

NO. 60153-9-I

COURT OF APPEALS OF THE STATE OF WASHINGTON

DIVISION I

STATE OF WASHINGTON,

Respondent,

v.

CHAUNCEY C. BANKS,

Appellant.

2010 MAY 24 PM 2:52

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APPEAL FROM THE SUPERIOR COURT FOR KING COUNTY

THE HONORABLE NICOLE K. MACINNES

BRIEF OF RESPONDENT

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A. ISSUE

Was justice administered openly when an entire criminal trial was open to the public, except for a brief chambers inquiry – unopposed by defense counsel – in which a single juror was questioned in private because she wanted to disclose a prior victimization by an armed man who attacked her in bed?

B. FACTS

Chauncey Banks was charged by amended information with robbery in the first degree and assault in the second degree. Trial began on May 22, 2007 and a series of pretrial motions were heard and decided in open court. 1RP 2-32. The court informed the lawyers that during *voir dire* it would ask jurors whether they had been the victim of a violent crime. 1RP 25. Defense counsel agreed this was appropriate because it was important to identify any juror who “got hurt or scared.” Id.

A panel of jurors was summoned to the open courtroom and *voir dire* began. 2RP 2. The court began by asking general questions. 2RP 2-20. In the middle of this process, the court said,

. . . Let me say, . . . when the attorneys get into their substantive questioning, if there's anything at all that you would feel more comfortable talking about outside

the presence of the other prospective jurors just say that. Of questions asked say[, “] I'd really rather talk about that privately[,”] and we can arrange that easily, and do it at a break or before we pick up again over the noon hour. It's a very common thing for jurors to ask. So please don't be hesitant or be embarrassed to do that. We are not here to embarrass you. We don't want to ask a lot of private questions, but there are some things we need to get a little more information about.

2RP 9-10. Neither counsel commented on these statements.

General questioning by the court continued and Juror No. 3 responded, along with nine other jurors, that she had been a victim of a crime against her person. 2RP 11-12. She also responded that she had reported this crime to the police. 2RP 12. Each lawyer then questioned the venire in open court in twenty-minute and ten-minute blocks of time. 1RP 27; 2RP 26-48, 74-88 (prosecutor); 50-73, 89-104 (defense). Both lawyers questioned jurors who had previously been victimized.

During the prosecutor's second round of questioning, he asked Juror No. 3 about her prior victimization and she was evidently reticent to respond directly, as the transcript shows:

Pros.: Juror No. 3. You had a situation where you had been the victim of a crime?

Juror: (Nods.)

Pros.: What was that?

Juror: It was a violent crime.

Court: Louder please.

Juror: It was a violent crime.

Pros.: Is this something you rather not - -

Juror: (Nods.)

Pros.: Okay. All right. We can follow up. How long ago was that?

Juror: That was mid-eighties. It was awhile back.

2RP 76-77.

The remainder of the jurors were questioned on a variety of subjects by both the prosecutor and defense counsel. 2RP 77-104. At the end of the allotted *voir dire* time, the court turned to the issue of Juror No. 3:

COURT: All right. I'm going to take the attorneys back here for just one quick moment again. So excuse us. We have logistic issues. I have a meeting at 12:00,¹ and the juror number 3 wanted to speak privately. So we have to talk about that privately. So I'm going to do – normally this isn't – we take you away, and then bring you back, but since we're having to bring number three back, maybe we can go into chambers with the court reporter, and we are going to talk to you back there. So the rest of you, you just got to sit tight. As soon as you're done with that come back, and we are now at the time of jury selection. So we should be able to get all this done by about three

¹ This meeting was actually scheduled for 3:00. See 1RP 28.

o'clock, and let everybody, but those of you who are on the jury, go. . . .

* * *

Juror number 3, come back. Kimmie,² come on back.

(Prospective Juror No. 3 was questioned in chambers.)

COURT: Let's talk about this incident.

JUROR: I was at home sleeping, and my daughter was in her bedroom, and my husband was out, and I didn't have the apartment door locked, and a man came in with a cap on his head, and he had either a screwdriver or knife, I couldn't really see it, and he attacked me in my bed.

COURT: And as a result of that what happened? I presume you called the police?

JUROR: Yeah, and FBI came out, and they got involved because they said, since I wasn't a 100 percent sure of who I thought it was, I guess they didn't do anything, but they wanted him to stay away from me.

COURT: So you thought you knew the person? So nothing ever happened as a result of that?

JUROR: Uh-huh.

COURT: I mean, no prosecution or...

