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COURT OF APPEALS 62109-2
DIVISION ONE

FEB 24 2009

Court of Appeals No. 62109-2-I
Skagit County Superior Court No. 03-1-00660-1

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

In re the Personal Restraint of:

PATRICK L. MORRIS

Petitioner.

REPLY ON PERSONAL RESTRAINT PETITION

By:

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I. REPLY ARGUMENT

A. MORRIS'S RIGHT TO A PUBLIC TRIAL WAS DENIED WHEN THE TRIAL COURT CLOSED THE COURTROOM FOR PORTIONS OF JURY SELECTION

1. Morris is not Seeking a New Rule

The State argues first that Morris is improperly relying on a “new rule” of constitutional procedure. As the State concedes, however, Morris is entitled to rely on any rule that was already established at the time his conviction became “final.” Finality, for these purposes, is defined as the date that the time for filing a petition for a writ of certiorari expired. See State’s Response to Personal Restraint Petition (Response) at 8.

Mr. Morris’s petition for review was denied on July 11, 2007. The time for filing a petition for a writ of certiorari expired 90 days later, which would be October 9, 2007. See Supreme Court Rule 13.1. The rule upon which Morris relies was established in 1984. See Waller v. Georgia, 467 U.S. 39, 104 S. Ct. 2210, 81 L. Ed. 2d 31 (1984) (defendant’s constitutional right to a public trial is violated unless trial court makes certain findings concerning the need for closure). Further, nearly all of the Washington cases cited by Morris were decided before October 9, 2007. See Personal Restraint Petition with Legal Argument and Authorities (PRP) at 7-11. The only exception is State v. Momah, 141 Wn. App. 705, 171 P.3d 1064 (2007), rev. granted, 163 Wn.2d 1012, 180 P.3d 1297 (2008), but Morris has urged the Court *not* to follow that case. In any event, Morris is not prohibited from relying on cases decided after

his conviction became final, as long as those cases did not establish an entirely new rule.

Perhaps what the State is really trying to say is that no case decided before October 9, 2007, dealt with the precise facts involved in this case. The “new rule” doctrine, however, is not that limited. Where a rule necessarily requires “case-by-case examination of the evidence,” the court tolerates “a number of specific applications without saying those applications themselves create a new rule.” Wright v. West, 505 U.S. 277, 308-309, 120 L. Ed. 2d 225, 112 S. Ct. 2482 (1992) (Kennedy, J., concurring in judgment). In other words, when dealing with “a rule designed for the specific purpose of evaluating a myriad of factual contexts, it will be the infrequent case that yields a result so novel that it forges a new rule, one not dictated by precedent.” Id. Here, the rule that criminal trials must be open to the public unless sufficient findings are made to justify closure necessarily requires a case-by-case examination. In each case, the nature of the closure and the reasons purportedly justifying it will be different. Even under the very restrictive rules governing federal habeas, a petitioner need not point to a case dealing with his precise facts. See Ramdass v. Angelone, 530 U.S. 156, 166, 120 S. Ct. 2113, 147 L.Ed.2d 125 (2000).

2. The Invited Error Doctrine does not Apply

The State next argues that Morris invited the error. It is true that Morris waived his own presence during the closed portion of jury selection because he believed the jurors would be more forthcoming in his absence.

But Morris never waived the presence of the public. Rather, his attorney said nothing about the trial court's decision to move jury selection into chambers. As the State concedes, mere silence in the face of manifest constitutional error does not invite the error. Response at 14, citing State v. Stein, 144 Wn.2d 236, 241, 27 P.3d 184 (2001).

The invited error doctrine prevents a defendant from appealing an action of the trial court that the defendant himself procured. State v. Henderson, 114 Wn.2d 867, 870, 792 P.2d 514 (1990). "This prevents counsel from 'setting up' the trial court by seeking a specific action of the court and then seeking reversal on the basis of that same action." State v. Young, 129 Wn. App. 468, 472, 119 P.3d 870 (2005). In Young, defense counsel did not invite error by asking the trial court to read the information to the jury, because he did not intend the court to include prejudicial information about a prior conviction. Id. "A trial court's obligation to follow the law remains the same regardless of the arguments raised by the parties before it." State v. Quismundo, 164 Wn.2d 499, 505-06, 192 P.3d 342 (2008) (defense did not invite error by going forward with trial on amended information when it could have insisted on dismissal without prejudice at close of State's case).

Here, neither side asked the trial court to take the "specific action" of questioning jurors in a closed setting. Rather, the parties relied on the trial court to "follow the law" and accepted the Court's procedures without objection.

