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25043-1-III

COURT OF APPEALS

DIVISION III

OF THE STATE OF WASHINGTON

STATE OF WASHINGTON, RESPONDENT

v.

BRIAN W. FRAWLEY, APPELLANT

APPEAL FROM THE SUPERIOR COURT

OF SPOKANE COUNTY

HONORABLE NEAL Q. RIELLY

BRIEF OF RESPONDENT

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I.

APPELLANT'S ASSIGNMENTS OF ERROR

(1) The evidence was insufficient to sustain the conviction of first-degree felony murder.

(2) The trial court erred in denying the defendant's motion to dismiss at the close of the State's case in chief.

(3) The trial court erred in failing to give a unanimity instruction.

(4) The trial court erred in denying the defendant's motion to sequester the jury.

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

II.

ISSUES PRESENTED

(1) Can defendant raise a challenge that he specifically waived?

(2) Is the practice of individual voir dire on sensitive issues in-chambers unconstitutional?

(3) Should the jury have been sequestered during deliberations?

(4) Did the evidence support the verdict?

III.

STATEMENT OF THE CASE

Defendant/appellant Brian Frawley was charged in the Spokane County Superior Court with, *inter alia*, first degree felony murder. CP 1-2, 19-20, 25. The victim, Margaret Cordova, had disappeared one night. Her body was found a month later. RP 1046-1047.¹

The matter was assigned to the Honorable Neal Rielly for trial. RP 1 *et seq.* Judge Rielly ruled that the murder count would be tried independently of other charged crimes --- the rapes of two women, a burglary and theft case, and a failure to register as a sex offender prosecution.² RP 20. Trial began on the murder count with the defendant waiving his right to be present during individual voir dire of jurors whose answers on the pre-trial questionnaire required investigation. RP 64-68.

¹ RP denoted the consecutively numbered transcription of the trial proceedings. The separately paginated post-trial transcripts will be denoted by date/RP.

² Defendant subsequently pled guilty before Judge Rielly to the failure to register charge as well as to six counts relating to the burglary incident. RP 52-63.

Prospective jurors filled out questionnaires and then were summoned, if needed, to chambers for individual questioning about their responses. RP 434-449, 462-474, 493-858. At the conclusion of the individual voir dire, Judge Rielly indicated that he wanted to do general voir dire in his courtroom and inquired whether the defendant would be willing to waive the right to have the public present during jury selection. "Otherwise, I'm going to try to have to locate a larger courtroom somewhere." RP 859. Defense counsel indicated his client would waive public presence. RP 859-860.

The court went through the issue with defendant personally the next day prior to general voir dire:

THE COURT: Okay. Mr. Frawley, the problem with it is you're entitled to have the public in here at all times.

THE DEFENDANT: Yes, sir.

THE COURT: In fact, both sides are entitled to have the public in here. I won't be able to get 49 jurors in here. I think that's what we have left is 49 jurors, security, all the attorneys. I wouldn't have any room left in here for the public.

THE DEFENDANT: Yes, sir.

THE COURT: But, if you wanted the public in here, I could try to find a bigger courtroom. That's what I would try to have to do. Do you understand that, sir?

THE DEFENDANT: Yes, sir.

THE COURT: And you do understand that you do have the right to have the public in here. Is that fair to say?

THE DEFENDANT: Correct.

THE COURT: And you understand that, if you wanted to, I'd make every effort to try to find a court available for the public?

THE DEFENDANT: Yes, sir.

THE COURT: And do you understand, sir, that, if you waive that right -- well, let me back up a little bit. First of all, do you understand the only time that we're talking about is for whatever period of time it takes to select a jury?

THE DEFENDANT: Yes, sir.

THE COURT: Okay. And do you understand, sir, that, if you waive that right to have the public -- to have room to have the public in court, you couldn't appeal that issue if you were convicted?

THE DEFENDANT: Yes, sir.

THE COURT: You could appeal any other mistakes that I might make or anything that you and your lawyers feel was unfair or improper or illegal or anything like that. But the one limited issue that the public was not allowed in this courtroom during the jury selection process -- do you understand you would not be able to appeal that?

THE DEFENDANT: Completely.

THE COURT: Okay. Do you have any questions about that?

THE DEFENDANT: No, sir.

THE COURT: And you've had an adequate opportunity to discuss it with your lawyer?

THE DEFENDANT: Yes, sir.

