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No. 63749-5-1

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

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STATE OF WASHINGTON, Respondent

v.

LARRY GRUBB, Appellant

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APPELLANT'S REPLY BRIEF

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ORIGINAL

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- I. *The appropriate remedy for conducting private voir dire, without articulating the need for closed voir dire is to grant a new trial.*

The State asserts that “the trial court placed on the record its basis, pursuant to State v. Bone-Club, for allowing the parties to question four potential jurors in chambers on issues sensitive to their ability to serve impartially on the jury.” RB<sup>1</sup> at 10. This assertion is simply incorrect as the Court failed to apply the Bone-Club factors on the record and further failed to articulate any reason on the record as to why these four jurors should be questioned in private. Furthermore, the trial court essentially controlled the private voir dire by asking the questions and then asked the lawyers if they wanted to inquire further. The record failed to indicate the circumstances requiring private questioning, as opposed to questioning at another public location. Finally, the record failed to demonstrate that Mr. Grubb made a deliberate, tactical and voluntary decision to proceed with private voir dire of these four prospective jurors.

The trial judge informed counsel that the court would conduct private voir dire in chambers for potential jurors who wanted to speak privately. RP, Vol. I, at 82. Specifically the trial judge articulated the following:

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<sup>1</sup> RB shall designate the RESPONSE BRIEF of the Respondent

Well, we're going to follow the *Momah* case and the other cases I think as best we can. I'm going to ask if there's anybody in the courtroom that has any objection, and if nobody objects, we'll go into chambers with the court reporter. We'll do them in order, those folks that indicate they want to speak privately.

Defense counsel then interjected that Mr. Grubb will have to be present. The trial judge then went on to state the following, with no opposition from any party:

Mr. Grubb will be there, [defense counsel] and [the prosecutor] will be there, and the rest of the panel won't be there. If anybody objects, I think we have to do it in open court. I doubt there will be anybody from the media, but if anyone says I don't want it going on in there without me being able to hear, I think we'll just have to put the jurors on the spot.

*Id.*, at 82.

After some preliminary questions in open court of the panel, the trial judge noted the four jurors who wanted to speak privately. RP (JVD)<sup>2</sup> at 20-29. The trial judge then made an inquiry about whether anyone in the room had an objection to the private questioning. The trial court never inquired with Mr. Grubb about whether or not he was comfortable with private questioning; The court did not explain or articulate on the record any compelling interest for conducting private voir dire; The court did not

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<sup>2</sup> JVD shall designate the report of the Jury Voir Dire proceedings.

articulate whether the closed setting was “the least restrictive means available” for protecting the threatened interests; And, the court did not conduct any balancing test assessing the interests of the public versus those of the proponent of closure. The trial judge simply failed to conduct any Bone-Club analysis whatsoever.

The State argues that the appropriate remedy is not reversal as the circumstances of the Grubb case are more consistent with State v. Momah, 167 Wn. 2d 140 (2009). Furthermore, the State argues that the Supreme Court opinion in State v. Strode, 167 Wn.2d 222 (2009), should be ignored.

First, our case is distinguishable from Momah primarily because in Momah the defendant essentially was the proponent arguing for closure. State v. Momah, 167 Wn. 2d at 151. There is no record in our case of Mr. Grubb arguing for closure. At most we have defense counsel reminding the trial judge that Mr. Grubb must be present in chambers.

Second, the State argues that State v. Strode, 167 Wn. 2d 222 (2009), provides little guidance in addressing the appropriate remedy because of the plurality’s limited precedential value. RB at 14-15. However, in reading both the plurality and the concurrence, the Strode Court agreed that without a proper Bone-Club analysis on the record, or its equivalent, automatic reversal is required. The concurrence, however, stated that a “defendant should not be

able to assert the right of the public or the press in order to overturn his conviction when his own right to a public trial has been safeguarded as required under Bone-Club or has been waived.” State v. Strode, 167 Wn. 2d at 236. Similar to Strode, the trial judge in the instant case did not apply the Bone-Club test, or something equivalent, nor is there any record that Mr. Grubb waived the right to public voir dire of the four jurors who wanted privacy. As such, the Strode plurality and concurrence would agree that under the facts of the instant case, Mr. Grubb is entitled to a new trial.