² The juror who sat in position 3 in the box had a name phonetically similar to the name mentioned here in the transcript. Supp. CP ____ (Sub No. 47A, Clerk's Minutes). It is not perfectly clear from the record that "Juror No. 3" as used in the transcript refers to seat number three of the jury box, as opposed to a juror number randomly assigned at the beginning of *voir dire*. See 1RP 24. However, it seems likely that the reference to Juror No. 3 is a reference to the juror's seat in the box. Thus, it probably follows that the juror questioned in this passage sat as a juror to verdict. (The juror is not named in this brief given the sensitive nature of the inquiry.)

JUROR: No. They called him in, and talked to him, and they just told him to stay away and -- stay away. So...

COURT: How long ago was that?

JUROR: That was mid '80s.

COURT: Okay. Was that locally here?

JUROR: Kirkland.

COURT: Okay. Do you feel that that incident would have any bearing on your ability to be fair in this case and listen to the evidence?

JUROR: No, it wouldn't.

COURT: I mean, this case doesn't involve someone breaking into a house and committing a crime, but do you think you would be all right?

JUROR: Yeah, I would be fine.

COURT: Mr. Ferrell?

PROS: I don't have anything.

COURT: Mr. Johnson, any questions?

DEFENSE: No.

2RP 104-06.

The court described its system for exercising peremptory challenges and the parties then exercised their challenges. 2RP 107-12. Neither lawyer challenged Juror No. 3. Defense counsel accepted the panel as constituted. 2RP 112. The court noted that

it had “a meeting starting in a couple of minutes” and quickly instructed the jury to avoid contact with the parties in the halls and not to discuss the case. 2RP 112. The jury was sworn and the case was adjourned for the day. 2RP 115-16.

Trial was conducted from May 23rd through May 25th. The jury returned verdicts of guilty on robbery in the first degree and assault in the second degree, as charged. CP 41-42. Banks was sentenced, and he appeals. CP 82-83.

C. ARGUMENT

Banks argues that the questioning of a single venire member in chambers – a person who had previously been victimized in a violent crime and wanted to discuss the matter outside the presence of other jurors – violated his right to a public trial, and requires reversal of his conviction. His argument should be rejected. The short inquiry of this single juror in chambers does not warrant a new trial where Banks never objected to the inquiry, where questioning was clearly required to ensure an impartial jury, where Banks accepted the jury after *voir dire*, and where it is apparent that the courtroom remained open at all other times.

A brief closure like this, tied to protecting a juror's right to confidentiality, should be considered *de minimis*.

1. BANKS' CONVICTION SHOULD BE AFFIRMED
PURSUANT TO STATE V. MOMAH.

A criminal defendant has the right to a "speedy and public trial." Art. I, § 22. The constitution also requires that justice be administered openly. Art. I, § 10. Similar rights are recognized under the federal constitution. U.S. Const. amend VI; Press-Enterp. Co. v. Superior Court, 464 U.S. 501, 104 S. Ct. 819, 78 L. Ed. 2d 629 (1984). The Washington Supreme Court has held that where a courtroom is closed during significant portions of trial, these constitutional rights are violated and a new trial may be required. State v. Marsh, 126 Wash. 142, 217 P. 705 (1923) (superior court tried an adult as if he were a juvenile, closing the entire proceeding and failing to provide counsel); State v. Bone-Club, 128 Wn.2d 254, 906 P.2d 325 (1995) (trial court summarily granted State's request to clear the courtroom for the pretrial testimony of an undercover detective); State v. Brightman, 155 Wn.2d 506, 122 P.3d 150 (2005) (trial court ordered the courtroom closed for the entire 2 ½ days of voir dire, excluding the

defendant's family and friends); In re Pers. Restraint of Orange, 152 Wn.2d 795, 100 P.3d 291 (2004) (trial court summarily ordered the defendant's family and friends excluded from all *voir dire*); State v. Easterling, 157 Wn.2d 167, 137 P.3d 825 (2006) (trial court ordered defendant and attorney excluded from pretrial motions regarding the co-defendant). In all of these cases, the court was not closed to ensure a fair trial, and reversal was appropriate to vindicate the rights to a public trial.

More recently, in State v. Momah, 167 Wn.2d 140, 217 P.3d 321 (2009), the Washington Supreme Court recognized that sometimes an appellate court must balance the right to public trial against the defendant's right to an impartial jury. The court observed that

[open court] principles do not exist in isolation of other constitutional rights and principles. . . . Article I, sections 10 and 22 serve complementary and interdependent functions in assuring fairness of our judicial system. Indeed, the central aim of any criminal proceeding must be to try the accused fairly. Thus, the requirement of a public trial is primarily for the benefit of the accused . . .

