

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

In re the PRP of William R. Coggin,

STATE OF WASHINGTON,

Respondent,

v.

WILLIAM COGGIN,

Petitioner.

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

The Honorable Steven J. Mura, Judge

REPLY BRIEF OF PETITIONER

JENNIFER M. WINKLER  
Attorney for Petitioner

NIELSEN, BROMAN & KOCH, PLLC  
1908 East Madison  
Seattle, WA 98122  
(206) 623-2373

Today I deposited in the mails of the United States of America a properly stamped and addressed envelope directed to attorneys of record of ~~respondent/appellant/plaintiff~~ containing a copy of the document to which this declaration is attached.

*Whatcom County Prosecutor*  
I certify under penalty of perjury of the laws of the State of Washington that the foregoing is true and correct.

*Patrick Mayovsky* 10/23/2007  
Name Done in Seattle, WA Date

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A. ISSUES IN REPLY

1. Does petitioner have standing to raise this claim?
2. Was the in-chambers voir dire a closed hearing in violation of petitioner's public trial rights?
3. Did petitioner waive his right to a public trial by agreeing to a jury questionnaire?
4. Should this Court, contrary to established law, weigh the Bone-Club<sup>1</sup> factors for the first time in this proceeding?

B. ARGUMENTS IN REPLY

1. COGGIN HAS STANDING TO RAISE THIS CLAIM.

The right to a public trial is guaranteed by article I, section 10 of the Washington State Constitution, which commands that justice in all cases shall be administered openly. Likewise, article I, section 22 of our constitution guarantees that “[i]n criminal prosecutions the accused shall have the right . . . to have a speedy public trial.” These provisions serve “complementary and interdependent functions in assuring the fairness of our judicial system” and Washington courts employ the same closure standard for both provisions. State v. Bone-Club, 128 Wn.2d 254, 259, 906 P.2d 325 (1995). These same rights are guaranteed by the Sixth

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<sup>1</sup> State v. Bone-Club, 128 Wn.2d 254, 258-59, 906 P.2d 325 (1995).

Amendment. State v. Frawley, \_\_\_ Wn. App. \_\_\_, 167 P.3d 593, 596 (2007).

These guarantees include “‘the process of juror selection’ which ‘is itself a matter of importance, not simply to the adversaries but to the criminal justice system.’” In re Pers. Restraint of Orange, 152 Wn.2d 795, 804, 100 P.3d 291 (2004) (quoting Press-Enter. Co. v. Superior Court, 464 U.S. 501, 505, 104 S. Ct. 819, 78 L. Ed. 2d 629 (1984)). A violation of public trial right is presumed prejudicial and is not subject to harmless error analysis. State v. Easterling, 157 Wn.2d 167, 181, 137 P.3d 825 (2006).

An accused may assert his as well as the public’s right to a public trial. Id. at 177-80. The State does not cite authority to the contrary. Brief of Respondent (BOR) at 7-8 (citing, inter alia, Commonwealth v. Horton, 753 N.E.2d 119, 128 (Mass. 2001) (rejecting claim of ineffective assistance for counsel’s failure to assert public trial rights). The State’s claim that Coggin lacks standing should be rejected.

2. THE IN-CHAMBERS VOIR DIRE WAS A CLOSED HEARING IN VIOLATION OF COGGIN’S PUBLIC TRIAL RIGHTS.

The State appears to assert (1) the court’s statement that voir dire of certain jurors would occur in chambers “with counsel and the court reporter” present was not an order excluding the public and (2) the hearing

was not in fact closed because a detective, a corrections deputy, and the clerk were present during the closed proceeding. BOR at 8. Such arguments fly in the face of logic.

The court's statements upon retiring to chambers, directed to the courtroom, was sufficient to demonstrate it was excluding everyone except the parties and court employees. See Brief of Petitioner at 3-4; BOR at 8 (court's statements). In Bone-Club, for example, the court cleared the public from the courtroom by stating only, "All those sitting in the back, would you please excuse yourselves at this time," and then conducted a suppression hearing. 128 Wn.2d at 257. The Supreme Court found a constitutional violation occurred. Id.