Finally, the opinion of State v. Momah has now been eclipsed by Presley v. Georgia, 130 S. Ct. 721 (2010), which was published three month after Momah and Strode. The United States Supreme Court held that under the First and Sixth Amendments of the United States Constitution, the voir dire of prospective jurors must be open to the public. Presley v. Georgia, 130 S. Ct. at 723-24. The Court made clear that this requirement is “binding on the States.” Presley, 130 S. Ct. at 723. The trial judge is “required to consider alternatives to closure even when they are not offered by the parties.” Id., at 724-25. Furthermore, the trial judge *must make appropriate findings* supporting its decision to close the proceedings. Id., at 725. The appropriate remedy as articulated by our United States Supreme Court would be automatic reversal of the conviction where the trial judge failed to *sua sponte* consider

reasonable alternatives and failed to make the appropriate findings. *Id.*, at 725.

Even if This Court agrees with the State's position about *Strode's* precedential value, the *Presley* opinion makes it abundantly clear that Mr. Grubb is entitled to a new trial. In the instant case, the trial judge closed a portion of the voir dire by interviewing four prospective jurors in chambers. The trial judge failed to apply all the *Bone-Club* factors before closing the proceedings. The trial judge failed to articulate on the record that the court had considered alternatives to closure and further failed to make appropriate findings explaining why closure was necessary. And finally, the trial judge failed to inquire as to whether Mr. Grubb was prepared to waive his right to a public trial limited to the private questioning of the four jurors. The appropriate remedy under *State v. Strode* and under *Presley v. Georgia* is automatic reversal of Mr. Grubb's convictions. *See also, State v. Paumier*, 155 Wn. App. 673, 684-685 (2010) ("By shutting out the public without first considering alternatives to closure and making appropriate findings explaining why closure was necessary, the trial court violated [the defendant's] and the public's right to an open proceeding" thereby requiring automatic reversal).

- II. *When the State has specific information about the time frame of the alleged criminal act, the trial court abuses its discretion in denying a defense request for a bill of particulars. Denying the request for a bill of particulars deprives the defendant of his right to develop a defense of Alibi.*

The State asserts that that a bill of particulars would not be appropriate because Grubb had sufficient notice to prepare his defense. Specifically, “[t]he fact that E.R. was specific during a defense interview but not sure of dates at trial demonstrates Grubb was on sufficient notice to prepare a defense . . .” RB at 28. The State further points out in its response that because the motion for the bill of particulars was made before the victim interview, the specifics of the victim interview (i.e., specifics about the timing of the alleged abuse) is “not relevant in determining whether the trial court abused its discretion.” RB at 27.

The State, however, misunderstands the argument. It does not matter if the motion was made before or after the victim interview. The point is that the State had knowledge of the specific dates of the alleged abuse in advance of trial, as evidenced by the facts discovered from the victim interview. Therefore, the State had an obligation to narrow the charging period accordingly under the Due Process Clause of both the State and Federal Constitutions.

The right to due process is implicated where the evidence may be so general that it effectively precludes the defendant from preparing a successful defense, such as alibi or misidentification. *State v. Brown*, 55 Wn. App. 738, 748 (1989). It is undisputed that in cases where the accused has virtually unchecked access to the victim, neither alibi nor misidentification is likely to be a reasonable defense. *Id.* Furthermore, there is no dispute that in “resident child molestation cases,” the Washington Courts agree that the defendant’s due process rights to raise an alibi defense are not violated when the child victim cannot remember specific dates. *State v. Cozza*, 71 Wn. App. 252, 258 (1993).