State v. Erickson, 146 Wn. App. 200, 189 P.3d 245 (2008), is directly on point. In that case, the parties jointly prepared a jury questionnaire that permitted the jurors to request private questioning. Id. at 203-04. The trial court took the jurors that made such requests into the jury room for voir dire, and counsel participated without objection. Id. at 204. On appeal, the State argued that the defense invited error.

The Court of Appeals disagreed because Erickson “did not ask the trial court to close the courtroom.” Id. at 205 n.2. “He merely acquiesced to the trial court’s proposal and his failure to object does not waive his right to public trial under article I, section 22.” Id., citing State v. Brightman, 155 Wn.2d 506, 517, 122 P.3d 150 (2005). “Furthermore, helping shape a questionnaire before beginning voir dire does not indicate his desire to move the proceedings out of the courtroom.” Id. In Erickson, as here, it was ultimately the trial court’s decision to move questioning into a closed setting. Id. at 208 n.5. “Thus, we disagree with the dissent’s suggestion that Erickson in effect ‘requested’ a courtroom closure making his public trial argument subject to the invited error doctrine.” Id.

3. The Error was not Waived

The State argues in the alternative that the mere failure to object to closure should preclude review because the constitutional error is not “manifest” under RAP 2.5(a)(3). As the State seems to recognize, however, such an argument conflicts with a long line of Washington Supreme Court cases including State v. Bone-Club, 128 Wn.2d 254, 906 P.2d 325 (1995); State v. Brightman, supra; Personal Restraint of Orange,

152 Wn.2d 795, 814, 100 P.3d 291 (2004); and State v. Easterling, 157 Wn.2d 167, 174, 137 P.3d 825 (2006). Similarly, in State v. Sadler, 147 Wn. App. 97, 193 P.3d 1108 (2008), the trial court did not expressly exclude the public from a hearing in the jury room. Nevertheless, “the trial court's affirmative act of moving the proceeding into the jury room, a part of the court not ordinarily accessible to the public, without inviting the public to attend, had the same effect as expressly excluding the public.” Id. at 1116-17. The judge’s chambers, like the jury room, are normally inaccessible to the public.

The State maintains that “in every courtroom closure case decided in Washington, the appellate court has reversed only upon a showing that the trial court actually issued an order closing the courtroom, or where it was clear that people were in fact excluded from the proceedings.” Response at 21. The case law is to the contrary. See State v. Brightman, 155 Wn.2d at 512-13, (reversing due to courtroom closure although “there is no evidence that the court enforced its ruling, there is no record of a written order, and there is nothing else in the record indicating that anyone was denied access to the courtroom”); In re Orange, 152 Wn.2d 795, 807-08 (reversing due to courtroom closure without requiring proof that any person had actually been kept out of the voir dire proceedings). At the least, the notation of the official court reporter that a hearing is held in chambers is sufficient to place the burden on the State to “overcome the strong presumption that the courtroom was closed.” State v. Brightman, 155 Wn.2d at 516. It would certainly come as a surprise to most trial court

judges and attorneys that members of the public are free to wander into chambers.

In State v. Erickson, *supra*, the record reflected only that the trial court interviewed four jurors in chambers. There was no suggestion that the trial court expressly excluded anyone from chambers or that any spectator wished to attend those proceedings. Nevertheless, the Court found that the right to a public trial was violated. Erickson, 189 P.3d at 249, citing State v. Frawley, 140 Wn. App. 713, 167 P.3d 593 (2007) and State v. Duckett, 141 Wn. App. 797, 173 P.3d 948 (2007). The same reasoning must apply here.

The State contends that State v. Gaines, 144 Wash. 446, 258 P. 508 (1927), requires a different result. But that ancient decision is no longer valid. “Gaines has since been superseded by Waller and Bone-Club.” Brightman, 155 Wn.2d at 516, citing Personal Restraint of Orange, 152 Wn.2d 795, 813, 100 P.3d 291 (2004). Likewise, to the extent that State v. Collins, 50 Wn.2d 740, 314 P.2d 660 (1957), suggests that a claim of courtroom closure requires an objection and a showing of prejudice, it is clearly inconsistent with the modern cases. Collins is in any event distinguishable because the trial court had the bailiff lock the courtroom door briefly to avoid the distraction of spectators coming and going during the prosecutor’s closing argument. The public was able to enter the courtroom before the argument started, however, and was able to observe the argument in its entirety. *Id.* at 746-48. “[I]f, 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. Here, however, all spectators were completely excluded from significant portions of the jury selection.

