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NO. 60015-0-I

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

STATE OF WASHINGTON,

Respondent,

v.

TINH TRINH LAM,

Appellant.

REC'D  
JUL 09 2008  
King County Prosecutor  
Appellate Unit

COURT OF APPEALS  
STATE OF WASHINGTON  
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COURT #1

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

The Honorable Jeffrey M. Ramsdell, Judge

REPLY BRIEF OF APPELLANT

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A. ARGUMENTS IN REPLY

Lam was convicted by jury of aggravated murder based on circumstantial evidence, much of which was forensic. CP 72; 1RP-9RP. Lam appeals on three grounds: (1) in-chambers jury voir dire violated his right to a public trial; (2) he was denied his right to effective assistance of counsel; and (3) he was prejudiced when the judge erroneously told the jury he would not be executed if found guilty. Brief of Appellant (BOA) 1, 7, 22; Supplemental BOA 1-4.

1. CONDUCTING JURY VOIR DIRE IN CHAMBERS VIOLATED LAM'S RIGHT TO A PUBLIC TRIAL.

The trial court violated Lam's right to a public when it voir dired some potential jurors in chambers without first conducting a Bone-Club<sup>1</sup> analysis on the record in open court. BOA at 22. The State responds that the judge may have addressed the Bone-Club factors after the proceedings were closed. Brief of Respondent (BOR) at 23. This argument is without merit.

An on-the-record Bone-Club analysis is a constitutional prerequisite for excluding the public. In re Personal Restraint of Orange, 152 Wn.2d 795, 812, 100 P.3d 291 (2005). Without the defendant's affirmative waiver, the court may not close any part of juror voir dire without first

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<sup>1</sup> State v. Bone-Club, 128 Wn.2d 254, 256-59, 906 P.2d 325 (1995).

making a record of the need for privacy versus objections to closure, the defendant's constitutional rights, and the possibility of less restrictive means. State v. Brightman, 155 Wn.2d 506, 518, 122 P.3d 150 (2005); Orange, 152 Wn.2d at 812; Bone-Club, 128 Wn.2d at 256-59. Accordingly, either an affirmative waiver or a Bone-Club analysis must precede the closure.

A purported Bone-Club inquiry conducted after the proceedings are removed from open court would be meaningless. Before removal can lawfully occur those present must have an opportunity to object. Bone-Club, 128 Wn.2d at 258. This inquiry can only be conducted in open court before potential objectors are excluded.

The question of whether judicial chambers are public in this context is an issue currently pending in the Supreme Court. In State v. Momah, 141 Wn. App. 705, 171 P.3d 1064 (2007), review granted, 163 Wn.2d 1012 (2008), Division I held chambers are open unless the record affirmatively shows otherwise. In State v. Frawley, 140 Wn. App. 713, 715, 167 P.3d 593, 594 (2007), Division III held chambers are presumed closed.

In Momah, this Court held that the public trial guarantee was not violated because excluding the public was not the court's primary purpose

in removing the proceedings to chambers. Momah, 141 Wn. App. at 711-12. The constitutional guarantee of a public trial, however, concerns the actual effect of closure on the defendant and the public -- for which the judge's subjective intent is irrelevant. Brightman, 155 Wn.2d at 514-15.

Here, the trial court neither obtained a waiver nor conducted a Bone-Club analysis in open court. Therefore, no meaningful analysis occurred. There was no opportunity to object or propose alternatives on the record. Nothing that happened during the in-chambers voir dire session could remedy this.

The Momah Court relied on Orange and Brightman -- in which the trial court expressly ordered closure -- in concluding that only the express language of the closure order is relevant to the inquiry of whether closure in fact occurred. Momah, 141 Wn. App. at 708. Orange and Brightman do not support that conclusion. In Orange, the Court also looked at the practical effect of the trial court's action, and the decision notes that closure occurred regardless of the express language. Orange, 152 Wn.2d at 808. In Brightman, the Court presumed closure actually occurred (a) because the trial court expressly ordered closure, and also (b) because nothing in the record suggested counsel were free to treat the order as optional. Brightman, 155 Wn.2d at 517, n.7.

