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NO. 62072-0-I

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

In re the Detention of:

WINSTON MOTLEY,

Appellant.

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Criminal Division
Civil Commitment Unit

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

The Honorable Bruce E. Heller, Judge

REPLY BRIEF OF APPELLANT

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A. ARGUMENT IN REPLY¹

THE TRIAL COURT UNLAWFULLY CLOSED PORTIONS OF THE TRIAL TO THE PUBLIC.

Motley contends in-chambers, unrecorded discussion of jury questions to witnesses violated the right to a public trial under article I, section 10 of the Washington Constitution. Brief of Appellant (BOA) at 9-18. In response, the state maintains (1) Motley lacks standing to invoke the public's right to open court proceedings; (2) Motley waived the issue by failing to object; (3) the right to a public trial does not apply to the "informal" in-chambers conference; and (4) the in-chambers proceedings were too de minimis. Brief of Respondent (BOR) at 7-27.

a. Motley has standing.

A litigant generally has no standing to challenge a statute in order to vindicate the constitutional rights of a third party. Mearns v. Scharbach, 103 Wn. App. 498, 511, 12 P.3d 1048 (2000), review denied, 143 Wn.2d 1011 (2001). But because the prohibition against third-party standing is prudential, rather than constitutional, there are exceptions to this general rule. Coalition of Clergy, Lawyers, and Professors v. Bush, 310 F.3d 1153, 1163 (9th Cir. 2002).

¹ Motley also argued the trial court committed reversible error by giving an outdated jury instruction. Brief of Appellant at 18-28. He rests on his brief with respect to that argument.

The litigant may have standing if (1) the litigant has suffered an injury-in-fact, giving him a sufficiently concrete interest in the outcome of the disputed issue; (2) the litigant has a close relationship to the third party; and (3) there exists some hindrance to the third party's ability to protect his or her own interests. Powers v. Ohio, 499 U.S. 400, 411, 111 S. Ct. 1364, 113 L. Ed. 2d 411 (1991); Ludwig v. Washington State Dept. of Retirement Systems, 131 Wn. App. 379, 385, 127 P.3d 781 (2006).

The state first asserts Motley did not suffer an injury-in-fact, claiming instead he actually benefited from the in-chambers proceeding "because it allowed the trial to proceed without dismissing the jury at the end of each witness to discuss potential jury questions." BOR at 13.

This Court should reject this claim. The state cites no authority for the proposition a party – be it the petitioner or the respondent -- benefits from more efficient or faster trials. Promoting speedier trials may permit the judicial system to process more cases, but there is nothing to suggest time savings inure to the benefit of any individual litigant. More specifically, the state makes no showing Motley benefited from the private consideration of jury questions.

Indeed, the opposite is true. Powers is instructive by analogy.² The Powers Court held a white criminal defendant had standing to raise the equal protection rights of black venire members who were excluded from jury service through the state's race-based peremptory challenges. 499 U.S. at 415. The Court held the white defendant was injured by and had a concrete interest in preventing racially motivated peremptory challenges because racial discrimination during voir dire casts doubt on the integrity of the proceeding and diminishes its fairness. Powers, 499 U.S. at 411. This was particularly harmful because "the jury acts as a vital check against the wrongful exercise of power by the State and its prosecutors." Id.

Similar reasoning justifies an RCW 71.09 respondent's assertion of the article I, section 10 right to open judicial proceedings. First, the public trial right is designed to promote fairness, remind judges and attorneys of the importance of their functions, encourage witnesses to testify, and deter perjury. State v. Strobe, 167 Wn.2d 222, 226, 217 P.3d 310 (2009) (citing State v. Brightman, 155 Wn.2d 506, 514, 122 P.3d 150 (2005)). All participants in the judicial process benefit from open proceedings. Just as

² This Court adopted the Powers rationale to find a male defendant has standing to raise equal protection claims on behalf of women who, through the state's gender-based use of peremptory challenges, are wrongfully excluded from the jury. State v. Burch, 65 Wn. App. 828, 838, 830 P.2d 357 (1992).

the jury, the public serves as a "vital check" on the system. The respondent in an RCW 71.09 proceeding thus has a concrete interest in opposing closure, which frustrates these purposes and results in injury-in-fact.

The state next maintains Motley fails to show he has a close relationship to the excluded public because he "makes no representation that he is asserting a violation on behalf of a particular member of the public." BOR at 13-14.

Again, Powers reveals the weakness of the state's position. The Court found the defendant had a close relationship to the excluded prospective jurors because they shared an interest in eliminating racial bias from the courtroom. Powers, 499 U.S. at 413-14. The defendant had much to gain, according to the Court, in proving the jury was wrongly chosen because discrimination in the voir dire process may result in reversal of a conviction. Powers, 499 U.S. at 414.

