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No. 25423-2-III

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

STATE OF WASHINGTON,

Plaintiff/Respondent,

vs.

TONY LAWRENCE STRODE,

Defendant/Appellant.

Appellant's Opening Brief

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A. 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.

Issue Pertaining to Assignment of Error

Where the trial court did not analyze the Bone-Club¹ 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?

B. STATEMENT OF THE CASE

Tony Strode was convicted by a jury of first-degree rape of a child, attempted first-degree rape of a child, and first-degree child molestation. (CP 49-55) As part of the jury selection process, the court convened in chambers with only counsel and the defendant present to conduct individual voir dire of each prospective juror who answered "yes" to any of the questions in a questionnaire submitted to the venire panel. (Voir Dire RP 1²) The court then conducted individual voir dire of at least 11 prospective jurors³. Challenges for cause were conducted and either granted or denied in chambers following the voir dire of each individual prospective juror. (Voir Dire RP 1-37)

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

² The jury voir dire was transcribed and numbered as a separate volume and will be so designated.

C. ARGUMENT

Since the trial court did not analyze the Bone-Club⁴ 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

³ The recording tape either ran out or was cut off, so there may have actually been more. See Voir Dire RP 37.

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 a right other than an accused's right to a fair trial, the proponent must show a ‘serious and imminent threat’ to that right.

⁴ State v. Bone-Club, 128 Wn.2d 254, 906 P.2d 325 (1995).

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 trial court failed to analyze any of the five Bone-Club factors. Therefore, since we are unable to determine from the record below whether the closure was warranted, this Court must remand the case for a new trial. See Brightman, 155 Wn.2d at 518.

D. CONCLUSION

For the reasons stated, the conviction should be reversed.

Respectfully submitted February 17, 2007.



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