The Brightman presumption should apply here. The Lam trial court removed voir dire to chambers to ensure juror privacy, and the judge did not invite interested members of the public to observe. 3RP 34, 75-76. Therefore, there was no reason for counsel or the public to expect that non-principals would be admitted. Had court been amenable to this, it could have included in a Bone-Club least restrictive alternative analysis a finding that excluding only interested spectators would be sufficient. In that case, however, there would be no point in removing to chambers at all.

Moreover, by contrast with Momah, Orange, and Brightman, Lam's record contains no order. All we have is the court's action and the practical effect. Lam cannot prove the act of removing voir dire to chambers effectively excluded the public, but he does not have to. Brightman, at 516-17 ("defendant does not have to prove closure in fact.") Additionally, the Momah court makes a point of the presence of a court reporter in the challenged proceedings. Momah, 141 Wn. App. 710-11. By contrast with Lam, the Momah decision does not suggest the record was immediately sealed. Id.

For these reasons, Lam's right to a public trial was abridged. Reversal is required. Const. art I, § 22; Orange, 152 Wn.2d at 812.

2. LAM'S TRIAL COUNSEL WAS INEFFECTIVE.

The State urges this Court not to review Lam's claim that his lawyers' inadequate cross examination of the State's forensic witnesses constituted ineffective assistance of counsel and denied him a fair trial. BOR at 13. The State argues that the extent and manner of cross examination is always a matter of trial strategy and cannot, therefore, ever be characterized as ineffective assistance. BOR at 14. The State is wrong.

It is the general rule that reviewing courts give judicial deference to trial counsel's performance and begin their analysis with a strong presumption that counsel was effective. Strickland v. Washington, 466 U.S. 668, 689-90, 104 S. Ct. 2052, 80 L. Ed. 2d 674 (1984); State v. McFarland, 127 Wn.2d 322, 335, 899 P.2d 1251 (1995). This presumption, however, is rebuttable. State v. Byrd, 30 Wn. App. 794, 799, 638 P.2d 601 (1981). If trial counsel fails to determine appropriate defenses or properly prepare for trial, the presumption of effectiveness is overcome. Byrd, 30 Wn. App. at 799. Counsel's preparation, both factual and legal, must be sufficient to anticipate and exploit all available defenses. State v. Jury, 19 Wn. App. 256, 263, 576 P.2d 1302, review denied, 90 Wn.2d 1006 (1978).

In Byrd, counsel's decision not to call witnesses -- generally considered trial strategy -- was deemed ineffective assistance. Byrd, 30 Wn. App. at 800. The presumption of effectiveness was overcome because (a) the failure to call witnesses was unreasonable and (b) the outcome of trial would have been different if counsel had presented witnesses. Byrd, 30 Wn. App. at 799-800, citing State v. Sherwood, 71 Wn. App. 481, 484, 860 P.2d 407 (1993), review denied, 123 Wn.2d 1022, 875 P.2d 635 (1994).

Likewise here, Lam's trial attorneys were not properly prepared for trial and failed to properly determine appropriate defenses. In a forensic case such as Lam's, proper preparation required counsel to carefully analyze the forensic evidence, identify inconsistencies, and highlight those inconsistencies for the jury. This in turn would enable counsel to present the jury with alternative scenarios consistent with innocence plausible under evidence that was not discredited.

Contrary to the State's assertion, Lam does not dispute that his counsel undertook some degree of preparation and conducted some cross examination of the forensic witnesses. See BOR at 18-21. By passing up numerous opportunities to impeach the State's experts, however, counsel allowed the State to imbue Lam's jury with false confidence in the forensic

evidence and to characterize the evidence against Lam as overwhelming, when some jurors otherwise could have agreed it was not. Accordingly, counsel's defective performance was highly prejudicial. Lam deserves a new trial.

3. INFORMING THE JURY THE DEATH PENALTY WAS NOT INVOLVED PREJUDICED LAM.

The trial court informed the jury that Lam was not facing the death penalty. The State contends Lam cannot show this prejudiced him. BOR at 25-27. The State is wrong.

