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DIVISION II

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STATE OF WASHINGTON
BY _____
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NO. 38549-0-II

COURT OF APPEALS, DIVISION II

STATE OF WASHINGTON,

Respondent

vs.

DEAN M. LORMOR,

Appellant

APPEAL FROM THE SUPERIOR COURT
FOR THURSTON COUNTY
The Honorable Richard A. Strophy, Judge
Cause No. 08-1-00940-1

BRIEF OF APPELLANT

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A. ASSIGNMENTS OF ERROR

01. The trial court erred by denying Lormor his constitutional right to an open public trial by excluding his daughter from the courtroom without conducting a Bone-Club inquiry.

02. The trial court erred in permitting Lormor to be represented by counsel who provided ineffective assistance by failing to object to the court's ruling excluding Lormor's daughter from the courtroom

B. ISSUES PERTAINING TO ASSIGNMENTS OF ERROR

01. Whether the trial court erred by denying Lormor his constitutional right to an open public trial by excluding his daughter from the courtroom without conducting a Bone-Club inquiry? {Assignment of Error No. 1].

02. Whether Lormor's counsel's failure to object to the trial court's exclusion of Lormor's daughter from the courtroom constituted ineffective assistance? [Assignment of Error No. 2].

C. STATEMENT OF THE CASE

01. Procedural Facts

Dean M. Lormor (Lormor) was charged by information filed in Thurston County Superior Court on May 28, 2008, with unlawful possession of methamphetamine, contrary to RCW 69.50.4013(1). [CP 3].

No pre-trial motions were filed nor heard regarding either a CrR 3.5 or CrR 3.6 hearing. [RP 6]. Trial to a jury commenced on September 24, the Honorable Richard A. Strophy presiding. Neither objections nor exceptions were taken to the jury instructions. [RP 69].

The jury returned a verdict of guilty as charged, Lormor was sentenced within his standard range and timely notice of this appeal followed. [CP 23, 25-34, 37]. 6, 9, 16].

02. Substantive Facts[1]

On May 22, 2008, Lormor was transported and processed into the Thurston County jail for an unrelated offense. A search of his person during this process produced from his front trouser pocket a small zip-lock baggie containing a substance that subsequently tested positive for methamphetamine. [RP 32-34, 45, 47]. Lormor initially told the police that the methamphetamine belonged to his wife, that he "had taken it from her possession prior to leaving the house ... so that if law enforcement had been called to the house we wouldn't have found it on her." [RP 34]. Later, he said he would "take the fall for it. He admitted at that time that it was his. He didn't want his wife to get in trouble." [RP 34]. He told the officer "that it was meth." [RP 34]. At trial, he asserted

[1] All references to the Report of Proceedings are to the transcript entitled Jury Trial, September 24, 2008.

that he had picked up the baggie at his house two days earlier and put it in his pocket, figuring it was probably his wife's. [RP 60-61].

D. ARGUMENT

01. THE TRIAL COURT DENIED LORMOR HIS CONSTITUTIONAL RIGHT TO AN OPEN PUBLIC TRIAL BY HIS EXCLUDING HIS DAUGHTER FROM THE COURTROOM WITHOUT CONDUCTING THE REQUIRED BONE-CLUB INQUIRY.

After jury selection and prior to opening statements, the following was put on the record:

> PROSECUTOR: The first issue is - - we talked at sidebar about this, and just for the record, there was some indication that the defendant either talked to or talked in front of one of the potential jurors and members of the panel regarding his daughter ... I'd ask the Court to instruct him to not discuss this or anything around the jurors that have been chosen....
>
> ....
>
> COURT: Okay. Mr. Lormor, I didn't really particularly in the presence of all the jurors want to inquire into the report that you were overheard making some comment in disappointment that your daughter was excluded from the courtroom ... I understand that your daughter was initially here. She is unfortunately in a medical condition that requires her to be in a wheelchair and to be on apparently breathing assistance.
>
> DEFENDANT: Ventilator, yes.
>
> COURT: I don't know how old she is, but she appears to me to be of adolescent years, but I don't know what her age is.