THE COURT: Do you want additional time to discuss with Mr. Mathiesen?

THE DEFENDANT: I don't think that's necessary.

THE COURT: And do you make a waiver of that, then?

THE DEFENDANT: Yes, sir.

THE COURT: You're willing to allow me to go ahead without having the public in here during the jury selection process?

THE DEFENDANT: Yes, sir.

THE COURT: All right. Thank you. You may be seated.

RP 864-866.

The record does not reflect whether or not the courtroom was ever closed to the public. In his opening remarks to counsel before testimony started, Judge Rielly expressly addressed the courtroom audience. He told the spectators that “the court is always open to the public as it should be. I believe our court should always be open to the public, and that’s why I allow the press to come into the courtroom and that’s important.” RP 1068. He then told the audience how important it was that no one do anything to disrupt the trial. RP 1068-1069.

The prosecution’s case consisted of forensic evidence recovered from the body and crime scene, testimony from family and friends who saw the victim shortly before she disappeared, and testimony from the officers who interviewed the defendant. Ms. Cordova was wearing pink pajamas, with another pair of pajamas on top, and a tank top when she was last seen. Her last hours with family members were documented between 4:00 p.m. on January 16 and 2:30 a.m. January 17, 2004. At that point the intoxicated young woman departed Ricci Gonzales’ house in northeast Spokane with the expressed desire to walk to

her friend Starr Gonzales' house in northwest Spokane. RP 1110-1114, 1116-1119, 1123-1124, 1137-1146, 1160, 1171-1185, 1201-1202, 1220, 1241-1243, 1246-1247, 1252, 1287-1289.

She never arrived. Police investigated her disappearance after missing person reports were filed January 18. RP 1282-1301. Her body was found in northeast Spokane on February 22. RP 1301, 1328-1329. The upper portion of the body had been disturbed by predators. Her legs were bound by cord; one pair of pajama bottoms was tied around her neck. She had no clothing below her waist except for a pair of panties that were only on one leg. RP 1413-1416, 1481-1482, 1710, 1718-1725.

The medical examiner attributed the death "to homicidal violence of unknown ideology." RP 1748. The decomposition and scavenging of the body prevented a conclusive determination, but Doctor Aiken believed that strangulation was the possible mechanism due to the presence of the ligaments. She also could not rule out death from exposure. RP 1724-1725, 1746-1748. Based on scavenging studies, Dr. Aiken believed the body had been at the scene between three weeks and two-and-one-half-months. RP 1745.

Fibers found on the victim's clothing were consistent with fiber samples from the seat of a car defendant drove. RP 1589-1600,

1806-1807, 1811-1812, 1866-1868. DNA testing showed that semen recovered from the victim's vagina belonged to the defendant. RP 1669-1677.

Police officers spoke to the defendant on different occasions. Defendant denied knowing the victim or ever being with her. RP 1423-1424, 1807-1809. Defendant likewise told one of his girlfriends that he did not know the victim, but changed his story when the DNA test results came back. RP 1992-1993. He was familiar with the location where the body was found as he dropped his girlfriend's brother at work near the site. RP 1813-1814, 1847-1849, 1926. Two of the defendant's friends testified about an incident when the defendant left the apartment they were partying in with his girlfriend's car and cell phone. When he did not immediately return they started calling him. He eventually came back many hours later and told them that he had hit a girl with the car and taken her body to the woods. RP 1931-1937, 1954-1964. Cell phone records showed the night to be January 16-17, 2004, the day the victim went missing. RP 1971-1973.

Defendant testified on his own behalf. He stated that he had previously given Ms. Cordova, who was hitch-hiking, a ride to the mall. On January 16 he ran in to her again at a fast food restaurant and agreed to give her a ride. When she saw that he had methamphetamine in

the car, she wanted some. Defendant said he gave her \$50 worth in exchange for sexual intercourse. He then left her at the restaurant and drove to Wal-Mart. RP 2027-2034. His time frame for the event was undercut when a Wal-Mart manager testified the store closed an hour earlier than defendant claimed. RP 2074-2075.

Defense counsel argued his client's version of events to the jury. He speculated that either the victim's boyfriend or the boyfriend of her cousin were responsible for the killing. RP 2135-2156. The jury convicted the defendant as charged. RP 2167; CP 111.

The trial court, finding defendant a manipulative liar and a danger to the community, imposed the maximum standard range sentence of 548 months. 3/23 RP 27; CP 115-127. Defendant then appealed to this court. CP 128-142.