It is well settled that a trial court errs when it informs the jury the defendant is not facing death, and that defense counsel's failure to object is deficient performance per se. State v. Hicks, 163 Wn.2d 477, \_\_\_\_, 181 P.3d 831, 836 (2008). Accordingly, the only issue before this Court is whether Lam was prejudiced by the error.

Prejudice occurs if there is a reasonable probability that the result would have been different if not for the error. State v. Townsend, 142 Wn.2d. 838, 844, 15 P.3d 145 (2001). Specifically, a new trial is warranted if a trial error may have unduly influenced the jury. State v. Trickel, 16 Wn. App. 18, 30, 553 P.2d 139 (1976). When assessing the impact of an instructional error, "reversal is automatic unless the error is trivial, or formal, or merely academic," such that it could not have affected

the outcome of the case in any way. Townsend, 142 Wn.2d at 848. But telling jurors a wrong verdict will not result in an innocent man's death could very well affect the outcome; such an instruction influences the jury by increasing the likelihood they will convict. 142 Wn.2d. at 847.

In Townsend, the Supreme Court resolved a split on this issue between Division I and Division II. Townsend, 142 Wn.2d at 843. The Court agreed with Division I that instructing the jury a murder case was non-capital unduly influences the jury. Townsend, 142 Wn.2d at 844-45, citing State v. Murphy, 86 Wn. App. 667, 673, 937 P.2d 1173 (1997), review denied, 134 Wn.2d 1002, 953 P.2d 95 (1998). The Court rejected Division II's conclusion that such an instruction was not an undue influence. Townsend, 142 Wn.2d at 845, citing State v. Townsend, 97 Wn. App. 25, 31, 979 P.2d 453 (1999). The Supreme Court concluded the prohibition against informing the jury of sentencing considerations is a strict one, necessary to ensure impartial juries and prevent unfair influence on the deliberations. Townsend, 142 Wn.2d at 846. The Court said:

[I]f jurors know that the death penalty is not involved, they may be less attentive during trial, less deliberative in their assessment of the evidence, and less inclined to hold out if they know that execution is not a possibility.

Townsend, 142 Wn.2d at 846.

In every case where the reviewing court held no prejudice resulted from informing the jury death was not a potential punishment, either the jury did not convict the defendant of the potentially capital crime, or the defendant did not dispute that the evidence was overwhelming. In Hicks, for example, the erroneously-instructed jury did not convict on the most serious charges presented -- aggravated first degree murder and attempted murder -- negating any concern the jury was influenced by sentencing considerations. Hicks, 181 P.3d at 837. Moreover, there was evidence of active and particularly careful deliberations by the jury. Id. In Murphy, this Court was persuaded the erroneous instruction did not prejudicially affect the jury's deliberations "only because the jury acquitted Murphy on the charge of first degree murder," which was the most serious charge. Murphy, 86 Wn. App. at 872-73 (emphasis added.). In Townsend, the jury convicted, but Townsend did not dispute that the supporting evidence was overwhelming. Townsend, 142 Wn.2d at 848.

Unlike in Hicks, Murphy and Townsend, here the jury convicted Lam of the most serious charge presented, first degree murder, and the evidence of guilt was not overwhelming in light of the numerous inconsistencies in the forensic evidence. A jury whose attentive faculties were sharpened by the possibility a death penalty awaited a wrong verdict

may have been more heedful of the myriad inconsistencies in the evidence (especially if these had been pointed out by the defense) and thus more receptive to alternative hypotheses other than guilt. Accordingly, this Court should conclude the instruction was both erroneous and prejudicial, and reverse.

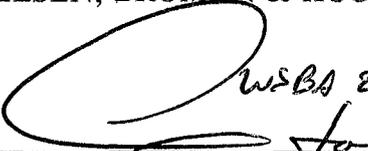
B. CONCLUSION

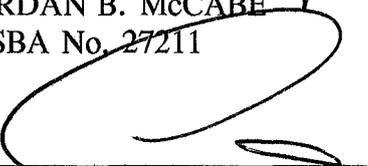
For the foregoing reasons and for the reasons stated in the opening and supplemental briefs, this Court should reverse Lam's conviction.

DATED this 9th day of July, 2008.

Respectfully submitted,

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