Similarly, Motley and the public have a close relationship because of their shared interest in open proceedings, which encourage responsible performances of judges, attorneys and witnesses. See Press-Enterprise Co. v. Superior Court, 478 U.S. 1, 7, 106 S. Ct. 2735, 92 L. Ed. 2d 1 (1986) ("The right to an open public trial is a shared right of the accused and the public, the common concern being the assurance of fairness."). After all,

“[t]he requirement of a public trial is for the benefit of the accused; that the public may see he is fairly dealt with and not unjustly condemned, and that the presence of interested spectators may keep his triers keenly alive to a sense of their responsibility and to the importance of their functions....”

State v. Bone-Club, 128 Wn.2d 254, 259, 906 P.2d 325 (1995) (quoting In re Oliver, 333 U.S. 257, 270 n.25, 68 S. Ct. 499, 92 L. Ed. 682 (1948) (quoting Thomas M. Cooley, Constitutional Limitations 647 (8th ed. 1927)).

Finally, the state contends Motley has not shown a particular member of the public cannot protect his or her own interest. BOR at 14. In Powers, the court found “[t]he barriers to a suit by an excluded juror are daunting,” in part because “[p]otential jurors are not parties to the jury selection process and have no opportunity to be heard at the time of their exclusion.” Powers, 499 U.S. at 414. The same is true where a trial court summarily moves a portion of a judicial proceeding into chambers, as the court did in Motley's case. Here, the trial court gave no member of the public an opportunity to object. Instead, after the jurors passed their questions forward, the judge merely said, “Counsel, why don't we go in chambers?” RP 858-59. To expect a member of the public to rise and either object or request permission to watch at that point is unreasonable.

The state also maintains this Court's decision in D.F.F. “cannot be read to confer standing” in Motley's case. BOR at 14-16. D.F.F.

challenged MPR 1.3, which provides that RCW 71.05 mental illness commitment proceedings shall be closed to the public unless the person subject to the proceedings or his attorney requests the proceedings be public. In re Detention of D.F.F., 144 Wn. App. 214, 218, 183 P.3d 302, review granted, 164 Wn.2d 1034 (2008). D.F.F. maintained the rule violated article I, section 10. D.F.F., 144 Wn. App. at 219.

This Court agreed, citing several civil cases for the proposition that the "Supreme Court has repeatedly held that article I, section 10 guarantees that the public's interest in access to court proceedings will not be impaired absent a compelling countervailing interest." D.F.F., 144 Wn. App. at 220. This Court concluded that because MPR 1.3 requires complete and automatic closure, it violates article I, section 10. D.F.F., 144 Wn. App. at 226.

This Court reached this conclusion despite D.F.F.'s failure to object. D.F.F., 144 Wn. App. at 218-19. The state calls this portion of D.F.F. dicta because "[t]here is no indication in the opinion that failure to object was a factual issue . . . or that the State challenged D.F.F.'s position on this basis." BOR at 15.

But the issues as framed by the parties do not limit an appellate court if the parties ignore established precedent. City of Seattle v. McCready, 123 Wn.2d 260, 269, 868 P.2d 134 (1994). It is apparent this

Court in D.F.F. was noting established precedent, because it observed that the Supreme Court "has clearly instructed that 'a defendant does not waive his right to appeal an improper closure by failing to lodge a contemporaneous objection.'" D.F.F., 144 Wn. App. at 218-19 (quoting State v. Easterling, 157 Wn.2d 167, 176 n.8, 137 P.3d 825 (2006)).

The state also maintains D.F.F. is distinguishable because "the state is challenging Motley's standing to raise rights that belong to the public and the press." BOR at 15. But D.F.F. likewise relied on a right belonging to the public and the press. See D.F.F., 144 Wn. App. at 219-20 ("According to D.F.F., the Supreme Court's opinions uniformly require an individualized analysis resulting in specific findings in order for court closures *to satisfy article I, section 10.*") (emphasis added). This Court had no problem with such reliance in that case; nor should it in Motley's case.

For these reasons, this Court should reject the state's assertion that Motley lacked standing to assert the right to open judicial proceedings under article I, section 10.

b. Motley did not waive the right guaranteed by article I, section 10. Nor did he invite the trial court's error.

The state claims Motley waived his argument on appeal by failing to raise it in the trial court. The state also asserts, citing State v. Momah,³ that Motley invited the error. Washington courts have repeatedly rejected the notion of waiver or invited error in similar circumstances. See Strode, 167 Wn.2d at 234 ("[T]he failure to object, alone, does not constitute waiver of the right to a public trial[.]") (Fairhurst, J. concurring); 167 Wn.2d at 229 ("Strode's failure to object to the closure or his counsel's participation in closed questioning of prospective jurors did not, as the dissent suggests, constitute a waiver of his right to a public trial." (Alexander, C.J., lead opinion)).

