Supreme Ct No. 90329-8

COA No. 31050-7-III

SUPREME COURT OF THE STATE OF WASHINGTON

STATE OF WASHINGTON, Petitioner

v.

BENITO GOMEZ, Respondent

ANSWER TO PETITION FOR REVIEW

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INDEX

TABLE OF AUTHORITIES

WASHINGTON CASES

CONSTITUTIONAL PROVISIONS

COURT RULES

A. IDENTITY OF ANSWERING PARTY

Respondent Benito Gomez answers the Walla Walla County Prosecutor's petition for review.

B. RELIEF REQUESTED

Mr. Gomez asks this court to deny the petition for review.

C. ISSUE PRESENTED

1. The Court of Appeals' decision – that the trial court failed to provide a public trial when it closed entry into the courtroom after court sessions began – does not conflict with any case law, pose a significant constitutional issue, or warrant review as a matter of public interest.

D. STATEMENT OF THE CASE

The State charged Benito Gomez with one count of first degree murder and six counts of first degree assault. (CP 145-147). Prior to trial, the trial court addressed the security measures in place for the trial. (CP 148-158). The trial court issued the following ruling regarding closure of the courtroom:

> We continue to have rules of procedure where people have to be on time for proceedings here. *We do not allow people to come into the courtroom after the court is in session for not only security reasons but as well as the distraction that that*

> *causes when people come in.* As you all know who have been here and tried cases, when a jury is impaneled in a case such as this, it doesn't make any difference what type of case it might be, but when people come into the courtroom after the matter is in session, they stop listening to the attorneys or to the witness who is testifying and they immediately direct their attention to the person that is coming in the door. And even though that person may be very innocent in coming in late, that distracts from the proceeding. And you run the potential that whatever is being said or addressed by the testimony, by the questions, by the Court's instructions is not going to be heard by the jury or members of that jury. And again, that then leads to problems and distractions and the orderly processing of that case.

(RP 153-154) (emphasis added).

The jury found Mr. Gomez guilty of the lesser included offense of second degree murder, and the jury also found him guilty of six counts of first degree assault, as charged. (CP 206-212; RP 666-667). Mr. Gomez appealed. (CP 258-272).

In an unpublished decision filed on March 27, 2014, the Court of Appeals reversed Mr. Gomez's convictions and remanded the case for a new trial, holding that the trial court failed to provide a public trial when it closed entry into the courtroom after court sessions began. The State now seeks review of this decision.

E. ARGUMENT

1. THE COURT OF APPEALS' DECISION – THAT THE TRIAL COURT FAILED TO PROVIDE A PUBLIC TRIAL WHEN IT CLOSED ENTRY INTO THE COURTROOM AFTER COURT SESSIONS BEGAN – DOES NOT CONFLICT WITH ANY CASE LAW, POSE A SIGNIFICANT CONSTITUTIONAL ISSUE, OR WARRANT REVIEW AS A MATTER OF PUBLIC INTEREST.

Petitioner has failed to show that the Court of Appeals decision conflicts with any decision of this court or any other decision of the Court of Appeals, involves a significant question of law under the Constitution of the State of Washington or of the United States, or involves an issue of substantial public interest that should be determined by this Court. *See* RAP 13.4(b).

The Court of Appeals correctly held that the trial court failed to provide a public trial when it closed entry into the courtroom after court sessions began. Both the federal and Washington State constitutions provide that a defendant has a right to a public trial. *State v. Wise*, 176 Wn.2d 1, 9, 288 P.3d 1113 (2012) (*citing* Wash. Const. art. I, § 22; U.S. Const. amend VI). This right to a public trial is not absolute. *Id.* (*citing State v. Bone-Club*, 128 Wn.2d 254, 259, 906 P.2d 325 (1995)). "In *Bone-Club,* this court enumerated five criteria that a trial court must consider on

the record in order to close trial proceedings to the public." *Id.* at 10 (*citing Bone-Club*, 128 Wn.2d at 258-59). The five criteria are as follows:

> 1. The proponent of closure or sealing must make some showing [of a compelling interest], and where that need is based on a right other than an accused's right to a fair trial, the proponent must show a "serious and imminent threat" to that right.
> 2. Anyone present when the closure motion is made must be given an opportunity to object to the closure.
> 3. The proposed method for curtailing open access must be the least restrictive means available for protecting the threatened interests.
> 4. The court must weigh the competing interests of the proponent of closure and the public.
> 5. The order must be no broader in its application or duration than necessary to serve its purpose.