IV.

ARGUMENT

A. DEFENDANT WAIVED HIS RIGHT TO HAVE THE PUBLIC PRESENT DURING JURY SELECTION.

Defendant's supplemental brief contends that the trial court erred in having him waive the public's presence during jury selection. His waiver of that issue precludes it being presented in this appeal.

Defendant bases his supplemental claim on Article I, §22 of the Washington Constitution. That provision is entitled “Rights of the Accused.” In very limited part, it says: “In criminal prosecutions the accused shall have the right ... to have a speedy public trial by an impartial jury” Jury selection is part of the public trial. In re Orange, 152 Wn.2d 795, 804, 100 P.3d 291 (2004).

A defendant is free to waive any of the rights guaranteed by the constitutions. For instance, an accused can waive the right to counsel and represent himself. Faretta v. California, 422 U.S. 806, 45 L. Ed. 2d 562, 95 S. Ct. 2525 (1975). “A waiver is the intentional relinquishment of a known right or privilege.” State v. Sweet, 90 Wn.2d 282, 286, 581 P.2d 579 (1978), *quoting* Johnson v. Zerbst, 304 U.S. 458, 82 L. Ed. 1461, 58 S. Ct. 1019 (1938). In this case, with the advice of counsel, defendant waived his right to public presence during jury selection. RP 864-866. Indeed, he expressly acknowledged that he could not appeal this issue. RP 865. Under these circumstances, defendant Frawley can not complain about the possible closure of the courtroom.

Recognizing such, defendant tries to back the issue up, before his waiver of general voir dire, to the stage of the individual voir dire concerning the juror questionnaire answers. He has presented no authority suggesting that inquiry into delicate matters is a part of the

public trial that must be conducted in the open courtroom. The juror questionnaires are typically considered private documents. Indeed, GR 31(j) indicates that access to juror information, other than the juror's name, can only be done by petitioning the court upon a showing of good cause. One has a hard time imagining how, if the answers are private, there is a public right to watch the parties ask about the private matters.

Defendant's argument is essentially a challenge to any in-chambers discussions with jurors. There simply is no authority for such a broad rule. It is clear that there is no right of public access to matters that are only ministerial in nature. *E.g.*, State v. Rivera, 108 Wn. App. 645, 652-653, 32 P.3d 292 (2001), *review denied* 146 Wn.2d 1006 (2002) [no right to public access of chambers conference dealing with one juror's complaint about another juror's hygiene]. Further inquiry into private matters likewise should be considered ministerial and non-public.

Even if considered public matters, the trial court did make a sufficient record to justify "closing" the courtroom. Courts apply a five factor test, borrowed from Seattle Times v. Ishikawa, 97 Wn.2d 30, 640 P.2d 716 (1982), and Allied Daily Newspapers v. Eikenberry, 121 Wn.2d 205, 848 P.2d 1258 (1993), to determine the propriety of closing a courtroom despite the guarantee of Article I, §22.

State v. Bone-Club, 128 Wn.2d 254, 258-259, 906 P.2d 325 (1995). The

five factors that must be considered are:

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

Id.

Application of these standards shows the trial court was justified in "closing" the courtroom for the individual voir dire. The first factor, the purpose of the closure, was for the defendant's benefit in picking a fair jury. Indeed, defense counsel was the one who asked the court to waive his client's presence for jury selection. RP 64. The court expressly noted that in its experience jurors will talk more freely about sensitive issues in private than in public. RP 66. The first factor heavily favors closure of the courtroom. The record does not reflect that the

second factor, allowing the opportunity for others present to object, was ever complied with. The record also does not reflect whether anyone else was present.

The third factor is whether the court uses the least restrictive means of achieving its goals. That was done here as well. Only those jurors who answered “yes” would be spoken with. There was no way to follow up the written answers except for making inquiry. For instance, whether or not a jury was correctly remembering this case could not be discovered by addressing more written questions to the jurors. Rather, the jurors had to be asked orally. Similarly, the fifth factor – that the order be no broader than necessary – was satisfied here. The jurors were questioned in chambers only about the specific questions that they answered “yes” to. Remaining issues were left to the general voir dire (which, of course, defendant had not yet agreed to close to the public).