Moreover, in the recent Frawley decision, the Court of Appeals clarified that for purposes of whether a violation of the right to a public trial has occurred, there is "no material distinction" between voir dire of individual jurors in camera and the closure of general voir dire of the jury panel: "Jury selection is jury selection." 167 P.3d at 596 (citing Orange, 152 Wn.2d at 804). The court's logic in Frawley is sound.

The record clearly indicates the court excluded the public from a private voir dire session without engaging in the required balancing test.

The presence of the parties and “the court” itself — including a detective,<sup>2</sup> a corrections deputy (presumably guarding Coggin), and a court clerk — does not undermine the conclusion this proceeding was closed to the public.

3. COGGIN DID NOT WAIVE HIS PUBLIC TRIAL RIGHTS OR INVITE ERROR.

Citing non-binding authority contrary to Washington law and case law that is not on point, the State claims this court should find Coggin waived his objection to the closed proceedings. BOR at 16-20. The State also suggests Coggin invited the error because he agreed to a jury questionnaire, drafted by the prosecutor, that mentioned the possibility of a closed hearing. BOR at 3, 15, 19-20. These arguments should be rejected.

In general, the failure of the accused object at trial does not waive the right to a public trial. State v. Brightman, 155 Wn.2d 506, 517, 122 P.3d 150 (2005) (citing Bone-Club, 128 Wn.2d at 257). The doctrine of invited error “prohibits a party from setting up an error at trial and then

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<sup>2</sup> ER 615 states:

At the request of a party the court may order witnesses excluded so that they cannot hear the testimony of other witnesses, and it may make the order of its own motion. This rule does not authorize exclusion of (1) a party who is a natural person, or (2) an officer or employee of a party which is not a natural person designated as its representative by its attorney, or (3) a person whose presence is shown by a party to be reasonably necessary to the presentation of the party's cause.

complaining of it on appeal.” In re Pers. Restraint of Thompson, 141 Wn.2d 712, 723, 10 P.3d 380 (2000). For the doctrine to apply, however, some affirmative action by an accused is generally required, such as proposing a jury instruction and then complaining about it on appeal. Id. at 724. Defense counsel’s actions in this case, which the State appears to acknowledge were limited to requesting a change in the State-proposed questionnaire, do not rise to the level of inviting the error. BOR at 3. The source of the error was the trial court, not defense counsel. The State’s claims should therefore be rejected.

4. WHERE A TRIAL COURT CLOSES PROCEEDINGS WITHOUT BALANCING THE NECESSARY FACTORS, THE REMEDY IS REMAND FOR A NEW TRIAL.

Although the court did not conduct any on-the-record balancing prior to closing the courtroom, the State urges this Court to balance the Bone-Club factors. BOR at 21-30. Washington courts have repeatedly rejected this approach.

“In order to protect the accused's constitutional public trial right, a trial court may not close a courtroom without, first, applying and weighing five requirements as set forth in Bone-Club and, second, entering specific findings justifying the closure order.” Easterling, 157 Wn.2d at 175. A reviewing court may review a trial judge's consideration of these factors as

found in the record, but may not consider them for the first time on appeal. Brightman, 155 Wn.2d at 518; Bone-Club, 128 Wn.2d at 261. The remedy for the violation is reversal and remand for new trial. Frawley, 167 P.3d 597.

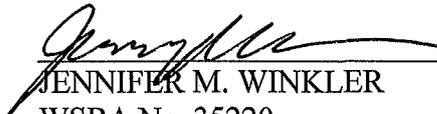
C. CONCLUSION

For the reasons stated above and in Coggin's opening brief, his petition should be granted and his convictions reversed.

DATED this 23<sup>rd</sup> day of October, 2007.

Respectfully submitted,

NIELSEN, BROMAN & KOCH, PLLC



JENNIFER M. WINKLER

WSBA No. 35220

Office ID No. 91051

Attorneys for Petitioner