *as it had done just two days previously* in order to address the entire venire panel. (RP 425-26, 434-35)

Regarding the second factor, there is nothing in the record to show anyone other than the attorneys was given the opportunity to object when the decision was made to conduct both the individual and general jury voir dire outside the presence of the public. As indicated above, both the public and press have an implicit First Amendment right to a public trial. Yet neither was given any opportunity to object to the court’s decision.

Considering the third factor, the proposed method for curtailing open access for both the individual and general voir dire was clearly not the least restrictive means available for protecting the threatened interests. For example, instead of conducting the individual voir dire in chambers, the court could have protected the threatened interest to an impartial jury by holding the prospective jury pool at a location outside the public courtroom and bringing prospective jurors into the courtroom for voir dire

one at a time. For the general voir dire, the court merely needed to switch courtrooms with another judge in the same building in order to keep the procedure open to the public.

To comply with the fourth factor the court must weigh the competing interests of the proponent of closure (the court) and the public. The record herein does not disclose any such weighing of the competing interests of private proceedings and the public's right to witness the proceedings. The constitutional public trial right is the right to have a trial open to the public. Orange, 152 Wn.2d at 804-05. "The requirement of a public trial 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 ... ." Bone-Club, 128 Wn.2d at 259 (*citing In re Oliver*, 333 U.S. 257, 270 n.25, 68 S.Ct. 499, 506 n.25, 92 L.Ed. 682 (1948) (*quoting* Thomas M. Cooley, *Constitutional Limitations* 647 (8<sup>th</sup> ed. 1927))). Herein, the public, the press, interested spectators, friends and family were excluded from the entire voir dire and jury selection process.

Finally, to comply with the fifth factor the order must be no broader in its application or duration than necessary to serve its purpose.

Assuming *arguendo* that the decision to hold the individual voir dire in chambers made the jurors more at ease and honest as the court suggested, the additional closing of the general voir dire was clearly too broad. As stated above, the only purpose for the second closure was to avoid switching courtrooms again, which is not a legitimate purpose. Therefore, the order of closure was too broad.

The State may argue that the two oral waivers given by Mr. Frawley negate the need for the trial court to analyze the Bone-Club factors. However, this argument fails for several reasons. First, regarding the individual voir dire, Mr. Frawley only waived his right to personally be present during the individual voir dire. He did not waive any right for those proceedings to be open to the public. Second, the authority cited above requires strict compliance of the Bone-Club factors before any closure order may be properly entered. The Bone-Club factors go far beyond just the defendant's wishes. The public, the press, interested spectators, friends and family have an equal constitutional right to witness the entire proceedings. Therefore, the waivers do not substitute for or alleviate the need for a thorough analysis of the Bone-Club factors.

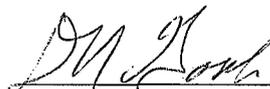
Because the trial court failed to analyze the Bone-Club factors before excluding the public from the jury voir dire and jury selection

process, under the rule in Orange and Brightman, Mr. Frawley's constitutional right to a public trial was violated. The remedy is reversal and a new trial.

**E. CONCLUSION**

For the reasons stated herein and in the initial brief, the conviction should be reversed.

Respectfully submitted December 4, 2006.



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