The fourth factor, the weighing of the interests, clearly favors “closure.” The defendant was giving up his personal right to be present in order to learn more about the jurors than he would by being present. Certainly that right was greater than his right to have the public present. If he was giving up the one right, he certainly would give up the other. Why have the public present to undo what he hoped to accomplish by staying away? More to the point, the defendant’s interest in having a

fair trial certainly outweighed the public's minimal interest in the jurors' private affairs.

The five-factor test clearly favored "closing" the courtroom. When the defendant gave up his personal right to be present, he also certainly gave up his right to have others present. The court did not err in permitting individual voir dire outside of the public eye.

In addition, this issue should also be considered waived. A valid waiver does not require an explicit statement of waiver by the defendant. North Carolina v. Butler, 441 U.S. 369, 373-76, 99 S. Ct. 1755, 1757-59, 60 L. Ed. 2d 286 (1979); State v. Thomas, 128 Wn.2d 553, 558-561, 910 P.2d 475 (1996) [waiver of right to testify at trial]. Rather, the waiver can be inferred from conduct. State v. Thomas, supra at 559.

Appellate courts have found arguments to be waived for appeal by the apparent conscious decision not to pursue an obvious issue in the trial court. For instance, in State v. Valladares, 99 Wn.2d 663, 664 P.2d 508 (1983), the defense had filed a pre-trial motion to suppress evidence, but then withdrew the motion. When defendant tried to raise the issue on appeal, the court declined to hear the motion as it was "waived or abandoned." Id. at 672. In State v. Walton, 76 Wn. App. 364, 884 P.2d 1348 (1994), *review denied* 126 Wn.2d 1024 (1995), defendant failed to challenge at trial the admission of a videotaped deposition even though his

counsel had stated at the time of the deposition that the defense might object to its use at trial. Division One declined to hear the constitutional challenge on appeal, concluding that it was not appropriate to hear the issue under RAP 2.5(a)(3) because the defense “consciously decided not to raise” the issue at trial. Id. at 370. “A conscious decision not to raise a constitutional issue at trial effectively serves as an affirmative waiver” Id.

The situation is the same here. The defendant was aware of his right to be present. He soon, if not then, was aware of the right to have the public present. His counsel participated in this practice and defendant himself stepped aside in order to permit jurors to open up. It was in his best interest. He waived any challenge.

This court should conclude that defendant’s belated challenge to the jury selection process is waived. He expressly waived his right to a public general jury selection; his right to a public individual voir dire (if there was such a right on these facts) was waived by his conduct.

B. THERE WAS NO NEED TO SEQUESTER THE JURY.

Defendant also contends the trial court erred in denying his mid-trial request to sequester the jury. He claims that the mere potential for juror contact with the press coverage justified sequestration. That is

not the standard. The trial court did not abuse its discretion by denying the request.

The standard of review for each of these rulings is well settled. A trial court has broad discretion in determining whether or not to sequester a jury. State v. Dictado, 102 Wn.2d 277, 299, 687 P.2d 172 (1984). Discretion is abused if it is exercised on untenable grounds or for untenable reasons. State ex rel. Carroll v. Junker, 79 Wn.2d 12, 26, 482 P.2d 775 (1971). The test also is sometimes viewed in a second way: whether any reasonable judge would rule as the trial judge did. State v. Nelson, 108 Wn.2d 491, 504-505, 740 P.2d 835 (1987).

CrR 6.7(a) provides that “the jury may be allowed to separate unless good cause is shown, on the record, for sequestration of the jury.” Defendant relies here, as he did in the trial court, on the mere possibility that the jury might be exposed to publicity during trial.

If the mere fact of sensational publicity³ was a basis for finding that a defendant’s right to a fair trial was violated, then it really does not matter whether or not the jury was sequestered. Simply the possibility of exposure, independent of the fact that the jury was not exposed to it, is enough of a basis if the publicity was sensational. In fact,

³ This record also does not show that the publicity was sensational or inappropriate. Indeed, the record reflects very little reference to the nature of the press coverage during the trial.

under his theory, even if this case had received no publicity in Spokane, he nonetheless would be entitled to a new trial based on publicity in Seattle or Singapore. The problem with his argument is that it divorces the publicity from the goal of providing a fair trial.

If a jury was not exposed to the publicity it should not make a difference how prejudicial it was. That was the circumstance here. The judge instructed the jury to avoid press coverage during the trial. There is no indication on the record that any juror was exposed.