The State is correct that the Washington Supreme Court will address issues relevant to this case in State v. Momah, supra, and State v. Strode, No. 80849-0. It requests that the Court stay this case pending a ruling in Momah. Response at 41-42. Because nearly eight months have passed since oral argument in Momah and Strode, it seems likely that a ruling will issue soon. Morris therefore agrees that the Court should stay these proceedings, and then permit supplemental briefing after the Supreme Court rules.

B. MORRIS’S CONSTITUTIONAL RIGHT TO PRESENT A DEFENSE WAS VIOLATED WHEN THE TRIAL COURT EXCLUDED PORTIONS OF THE PROPOSED TESTIMONY OF LAWRENCE DALY

The State’s response on this issue largely attacks straw men. Morris has not argued that Daly was entitled to testify to every point mentioned in his written report, such as his opinion about the credibility of witnesses. The PRP focuses on specific points that were improperly excluded.

One of those points was the adequacy of the police investigation. See PRP at 12-14. The State does not deny that the defense has a right to explore that topic, but suggests that the trial court properly excluded it because Daly and defense counsel sometimes used the civil-law phrase

“standard of care.” Counsel and the trial court, however, clearly understood what the proposed testimony would include. Daly’s report itemized in detail the specific errors of the detective. See PRP at 13. The trial court characterized the issue as “Detective Ryan’s failures.” 6/14/04 RP 75. Defense counsel maintained that an expert opinion would be helpful “in determining the adequacy of the investigation.” Id. at 76. The trial court’s ruling excluding the topic was not based on any confusion between civil and criminal standards, but rather on the court’s view that Detective Ryan’s conduct was irrelevant precisely because she did so little. See PRP at 13-14.

It is true that defense counsel touched on this topic to some extent in closing argument. But, of course, the arguments of counsel are not evidence. It would have been far more persuasive to have expert testimony from Mr. Daly, a former detective.

The second topic improperly excluded by the trial court was Daly’s expert testimony that the manner in which A.W. was questioned by her mother and others was likely to lead her to mistakenly believe that she had been abused. See PRP at 14-20. The State’s position on appeal is that the trial court properly excluded the testimony because it did not meet the second factor of the three-part test set out in State v. Willis, 151 Wn.2d 255, 261 87 P.2d 1164 (2004): that the opinion is based upon an explanatory theory generally accepted in the scientific community. See Response at 34-35. In the trial court, however, the prosecutor maintained that *any* expert testimony concerning the suggestibility of children was

flatly prohibited. See PRP at 15-16. The trial court agreed. See PRP at 16. There was no ruling from the trial court regarding the second Willis factor and therefore nothing to which this Court can defer.

Further, the second Willis factor was clearly satisfied here. Mr. Daly set out his considerable experience and training with allegations of child sexual abuse. He has handled thousands of such cases as a detective or private investigator. He also has a Masters in Psychology in Child Abuse and the Law, attends two or three seminars and year, and studies the literature on the subject. See Report of Lawrence W. Daly at p.1-2, Ex. F to State's Response. Specifically, Daly is familiar with the scientific literature concerning suggestive interview techniques. He discusses four published scientific studies on this topic in his Report at pp. 11-17. (The full citations to the studies are at pp. 22-24).

Under Washington case law, Daly's report is ample to establish general acceptance of his opinions regarding child suggestibility. In State v. Graham, 59 Wn. App. 418, 421- 24 , 798 P.2d 314 (1990), for example, the trial court properly allowed an expert to testify that sexually abused girls often delay up to one year before reporting the abuse. The expert was also allowed to give reasons for such delay. The general acceptance of this theory was based on nothing more than the expert's "experience," "the literature" and the "workshops" she had taken. Id. at 422-23. It does not appear that the witness ever identified what literature she relied on or what workshops she had taken. Id. at 422-23. Similarly, in State v. Stevens, 58 Wn. App. 478, 496-97, 94 P.2d 38 (1990), a caseworker was properly

Daly were mostly consistent with those given to others. But the prosecutor capitalized on that point at trial, pointing out that a defense expert obtained the same incriminating information that others did. See PRP at 20. That is why it was so important for the defense to exclude the interview once the trial court prohibited Daly from explaining how A.W. had been “coached” by the time he interviewed her.

DATED this 23rd day of February, 2009.

Respectfully submitted,



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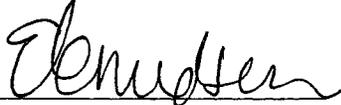
CERTIFICATE OF SERVICE

I hereby certify that on the date listed below, I served by United States Mail one copy of the Reply on Personal Restraint Petition on the following:

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Emily Knudsen