But using the logic of *Brown* and *Cozza*, the due process concerns certainly exist when the State in fact has knowledge of the specific time period of alleged abuse. When the State becomes aware of specific dates of abuse, we maintain that in the interest of justice and fairness the State has an obligation to narrow the charging period accordingly. This is true even if the accused is a so-called “resident molester” or has “unchecked access” to the complaining witness. The logic being that the State would then be in a position to pin down the period of alleged abuse *based on the specific information it obtains from its complaining witness*. For the State to instead charge an unduly lengthy period of alleged abuse notwithstanding the fact that

the State is fully aware of a more specific period, simply runs afoul of our Due Process Clause. The trial court order denying our motion for a bill of particulars deprived Mr. Grubb of effectively mounting a defense of alibi. He is therefore entitled to a new trial.

III. *The trial judge failed to identify legally sufficient reasons under RCW 10.58.090 and also failed to conduct a proper Evidence Rule 403 balancing test before admitting prior uncharged sexual conduct into evidence.*

The State incorrectly characterizes our argument on this issue as follows: “Grubb asserts the trial court abused its discretion because he alleges the trial court found that RCW 10.58.090 mandated admission of the Mukilteo incident.” RB at 32. The “Mukilteo incident” was an uncharged allegation of sexual misconduct that the State dismissed as a charged count one week before trial. Therefore, there is no dispute that the first time the State informed the defense of its intent to use this uncharged incident as “prior bad acts” evidence occurred approximately one week before trial—at the time it dismissed the charge.

The State further takes defense counsel’s argument to the trial judge out of context when asserting the following in its response brief: “Grubb

acknowledged and clarified then that he was not claiming ‘there was a violation with respect to lack of notice.’” RB at 33.

It is imperative that the trial court apply a probative value versus prejudicial impact balancing test before admitting any prior uncharged misconduct. *State v. Baker*, 89 Wn. App. 726, 735 (1997). After the trial court determines that the prior misconduct is relevant, it must weigh the probative value of the evidence against its prejudicial effect. *Id.* Furthermore, the weighing itself must appear in the record for meaningful appellate review. *Id.*, at 736. The fact remains that prior uncharged acts of sexual misconduct in a multi-count child rape trial will undoubtedly carry a risk of undue prejudice against the defendant. This is because evidence of prior similar acts in a child sex trial will create the likelihood that the jury will convict solely on character. Accordingly, an Evidence Rule 403 balancing test is critical. *Id.*, at 736.

The State mischaracterizes our argument when it asserts that our claim of error is that the trial judge erroneously found that RCW 10.58.090 “mandated admission” of the prior uncharged misconduct. Our position is that the trial judge erroneously failed to consider the factors mandated by RCW 10.58.090. Equally important, the record fails to demonstrate that the trial judge conducted any sort of ER 403 balancing test, as required by the

statute, by *State v. Baker*, cited above, and by *State v. Lough*, 125 Wn. 2d 847 (1995).

Furthermore, the State takes defense counsel's argument out of context when suggesting that we are "not claiming there was a violation with respect to lack of notice." The defense made it clear on the record the following points with respect to its objection to the "Mukilteo incident." First, the defense had notice of the Mukilteo incident by the fact that it was initially a formal charge against Mr. Grubb. Second, approximately one week prior to trial, the State formally dismissed the charge and at that point in time, for the first time, gave formal notice to the defense of its intent to use the now uncharged conduct as "prior bad acts" evidence. Therefore, the defense objection was that the defendant did not receive proper notice *as to how the prior bad acts evidence would be used at trial against the defendant*. This objection further fits into our claim that the trial judge categorically did not properly apply the mandated tests before admitting the prior bad acts evidence as required by RCW 10.58.090, by Evidence Rule 404(b), and by Evidence Rule 403. For these reasons, Mr. Grubb's convictions must be reversed.