> DEFENDANT: She'll be four on the 29th (five days hence).
>
> COURT: So she is even younger than adolescent years. I made the decision she should not be in the courtroom for a number of reasons: Number one, at that age I don't know how much she would understand of the proceedings. Two, given the setup I could even hear at the bench the ventilator operating, and I concluded that would be an inappropriate distraction and frankly difficult for her as it would be potentially distracting for the jury. And that's the decision I've made.
>
> And I have empathy for her circumstances as well as yours in that regard, but I just don't think it's appropriate for a young person to be in this kind of a controlled setting, and I did hear some sounds from her which are perfectly understandable. I don't want in any way to limit her need to express herself for assistance or how she's feeling or anything else, but I just believe that would serve as an appropriate distraction to the process and so that's why I've excluded her, and I want you to know that I don't take that lightly but I would do that in any type of case under the circumstances unless she were a necessary witness and was competent to testify, which given her tender years she would not be under the evidence rules of the court.
>
> ....

[RP 21-23].

Following the prosecutor's expression of his concern that Lormor may attempt to inject his daughter's terminal condition into the proceedings to "gain sympathy from the jury [RP 23](,)" the court noted:

> So I've already made my reasons known for excluding Mr. Lormor's daughter. I'll maintain them. I think they respond to counsel's concerns, and so I would direct, however, that counsel or the defendant or any witnesses not make reference to the status of defendant's daughter

> without further alerting the court and outside the jury's presence having a discussion as to whether such can be done before any mention of it takes place in front of the jury.

[RP 25].[2]

Both the Sixth Amendment to the United States Constitution and article I, section 22 of the Washington Constitution guarantee criminal defendants the right to a public trial. State v. Russell, 141 Wn. App. 733, 737-38, 172 P.3d 361 (2007), reviewed denied, 164 Wn.2d 1020 (2008). As well, article I, section 10 of the Washington Constitution states, "Justice in all cases shall be administered openly," thereby giving the public, in addition to the defendant, a right to open proceedings. Seattle Times Co. v. Ishikawa, Wn.2d 30, 36, 640 P.2d 716 (1982).

"(T)he right to a public trial also extends to jury selection." State v. Brightman, 155 Wn.2d 506, 515, 122 P.3d 150 (2005) (citing In re Pers. Restraint of Orange, 152 Wn.2d 795, 804, 100 P.3d 291 (2004)). A defendant's right and the public's right "serve complementary and independent functions in assuring the fairness of our judicial system. In

---

[2] The parties have filed with this court a stipulation that other than the comments set forth in the record on September 24, 2008, at pages 21-25 of the verbatim report of proceedings, there is no other evidence in the record, including all pre-trial hearings and jury voir dire, where the court or the parties addressed the court's reasons for excluding the defendant's daughter from the courtroom. For the court's convenience, a copy of the stipulation is attached hereto.

particular, the public trial right operates as an essential cog in the constitutional design of fair trial safeguards." State v. Bone-Club, 128 Wn.2d 254, 259, 906 P.2d 325 (1995). And a defendant has standing to voice the public's interest in public trials. State v. Erickson, 146 Wn. App. 146 Wn. App. 200, 205 n.2, 189 P.3d 245 (2008); State v. Duckett, 141 Wn. App. 797, 804-05, 173 P.3d 948 (2007).

To protect these rights, a trial court may exclude a member of the public from a courtroom only after (1) considering the following five requirements enumerated in Bone-Club and (2) entering specific findings on the record to justify so ruling. State v. Bone-Club, 128 Wn.2d at 258-59.

> 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.
>
> 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.

id.

A trial court's failure to conduct the required Bone-Club inquiry before excluding a member of the public "results in a violation of the defendant's public trial rights." State v. Brightman, 155 Wn.2d at 515-16. In such a case, the defendant need show no prejudice; it is presumed. Bone-Club, 128 Wn.2d at 261-62. Additionally, a defendant's failure to "lodge a contemporaneous objection" at the time of the exclusion does not amount to a waiver of his or her right to a public trial. Brightman, 155 Wn.2d at 517. The remedy for such a violation is to reverse and remand for a new trial. In re Pers. Restraint of Orange, 152 Wn.2d at 814. This court reviews de novo the question of law of whether a defendant's right to a public trial has been violated. Brightman, 155 Wn.2d at 514.

Here, similar to the exclusion of members of the public in In re Pers. Restraint of Orange, 152 Wn.2d at 507-08, the trial court's affirmative act of excluding Lormor's daughter from the courtroom violated Lormor's right to a public trial. This was accomplished with no discussion of the five Bone-Club factors, no request for Lormor or anyone else to comment and no specific findings relating to any type of Bone-Club inquiry. Nothing in the record suggests that the trial court recognized, let alone considered Lormor's right to a public trial before removing his daughter from the courtroom. It erred in not performing the

five-part Bone-Club inquiry before making its decision. And since Lormor's failure to object to the process does not constitute a waiver and because prejudice is presumed, this court must reverse Lormor's conviction and remand for a new trial. State v. Brightman, 155 Wn.2d 514-15.