The state's reliance on Momah is unavailing. Motley's counsel did not invite the trial court's error in the Momah sense. Counsel did not initiate the in-chambers meeting, offer any input on its efficacy, affirmatively assent to it, or argue for its expansion. Nor did counsel or the trial judge, as in Momah, express any concern about the possibility public consideration of jurors' questions might jeopardize Motley's right to a fair trial. On the record before it, this Court cannot legitimately presume Motley "made tactical choices to achieve what he perceived as the fairest

³ 167 Wn.2d 140, 217 P.3d 321 (2009).

result." Momah, 167 Wn.2d at 155. By minimally participating in a procedure dictated by the trial court, Motley did not invite the court to violate his right to a public trial.

c. Motley's right to public proceedings applied to the in-chambers conference.

The state asserts that "the informal chamber conference does not qualify as 'proceedings' or 'hearings' that can fairly be characterized as part of Motley's trial." BOR at 17. The state compares the conference to a sidebar and cites to cases holding a defendant has no right to be present when the subjects discussed are merely ministerial or purely legal. BOR at 17-20. Because the public trial right did not attach to the in-chambers conference, the state deduces, the closure was "discretionary." BOR at 21-23.

There are several reasons for this Court to reject this argument. First, this argument got no further than a dissenting opinion in State v. Heath, 150 Wn. App. 121, 131, 206 P.3d 712 (2009) (regarding motions in limine that addressed purely legal matters heard in chambers). A majority of the court rejected a similar argument in State v. Sadler, holding the right to a public trial applied to discussion of the accused's Batson⁴

⁴ Batson v. Kentucky, 476 U.S. 79, 106 S. Ct. 1712, 90 L. Ed.2d 69 (1986).

challenge to the state's use of a peremptory challenge to excuse a venireperson. 147 Wn. App. 97, 114-16, 193 P.3d 1108 (2008), petition for review pending.⁵

Second, the public trial right applies to the evidentiary phases of the trial and other "adversary proceedings." State v. Rivera, 108 Wn. App. 645, 652-53, 32 P.3d 292 (2001), review denied, 146 Wn.2d 1006 (2002) (quoting Ayala v. Speckard, 131 F.3d 62, 69 (2d Cir.1997)). Similarly, the accused has the right to be present at all phases of trial where his substantial rights might be affected. State v. Walker, 13 Wn. App. 545, 557, 536 P.2d 657, review denied, 86 Wn.2d 1005 (1975).

In Motley's case, the jury's questions were directed to the expert witnesses. CP 56-57, Supp. CP __ (sub no. 50A, Juror Questions of Witness Dr. Theodore Donaldson, filed 7/1/2008).⁶ In one set of questions, jurors wanted more factual information about the actuarial tests, which the experts relied on in determining whether Motley qualified for

⁵ Of note, the Sadler court was evidently not persuaded by the state's reliance on In re Personal Restraint of Lord, 123 Wn.2d 296, 868 P.2d 835 (1994) and In re Personal Restraint of Pirtle, 136 Wash.2d 467, 484, 965 P.2d 593 (1998). Sadler, 147 Wn. App. at 114. The state relies on those same cases in Motley's case. BOR at 17-19.

⁶ In footnote 6 of the Brief of Appellant, Motley states the record did not indicate that the questions to Dr. Donaldson were filed in the trial court. BOA at 9. This was error; Motley's counsel overlooked sub. no. 50A.

commitment under RCW 71.09. CP 56 (questions to Dr. Robert Wheeler). In the set directed to Dr. Donaldson, jurors asked questions about statistics and the concept of paraphilia NOS non-consent, among other topics. Supp. CP __.

Resolving whether or not to ask these substantive questions, or to amend them, cannot be considered a purely legal or ministerial function. Moreover, while not strictly an "evidentiary phase," the in-chambers conference had a direct bearing on what evidence the jurors were permitted to consider during deliberations. Finally, the conference certainly was a phase where Motley's substantial rights might be affected.

That the conference here was a "proceeding" to which the public trial right attached becomes clear when compared to the facts of cases reaching opposite conclusions. In one of those cases, State v. Sublett, the jury asked the court to explain its accomplice instruction. __ Wn. App. __, 231 P.3d 231, 241 (2010). The court met with counsel in chambers and everyone agreed the court should decline to answer the question. Id.

On appeal, the court held the private conference did not trigger the public trial right. Id. at 243 (2010). The court concluded the matter was purely legal or ministerial, and did not require the resolution of disputed facts. Id. The court found it important that "questions from the jury to the trial court regarding the trial court's instructions are part of jury

deliberations and, as such, are not historically a public part of the trial." Sublett, 231 P.3d at 243.