Bone-Club, 128 Wn.2d at 258-59.

"A trial court is required to consider the *Bone-Club* factors *before* closing a trial proceeding that should be public." *Wise*, 176 Wn.2d at 12 (emphasis in original); *see also State v. Paumier*, 176 Wn.2d 29, 35, 288 P.3d 1126 (2012). Closure "occurs when the courtroom is completely and purposefully closed to spectators so that no one may enter and no one may leave." *State v. Sublett*, 176 Wn.2d 58, 71, 292 P.3d 715 (2012) (*quoting State v. Lormor*, 172 Wn.2d 85, 93, 257 P.3d 624 (2011)).

"[U]nless the trial court considers the *Bone-Club* factors on the record before closing a trial to the public, the wrongful deprivation of the public trial right is a structural error presumed to be prejudicial." *Wise*,

176 Wn.2d at 14; *see also Paumier*, 176 Wn.2d at 35-37. Contrary to Petitioner's argument, a defendant may raise the public trial issue for the first time on appeal. *Wise*, 176 Wn.2d at 9. A defendant is not required to prove prejudice when his constitutional public trial right is violated. *Paumier*, 176 Wn.2d at 37 (*citing Wise*, 176 Wn.2d at 14).

The violation of the constitutional right to a public trial is not subject to harmless error analysis. *State v. Strode*, 167 Wn.2d 222, 231, 217 P.3d 316 (2009) (*quoting State v. Easterling*, 157 Wn.2d 167, 181, 137 P.3d 825 (2006)). The remedy for a violation of the constitutional public trial right is a new trial. *Wise*, 176 Wn.2d at 15, 19; *see also Paumier*, 176 Wn.2d at 35-37.

Here, the trial court closed the courtroom by prohibiting the public from entering the courtroom after court was in session. (RP 153-154); *see also Sublett*, 176 Wn.2d at 71 (defining what constitutes a courtroom closure). This ruling was a general prohibition for spectators and an exclusion of the public from the trial. *Cf. Lormor*, 172 Wn.2d at 92-93 (the exclusion of one person from the trial, without a general prohibition for spectators, was not a courtroom closure). Although the record contains no other discussion of the courtroom closure, "[o]n appeal, a defendant claiming a violation to the public trial right is not required to prove that the trial court's order has been carried out." *State v. Brightman*, 155 Wn.2d 506,

517, 122 P.3d 150 (2005) (*citing In re Personal Restraint of Orange*, 152 Wn.2d 795, 813-14, 100 P.3d 291 (2004)). "[O]nce the plain language of the trial court's ruling imposes a closure, the burden is on the State to overcome the strong presumption that the courtroom was closed. *Id.* at 516. The State cannot overcome the presumption that a closure occurred here.

The trial court did not consider the *Bone-Club* factors before closing the trial to the public. *See Bone-Club*, 128 Wn.2d at 258-59. Therefore, Mr. Gomez's constitutional right to a public trial was violated. *See Wise*, 176 Wn.2d at 14; *Paumier*, 176 Wn.2d at 35-37. This is a structural error, and the remedy is a new trial, as ordered by the Court of Appeals. *See Wise*, 176 Wn.2d at 14-15, 19; *see also Paumier*, 176 Wn.2d at 35-37.