Momah, 167 Wn.2d at 148. While proceedings are presumed to be open, "the right is not absolute . . . [and] . . . may be overcome by an overriding interest . . . essential to preserve higher values . . ."

Where article I, sections 10 and 22 conflict, a court “must harmonize the right to a public trial with the right to an impartial jury.” Momah, at 152-53 (citing Federated Publications, Inc. v. Kurtz, 94 Wn.2d 51, 61, 615 P.2d 440 (1980)). The rights should be construed “in light of the central aim of the criminal proceeding: to try the accused fairly.” Id.

On appeal, the question becomes whether a trial court’s failure to expressly balance these rights on the record always requires a new trial. “[N]ot all courtroom closure errors are fundamentally unfair . . .” Momah, at 150 (*discussing* Waller v. Georgia, 467 U.S. 39, 104 S. Ct. 2210, 81 L. Ed. 2d 31 (1984)). An appellate court should “devise a remedy appropriate to [the] violation.” Momah, at 149.

The court has identified a number of factors that should be considered when deciding an appeal of this nature including, whether closure impacted the fairness of the proceedings, whether the court sought objections, input or assent from the defendant, and whether the trial court considered the defendant’s right to a public trial. Momah, at 151. The Court said that the most important factor was that “the trial judge closed the courtroom to safeguard the defendant’s right to a fair trial by impartial jury, not to protect any

other interests.” Id. at 151-52. The court also made it clear that a defendant who makes tactical choices to protect his right to a fair and impartial jury, at the expense of openness, may not be entitled to the same remedy on appeal as would be applied to a defendant who did not make those tactical choices. Id. at 153.

On the same day as the court decided Momah, it decided State v. Strode, 167 Wn.2d 222, 217 P.3d 310 (2009). At least eleven jurors in Strode were examined in private. A majority of the court voted to reverse the conviction but there was no majority opinion, so the rationale for reversal is less than clear. It appears, however, that a majority of justices believed that because the record was wholly silent as to the reasons for closure, and because it was not apparent whether Strode’s lawyer assented to and benefitted from the procedure, reversal was required.

The Momah factors favor affirming Banks’ conviction; remand for a new trial would be grossly out of proportion to any public trial violation. First, and most importantly, it is clear that Juror No. 3 was questioned in chambers to ensure an impartial jury. She had informed the court that she was previously victimized in a violent crime and any reasonable defense lawyer would have wanted additional inquiry on that point to ensure her impartiality.

Second, the fairness of these proceedings could not have been affected in any way. Both parties understood the importance of private inquiry. Moreover, defense counsel was plainly satisfied with the juror's assurance that she could be fair. Third, defense counsel clearly had the opportunity to object, but did not, because counsel was obviously concerned about probing the juror's fairness. Fourth, although the trial judge did not expressly consider public trial rights, she mentioned that, ordinarily, she would have questioned the juror in open court but, since the inquiry was to be brief, and the rest of the jury was assembled in the courtroom, the juror could be questioned in chambers. 2RP 104 ("Normally . . . we take you away and then bring you back . . ."). All these factors except the last one favor affirming Banks' conviction.

Still, even if the trial court erred, the grant of a new trial is not appropriate. Trial counsel clearly subverted Banks' interest in open courtrooms to his interest in finding out what Juror No. 3 had to say. Although this tactical choice may not rise to the level of invited error, it does inform the scope of Banks' remedy. Momah, at 149, 153-55.

2. THE CHAMBERS CONFERENCE HERE WAS FLEETING AND, AT WORST, A *DE MINIMIS* CLOSURE.

The Washington Supreme Court has observed that “a trivial [courtroom] closure does not necessarily violate a defendant’s public trial right.” State v. Brightman, 155 Wn.2d at 517. Several justices have suggested in dicta, however, that no closure has yet been found to be trivial. State v. Easterling, 157 Wn.2d at 180-81. Justice Madsen has argued that Washington should recognize the *de minimis* closure exception, which “applies when a trial closure is too trivial to implicate the constitutional right to a public trial. . . i.e., no violation of the right to a public trial occurred at all.” Easterling, 157 Wn.2d at 183-84 (Madsen, J. concurring). The exception can apply to either inadvertent or deliberate closures. Id. Other justices have argued that “the people deserve a new trial” each and every time a courtroom is closed, no matter how insignificant. Id. at 185 (Chambers, J. concurring). Thus, whether a closure can be *de minimis* under Washington law is an open question.