As was stated in State v. Wixon, 30 Wn. App. 63, 631 P.2d 1033, *review denied* 96 Wn.2d 1012 (1981):

The purpose of sequestering a jury is to protect jurors from outside influence, during the course of a trial, which might affect their verdict. * * * A defendant's assertion that he was prejudiced because his jury was not sequestered must be considered in light of this purpose. A defendant cannot claim error in the denial of a motion for a change of venue if he can point to nothing in the record, other than the mere existence of publicity concerning the case, which indicates he may have been prejudiced. * * * No lesser showing ought to be required when a defendant contends his jury should have been sequestered. Unless the record indicates that either the nature of the publicity during the trial or the jury's exposure to the publicity created a probability of prejudice, the trial judge has not abused his discretion under CrR 6.7.

Id. at 74 (emphasis supplied; citations omitted).

Sensational publicity that does not reach the jury simply does not impact the defendant's trial. He was entitled to a fair trial, not freedom from unwanted publicity. He received a fair trial.

The record does not reflect that the jury was ever exposed to the publicity. Therefore, the purpose of the jury sequestration rule was satisfied and there was no abuse of discretion in denying the motion.

C. THE EVIDENCE SUPPORTED THE VERDICT.

Defendant also contends, for a variety of reasons, that the evidence was insufficient to support the verdict. There was no error. The evidence allowed the jury to conclude defendant committed first degree felony murder.

The standard for adjudging the sufficiency of the evidence to support a verdict is well established. The test is whether, after viewing the evidence in a light most favorable to the State, any rational trier of fact could find that each element of the offense has been proved beyond a reasonable doubt. State v. Green, 94 Wn.2d 216, 221-222, 616 P.2d 628 (1980). In reviewing the sufficiency of the evidence in a criminal case, the reviewing court must draw all reasonable inferences from the evidence in favor of the State and interpret those inferences most strongly against the defendant. State v. Lopez, 79 Wn. App. 755, 768, 904 P.2d 1179 (1995);

State v. Hagler, 74 Wn. App. 232, 235, 872 P.2d 85 (1994). Application of that standard requires affirmance of this conviction.

Contrary to this standard of review, defendant largely re-argues this trial court theory to the jury. That view, of course, was rejected by the jury and is irrelevant here. The question is whether the jury could do what it did – find the defendant guilty – rather than whether it should have done what it did.

The evidence easily supported the jury's determination. The pathologist's conclusion that the death was a homicide was all the jury needed to draw the same conclusion. The fact that the exact cause of death was uncertain does not change that conclusion. Indeed, there have been many homicide prosecutions where the body of the victim was never recovered at all, let alone a specific mechanism of death medically determined. *E.g.*, State v. Lung, 70 Wn.2d 365, 422 P.2d 72 (1967); State v. Neslund, 50 Wn. App. 531, 546, 749 P.2d 725, *review denied* 110 Wn.2d 1025 (1988); State v. Quillin, 49 Wn. App. 155, 741 P.2d 589 (1987), *review denied* 109 Wn.2d 1027 (1988). Here, the existence of the ligatures certainly were indicative of criminal causation and supported either of Dr. Aiken's likely means of death. The evidence certainly permitted the jury to return a guilty verdict.

Defendant also suggests that the evidence did not support either of the felonies (rape and kidnapping) underlying the felony murder theory. *See State v. Ortega-Martinez*, 124 Wn.2d 702, 881 P.2d 231 (1994); *State v. Maupin*, 63 Wn. App. 887, 894, 822 P.2d 355, *review denied* 119 Wn.2d 1003 (1992). It most certainly did. The finding of a bound body left in a vacant area clearly supports a kidnapping determination. The trace evidence showed that she had been in defendant's vehicle and allowed the jury to determine he was the kidnapper. Similarly, defendant's semen supported the rape theory. The victim was in a committed relationship living with the father of her child. She left one friend's house to visit another to await her boyfriend's return from work. The ludicrous claim of the defendant that she was interested in a sexual encounter with him, for any reason, understandably did not fly with the jury. The jury was quite free to conclude, as it did, that defendant raped Ms. Cordova. The presence of the ligatures likewise supported that theory of the case.

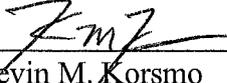
The evidence permitted the jury to return the verdict that it did. Hence, it was sufficient.

V.

CONCLUSION

For the reasons stated, the first degree murder conviction should be affirmed.

Respectfully submitted this 26th day of February, 2007.



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