The State argues that all parts of the trial were open to the public, and that the public could enter and exit the courtroom. (Pet'r's Br. at 12). The record shows otherwise. (RP 153-154). The trial court stated: "[w]e do not allow people to come into the courtroom after the court is in session[.]" (RP 153). The trial court's ruling prohibited the public from entering the courtroom any time court was in session throughout the four-day trial. (RP 153-154). Because the plain language of the trial court's ruling imposes a courtroom closure, it is the State's burden to overcome the strong presumption that the courtroom was closed. *Brightman*, 155 Wn.2d at 516.

The State argues the closure that occurred here was de minimis. (Pet'r's Br. at 8-12). Washington has not adopted a *de minimis* standard in the context of the public trial right. *See Easterling*, 157 Wn.2d at 180-81. And, the closure that occurred here was not *de mimimis*. The trial court's ruling closed entry into the courtroom any time after a court session began, throughout the four-day trial. (RP 153-154).

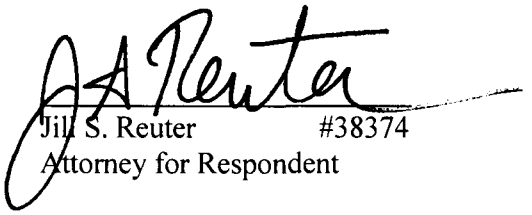
Finally, the State argues it should be afforded the benefit of this Court's decisions on pending, related cases. (Pet'r's Br. at 18); *see also State v. Njonge*, 161 Wn. App. 568, 255 P.3d 753 (2011), *review granted*, 176 Wn.2d 1031 (2013); *State v. Shearer*, 162 Wn. App. 1007 (2011), *review granted*, 176 Wn.2d 1031 (2013); *State v. Grisby*, 167 Wn. App. 1005 (2012), *review granted*, 176 Wn.2d 1031 (2013). However, these cases are inapposite from the case here, as they involve courtroom closures during *voir dire*, rather than throughout trial. *See Njonge*, 161 Wn. App. at 568; *Shearer*, 162 Wn. App. at 1007; *Grisby*, 167 Wn. App. at 1005. The State is also assuming that these cases will be resolved in its favor.

F. CONCLUSION

Mr. Gomez asks this court to deny the petition for review of the Court of Appeals decision, which is wholly consistent with other decisions of this Court.

Dated this 13th day of June, 2014.

JANET GEMBERLING, P.S.



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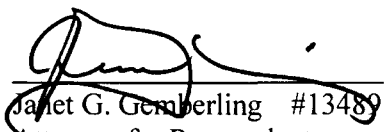

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IN THE SUPREME COURT OF THE STATE OF WASHINGTON

STATE OF WASHINGTON,	)	
	)	
Petitioner,	)	No. 90329-8
	)	
vs.	)	CERTIFICATE
	)	OF MAILING
BENITO GOMEZ,	)	
	)	
Respondent.	)	

I certify under penalty of perjury under the laws of the State of Washington that on June 13, 2014, I served a copy of the Answer to Petition for Review in this matter by email on the attorney for the respondent, receipt confirmed, pursuant to the parties' agreement:

Teresa Chen
tchen@wapa-sep.wa.gov

I certify under penalty of perjury under the laws of the State of Washington that on June 13, 2014, I mailed a copy of the Answer to Petition for Review in this matter to:

Benito Gomez
#358688
Washington State Penitentiary
1313 N. 13th Avenue
Walla Walla, WA 99362

Signed at Spokane, Washington on June 13, 2014.

Jill S. Reuter #38374
Attorney for Respondent

OFFICE RECEPTIONIST, CLERK

To: Robert Canwell; Teresa Chen
Subject: RE: Answer to Petition for Review - Gomez (90329-8)

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Sent: Friday, June 13, 2014 1:01 PM
To: OFFICE RECEPTIONIST, CLERK; Teresa Chen
Subject: Answer to Petition for Review - Gomez (90329-8)

Dear Clerk,

Please find attached for filing Mr. Gomez's answer to the Petition for Review in this matter.

Many thanks,

Robert Canwell
Legal Assistant

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