Sublett is distinguishable. The jury question there went to a court's instruction. Because the court's instructions are the law of the case, resolution of the question – unlike those in Motley's case -- involved a purely legal matter. Furthermore, while the question in Sublett arose during the jury's inherently private deliberations, the questions in Motley were presented during the evidentiary phase of the case. Contrasting Sublett with Motley's case reveals the weakness of the state's argument. See also State v. Bremer, 98 Wn. App. 832, 835, 991 P.2d 118 (2000) (accused had no right to be present during conference on court's jury instructions because "[j]ury instructions involve resolution of legal issues, not factual issues.").

Another case, one upon which the state relies, is Rivera. BOR at 20. The trial court there closed a hearing to address a juror's complaint regarding another juror's hygiene and a discussion about seating one juror away from another juror. Rivera, 108 Wn. App. at 653. Unremarkably, the court found this a "ministerial matter, not an adversarial proceeding. It did not involve any consideration of evidence, or any issue related to the trial." Id. Equating the public's right to view a proceeding with the

accused's right to be present, the court held there was no violation of the constitutional right to a public proceeding. Id.

The issues discussed in the private conference in Rivera were patently ministerial, having nothing to do with the facts of the case or the applicable law. The private discussion in Motley's case bears no relation to the one in Rivera.

For all these reasons, the in-chambers conference in Motley's case was a "proceeding" to which the right to a public trial attached. The state's argument to the contrary should be rejected.

Next, the state claims Motley waived the issue by failing to object to the trial court's "discretionary courtroom closure." BOR at 21-23. For this proposition the state relies on State v. Collins, 50 Wn.2d 740, 746, 314 P.2d 660 (1957), where the court locked the courtroom door to prevent distraction during the prosecutor's closing argument. The defendant did not object, and the Supreme Court found the issue waived. Collins, 50 Wn.2d at 748.

Collins is distinguishable. The accused was not deprived of his right to have the public view the proceedings. The trial court merely announced it would be locking the courtroom during the prosecutor's argument and that those spectators in the courtroom were free to remain. Collins, 50 Wn.2d at 746. This was important to the Court; it held that "if,

as in the present case, a reasonable number of people are in attendance and there has been no partiality or favoritism in their admission, an order excluding the admittance of others may be entered if justification exists." Id. at 748.

It is apparent from this language the Court's opinion would likely have been different if, as in Motley's case, *no one* from the public was permitted to view the proceedings. Furthermore, Collins was decided well before the current analytical framework for public trial issues. Whatever it may have once dictated, it does not represent the state of the law. Under current precedent, no objection is necessary to preserve the issue for appeal. See BOA at 16; Bone-Club, 128 Wn.2d at 258 (Collins distinguishable because trial court ordered courtroom doors locked but still allowed reasonable number of spectators to remain; Collins court held partially closed hearing did not rise to level of constitutional violation).⁷

Collins does not change the analysis in Motley's case. This Court should find he has not waived this issue by failing to object.

d. The trial court's error was not de minimis.

The state asserts any error in closure "was for such a short period of time it was too trivial to cause a constitutional deprivation." BOR at 25.

⁷ With respect to this issue, Collins has been cited in but two published opinions – one of them Bone-Club -- in its half-century of existence.

Such "de minimis" claims have been repeatedly rejected. Strode, 167 Wn.2d at 230 (noting Supreme Court has never found violation of public trial right to be de minimis); see State v. Duckett, 141 Wn. App. 797, 809, 173 P.3d 948 (2007) ("The closure here was deliberate, and the questioning of the prospective jurors concerned their ability to serve; this cannot be characterized as ministerial in nature or trivial in result."), petition for review pending.

Motley urges this Court to reject the state's arguments. The trial court's commitment order should be reversed.

B. CONCLUSION

For the reasons cited herein and in his Brief of Appellant, Motley requests this Court to reverse the trial court's order of commitment and remand for a new trial.

DATED this 9 day of July, 2010.

Respectfully submitted,

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

In re the Detention of:)	
)	
)	
WINSTON MOTLEY,)	COA NO. 62072-0-1
)	
)	
Appellant.)	

DECLARATION OF SERVICE

I, PATRICK MAYOVSKY, DECLARE UNDER PENALTY OF PERJURY UNDER THE LAWS OF THE STATE OF WASHINGTON THAT THE FOLLOWING IS TRUE AND CORRECT:

THAT ON THE 9TH DAY OF JULY, 2010, I CAUSED A TRUE AND CORRECT COPY OF THE **REPLY BRIEF OF APPELLANT** TO BE SERVED ON THE PARTY / PARTIES DESIGNATED BELOW BY DEPOSITING SAID DOCUMENT IN THE UNITED STATES MAIL.

[X] WINSTON MOTLEY
SPECIAL COMMITMENT CENTER
P.O. BOX 88600
STEILACOOM, WA 98388

SIGNED IN SEATTLE WASHINGTON, THIS 9TH DAY OF JULY, 2010.

x. *Patrick Mayovsky*