This court should hold that the brief chambers conference in this case was *de minimis*. A single juror asked for permission to relate, outside the presence of other jurors, a violent attack she had endured some years earlier. She described an attack by an armed

intruder as she slept in her bed. It is not mentioned whether a sexual assault was involved. It is not clear if she had ever before told a stranger (other than the police) about the attack. Although the juror was questioned out of the sight and hearing of the courtroom, all other venire members and the court staff remained in the courtroom, and the courtroom remained open. It is quite likely the trial judge did not view this as a closure, at all, since it was so brief. The inquiry spans a mere three pages of a trial transcript that is about 608 pages long. This *de facto* closure should be held to be *de minimis*.

3. JURORS HAVE A RIGHT TO PRIVATE INQUIRY ON SENSITIVE MATTERS; THAT RIGHT OBTVIATES THE NEED FOR AN EXPRESS BONE-CLUB ANALYSIS, AT LEAST WHEN THE RECORD CLEARLY SHOWS THAT THE JUROR'S CONCERNS WERE LEGITIMATE.

Neither the majority opinion in *Momah* nor the lead and concurring opinions in *Strode* expressly address juror privacy, and whether juror privacy should factor into this analysis. Such arguments were raised by the Washington Association of Prosecuting Attorneys as amicus in *Strode*, but the State, as party, did not brief those issues. RAP 13.7(b); Citizens for Responsible

Wildlife Mgmt. v. State, 149 Wash.2d 622, 631, 71 P.3d 644 (2003)

(court generally does not address an issue raised solely by an amicus). The dissent in Strode addressed these arguments.

Strode, 167 Wn.2d at 236-40.

The State respectfully asks this court to hold that reversal is not required where a single juror was questioned in private to protect that juror's privacy. Such a holding would be consistent with United States Supreme Court precedent, and with Washington Supreme Court authority.

In Press-Enterp. Co., supra, a capital rape-murder case, the trial court authorized closure of the courtroom for six full weeks of *voir dire*, and refused requests from the press to relinquish even a partial transcript of those proceedings. Press-Enterp. Co., 464 U.S. 503-04. The trial court justified this total closure based on a concern for the defendant's right to a fair trial and on concerns for the privacy of a few jurors. Id. at 510.³ But, the trial judge closed "an incredible six weeks of *voir dire*" without tailoring the closure to the asserted interests. Id. at 513. Because the closure was so

³ The trial court observed, "Most of them are of little moment. There were a few, however, in which some personal problems were discussed which could be somewhat sensitive as far as publication of those particular individual's situations are concerned." Id. at 504.

seriously out of balance with the asserted interests of the few jurors, the Supreme Court reversed the conviction. Id. at 510-11.

The Supreme Court went to great pains to observe, however, that privacy rights of jurors are different, and may justify a private inquiry without violating the right to a public trial.

The jury selection process may, in some circumstances, give rise to a compelling interest of a prospective juror when interrogation touches on deeply personal matters that person has legitimate reasons for keeping out of the public domain. The trial involved testimony concerning an alleged rape of a teenage girl. Some questions may have been appropriate to prospective jurors that would give rise to legitimate privacy interests of those persons. For example a prospective juror might privately inform the judge that she, or a member of her family, had been raped but had declined to seek prosecution because of the embarrassment and emotional trauma from the very disclosure of the episode. The privacy interests of such a prospective juror must be balanced against the historic values we have discussed and the need for openness of the process.

Press-Enterp. Co., 464 U.S. at 511-12. The Court recommended that a trial judge should "ensure that there is in fact a valid basis for a belief that disclosure infringes a significant interest in privacy" in order to minimize the breadth of any closure order.

This is the general approach recommended and followed in Washington. For example, GR 31(j) provides that "individual juror information, other than name, is presumed to be private." The juror

handbook appearing on the Washington Courts website clearly anticipates that questioning may occur in private:

After you're sworn in, the judge and the lawyers will question you and other members of the panel to find out if you have any knowledge about the case, any personal interest in it, or any feelings that might make it hard for you to be impartial. This questioning process is called *voir dire*, which means "to speak the truth." ... Though some of the questions may seem personal, you should answer them completely and honestly. ... If you are uncomfortable answering them, tell the judge and he/she may ask them privately.⁴

Similarly, the video shown to prospective jurors upon their arrival for service tells them to alert the court if they wish to answer certain questions in private.⁵ The Washington State Jury Commission recommends that jurors be given an opportunity to discuss sensitive matters in private.⁶ The American Bar Association likewise recommends private inquiry into sensitive matters.⁷ Studies have shown that jurors will respond more frankly if sensitive

⁴ http://www.courts.wa.gov/newsinfo/resources/?fa=newsinfo_jury.jury_guide#A3.

⁵ <http://www.courts.wa.gov/newsinfo/resources/>.