02. LORMOR'S COUNSEL'S FAILURE TO OBJECT TO THE TRIAL COURT'S EXCLUSION OF LORMOR'S DAUGHTER FROM THE COURTROOM CONSTITUTED INEFFECTIVE ASSISTANCE.[3]

A criminal defendant claiming ineffective assistance must prove (1) that the attorney's performance was deficient, i.e. that the representation fell below an objective standard of reasonableness under the prevailing professional norms, and (2) that prejudice resulted from the deficient performance, i.e. that there is a reasonable probability that, but for the attorney's unprofessional errors, the results of the proceedings would have been different. State v. Early, 70 Wn. App. 452, 460, 853 P.2d 964 (1993), review denied, 123 Wn.2d 1004 (1994); State v. Graham, 78 Wn. App. 44, 56, 896 P.2d 704 (1995). Competency of counsel is determined based on the entire record below. State v. White, 81 Wn.2d 223, 225, 500 P.2d 1242 (1972) (citing State v.

[3] While it has been argued in the preceding section of this brief that the issue of the trial court's exclusion of Lormor's daughter from the courtroom constituted constitutional error that may be raised for the first time on appeal, this portion of the brief is presented only out of an abundance of caution should this court disagree with this assessment.

Gilmore, 76 Wn.2d 293, 456 P.2d 344 (1969)). A reviewing court is not required to address both prongs of the test if the defendant makes an insufficient showing on one prong. State v. Tarica, 59 Wn. App. 368, 374, 798 P.2d 296 (1990).

Additionally, while the invited error doctrine precludes review of any instructional error where the instruction is proposed by the defendant, State v. Henderson, 114 Wn.2d 867, 870, 792 P.2d 514 (1990), the same doctrine does not act as a bar to review a claim of ineffective assistance of counsel. State v. Doogan, 82 Wn. App. 185, 188, 917 P.2d 155 (1996) (citing State v. Gentry, 125 Wn.2d 570, 646, 888 P.2d 1105, cert. denied, 116 S. Ct. 131 (1995)).

Should this court determine that counsel's failure to object to the trial court's exclusion of Lormor's daughter from the courtroom does not constitute constitutional error or that counsel waived the issue by failing to object. then both elements of ineffective assistance of counsel have been established.

First, the record does not reveal any tactical or strategic reason why trial counsel would have failed to object, and had counsel done so, the trial court would have granted the objection under the law set forth in the preceding section of this brief. Second, prejudice is presumed where

the violation of the public trial right occurs. State v. Bone-Club, 128 Wn.2d at 261-62.

Counsel's performance was deficient because he failed to object to the exclusion of Lormor's daughter from the courtroom, with the result that Lormor was deprived of his constitutional right to effective assistance of counsel, and is entitled to reversal of his conviction.

E. CONCLUSION

Based on the above, Lormor respectfully requests this court to reverse and dismiss his conviction consistent with the arguments presented herein.

DATED this 12th day of May 2009.

Thomas E. Doyle
THOMAS E. DOYLE
Attorney for Appellant
WSBA NO. 10634

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CERTIFICATE

I certify that I mailed a copy of the above brief by depositing it in the United States Mail, first class postage pre-paid, to the following people at the addresses indicated:

Carol La Verne Deputy Pros Atty 2000 Lakeridge Drive S.W. Olympia, WA 98502	Dean M. Lormor #936061 Cedar Creek Correction Center P.O. Box 37 – Oly H17L Littlerock, WA 98556

DATED this 12th day of May 2009.

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IN THE COURT OF APPEALS
STATE OF WASHINGTON
DIVISION II

STATE OF WASHINGTON, Respondent, vs. DEAN M. LORMOR, Appellant.	)	NO. 38549-0-II STIPULATION

THOMAS E. DOYLE, court-appointed counsel for Appellant, and CAROL LA VERNE, counsel for Respondent, stipulate that other than the comments set forth in the record on September 24, 2008, at pages 21-25 of the verbatim report of proceedings, there is no other evidence in the record, including all pre-trial hearings and jury voir dire, where the court or the parties addressed the court's reasons for excluding the defendant's daughter from the courtroom.

Dated this 12th day of May 2009.

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