IV. *The only appropriate remedy for the State's failure to timely give notice of its expert witness is exclusion of the testimony. The remedy is appropriate given the alternative of either forcing the defendant to*

*waive his speedy trial right by asking for a continuance or proceeding un-prepared to conduct effective cross examination.*

The State concedes that the prosecutor did not fully comply with the discovery obligations under Criminal Rule 4.7 with respect to the expert testimony of Joan Gaasland-Smith, the State's sexual assault specialist. RB at 39. The defense objected to her expert testimony because the State did not provide notice of the substance of her expert testimony until one week before trial. The objection emphasized the prejudice caused to the defense as the untimely notice placed the defendant in the untenable position of either having to waive speedy trial by asking for a continuance or proceed without adequately being prepared to effectively cross examine the witness. RP 59-63, Vol. I; RP 87-104, Vol. II.

The defense's proposed remedy was exclusion of the witness from trial. The Court ruled as follows with respect to permitting the sexual assault specialist to testify as an expert witness: "When you've got an expert that you're going to call as an expert, you've got to tell the defense what they're going to testify about, not just this is the person's knowledge and expertise, but what they're going to talk about . . . [However], the remedy is to seek a continuance." RP 101, Vol. II.

The remedy for a discovery violation can range from the granting of a continuance to the dismissal of charges. State v. Wilson, 149 Wn. 2d 1, 9 (2003). For violations that do not involve misconduct rising to the level justifying dismissal, yet are serious enough to impede the defendant's right to effectively confront witnesses, exclusion of the witness may be the appropriate remedy. State v. Wilson, 149 Wn. 2d at 12, citing State v. Hutchinson, 135 Wn. 2d 863, 880-84 (1998), *aff'd*, 147 Wn. 2d 197, 202-06 (2002).

Exclusion of a witness may be the only appropriate remedy when the State's discovery violation interferes with the defendant's compulsory process right to interview a witness in advance of trial. For example, in State v. Wilson, 149 Wn. 2d at 12-13, the State Supreme Court recognized that "the defendant's right to compulsory process includes the right to interview a witness in advance of trial." Interfering with this right by making the witness available to the defense in an untimely fashion can certainly violate the compulsory process. The Court specifically held, "to force a defendant to choose between the right to a speedy trial and the right to adequately prepared counsel because an interview has not occurred by the speedy trial expiration does materially affect a defendant's right to a fair trial such that prejudice results." *Id.*, at 13.

In the instant case, the State violated the discovery rules by providing untimely notice of the substance of the sexual assault expert's testimony. This violation directly resulted in the defense being forced to interview the witness at the "11<sup>th</sup> hour" just before trial. The "Hobson's Choice" at that point was to either request a continuance and involuntarily extend speedy trial or proceed to trial without being adequately prepared to confront the State's witness. To face this choice, as emphasized in *Wilson*, runs afoul with the right to a fair trial and further results in prejudice.

Unlike the remedy of outright dismissal requested in *Wilson*, Mr. Grubb was requesting a less extreme remedy. Mr. Grubb was requesting the exclusion of the witness, which has been recognized to be the appropriate remedy when dismissal is too drastic. See, *State v. Hutchinson*, cited above. Exclusion was the appropriate remedy under the circumstances because in order to effectively examine Ms. Gaasland-Smith, the defense would need to scrutinize her credentials, her prior cases and opinions, and perhaps call a "counter-expert" to challenge her findings. In order to accomplish this objective, the defense would necessarily have to waive speedy trial. To be forced to waive speedy trial due to the State's mismanagement is simply inconsistent with the principles of being afforded the right to a fair and speedy trial. For these reasons, Mr. Grubb is entitled to a new trial.

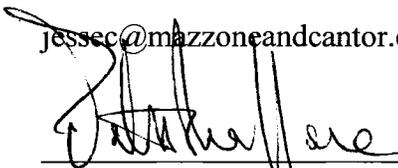
V. CONCLUSION

As argued in our opening and reply briefs, there were a number of claimed errors that independently and cumulatively deprived Mr. Grubb of having a fair trial. For the reasons presented in this Reply, and further presented in our Opening Brief, the Appellant respectfully requests reversal with an order remanding This Case for a new trial.

DATED: This 23 day of NOVEMBER, 2010

  
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