⁶ "Recommendation 20 ... The court should try to protect jurors from unreasonable and unnecessary intrusions into their privacy during jury selection. In appropriate cases, the trial court should submit written questionnaires to potential jurors regarding information that they may be embarrassed to disclose before other jurors. ..." http://www.courts.wa.gov/committee/?fa=committee_display&item_id=277&committee_id=101.

⁷ See The ABA Principles for Juries and Jury Trials (and Commentary), at 42-43; http://www.abanet.org/jury/pdf/final%20commentary_july_1205.pdf.

questions are asked privately.⁸ Until recently, no case in Washington has questioned the propriety of this sensible approach.

A juror should not be forced to disclose sensitive, private information to the general public simply because he or she received a jury summons. Response rates to juror summons are notoriously low. If jurors are not offered the modicum of privacy granted by an *in camera* screening process, that rate may drop further. These concerns exist whenever a juror is called to serve and must answer questions in a room of strangers. The right to a public trial may be protected without requiring such a high price be paid by jurors performing their civic duty.

⁸ "A number of empirical studies have found that prospective jurors often fail to disclose sensitive information when directed to do so in open court as part of the jury selection process. A 1991 study of juror honesty during voir dire found that 25% of jurors questioned during voir dire failed to disclose prior criminal victimization by themselves or their family members. In a more recent study of the effectiveness of individual voir dire, Judge Gregory Mize (D.C. Superior Court) found that 28% of prospective jurors failed to disclose requested information during questioning directed to the entire jury panel. During individual voir dire, a number of those jurors revealed information that Judge Mize believed was relevant to their ability to serve fairly and impartially. Thus, failure to protect juror privacy can actually undermine the primary objective of voir dire – namely, to elicit sufficient information about prospective jurors to determine if they can serve fairly and impartially." Making the Case for Juror Privacy: A New Framework for Court Policies and Procedures, by Paula L. Hannaford (footnotes omitted). http://www.ncsconline.org/WC/Publications/Res_Juries_JurorPrivacyWhitePaperPub.pdf.

The Supreme Court and the Washington Supreme Court have made it clear that reversal of a conviction is not required each time the public trial right was violated.⁹ The Court observed that "the remedy should be appropriate to the violation" and that there is no need to provide the defendant with a windfall to vindicate the interests of the public. Waller, 467 U.S. at 50; Momah at 149.

For these reasons, the State respectfully asks this Court to hold that, as to *in camera* screenings of jurors as to their private personal histories, a new trial should not be ordered where it is apparent that private inquiry was warranted to protect the juror's privacy. There can be no serious question that this lone juror's request for private inquiry was reasonable.

⁹ Under Supreme Court precedent, unpreserved claims of error are forfeited. Peretz v. United States, 501 U.S. 923, 936, 111 S. Ct. 2661, 115 L. Ed. 2d 808 (1991) ("[t]he most basic rights of criminal defendants are . . . subject to waiver."); Yakus v. United States, 321 U.S. 414, 444, 64 S. Ct. 660, 88 L. Ed. 834 (1944) ("No procedural principle is more familiar to this Court than that a constitutional right may be forfeited in criminal . . . cases by the failure to make timely assertion of the right"). This principle has been applied to open courtroom claims. Levine v. United States, 362 U.S. 610, 619, 80 S. Ct. 1038, 4 L. Ed. 2d 989 (1960). See also Waller, 467 U.S. at 42 n.2 (co-defendant who failed to object to closure might not be permitted to raise the claim). Cf. Presley v. Georgia, ___ U.S. ___, 130 S. Ct. 721, ___ L. Ed. 2d ___ (January 19, 2010) (defendant who objected to closure is entitled to new trial). Thus, under federal law, Banks would not even be permitted to raise his argument on appeal.

D. CONCLUSION

For the foregoing reasons, Banks' conviction should be affirmed.

DATED this 24th day of May, 2010.

Respectfully submitted,

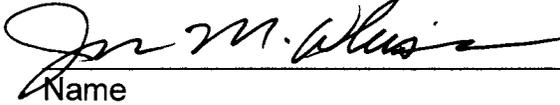
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Certificate of Service by Mail

Today I deposited in the mail of the United States of America, postage prepaid, a properly stamped and addressed envelope directed to Andrew Zinner, the attorney for the appellant, at Nielsen Broman & Koch, P.L.L.C., 1908 E. Madison Street, Seattle, WA 98122, containing a copy of the Brief of Respondent, in STATE V. CHAUNCEY C. BANKS, Cause No. 60153-9--I, in the Court of Appeals, Division One.

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


Name

Done in Seattle, Washington

5/24/10
Date