NO. 44837-8-II

COURT OF APPEALS, DIVISION II

STATE OF WASHINGTON,

Respondent,

vs.

ANTHONY R. MILLER,

Appellant.

APPEAL FROM THE SUPERIOR COURT
FOR MASON COURT
The Honorable Amber L. Finlay, Judge
Cause No. 12-1-00497-8

BRIEF OF APPELLANT

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02. The trial court violated Miller's constitutional right to be present at all critical stages of his trial.

B. ISSUES PERTAINING TO ASSIGNMENTS OF ERROR

01. Whether under the circumstances of this case, the decision to excuse prospective juror 28 off the record and not in open court was part of jury selection for purposes of Miller's public trial right? [Assignment of Error No. 1]

02. Whether Miller's absence during the excusal of prospective juror 28 violated his right to to present at all critical stages of his trial? [Assignment of Error No. 2].

C. STATEMENT OF THE CASE

01. Procedural Facts

Anthony R. Miller was charged by first amended information filed in Mason County Superior Court February 15, 2013, with conspiracy to commit murder in the first degree, count I, and murder in the first degree while armed with a firearm, count II, contrary to RCWs 9A.32.030(1)(a), 9A.28.040 and 9A.08.020. [CP 154]. Count II further alleged domestic violence as defined in RCW 10.99.020 and that the

offense occurred within sight or sound of the victim's or Miller's minor children under the age of 18 years, in violation of RCW 9.94A.535(3)(h)(2). [CP 65-66].

No pre-trial motions were filed nor heard regarding either a CrR 3.5 or CrR 3.6 hearing. [RP 3]. On the mourning of February 6, at the commencement of voir dire, the court convened at 9:52 to address preliminary matters [RP 44; CP 83] before recessing at 10:03. [RP 51; CP 83]. At 10:18, the court reconvened and informed counsel that prospective juror 28 had been excused during the recess. [RP 51; CP 83].

> THE COURT: Also there was an individual who was present apparently in the courtroom here when we began these proceedings who was a prospective juror. And we have - -
>
> JURY MANAGER: That's number 28.
>
> THE COURT: - - because she was present during those proceedings, when she should not have been there, but down with the rest of the jurors, we've gone ahead and excused her. And that's number 28?
>
> JURY MANAGER: Number 28.

[RP 51].

Counsel acknowledged prior notification of the occurrence and both agreed and stipulated the juror should have been excused. [RP 52]. The clerk's minutes for this on-the-record discussion reflect: "Juror #28

was excused off the record for coming into the courtroom before the venire entered." [CP 83].

Trial to a jury commenced the next day, the Honorable Amber L. Finlay presiding. [RP 77]. Neither objections nor exceptions were taken to the jury instructions. [RP 738, 818, 829].

Miller was found guilty as charged, including firearm enhancement and aggravating factors, given an exceptional sentence of 680 months, and timely notice of this appeal followed. [CP 2-19, 26-29].

02. Substantive Facts: Trial

In the early morning of November 21, 2012, police responded to the report of shots being fired inside a mobile home in Mason County, where they found Barbara Giles, Miller's ex-girlfriend, in the living room suffering from multiple gunshot wounds that eventually proved fatal. [RP 84, 92, 245-46, 622, 656, 686]. At the time of the shooting, Giles's and Miller's adopted two-year-old daughter was asleep in the master bedroom and Giles's 7-year-old son, who woke up at the first gunshot, was in the front bedroom. [RP 79, 83-85, 100, 126, 131].

Miller's daughter Asaria,[1] who testified in exchange for a recommendation for a 30-year prison term for a guilty plea to first degree

[1] For clarity, Asaria Miller is referred to by her first name. No disrespect is intended.

murder with firearm enhancement [RP 478, 532, 534], said she was present when her boyfriend, James Hartfield, shot Giles with a pistol for which Miller had provided money to purchase. [RP 478, 517, 524, 528]. She was 16 at the time. [RP 499]. She explained that after her dad split up with Giles, he started talking about wanting her killed approximately two weeks before it occurred. [RP 480-83, 531]. "(H)e couldn't do it 'cause all of his guns were registered in his name." [RP 531]. "He said he knew I could get it done." [RP 531]. She reviewed numerous text messages between she and Miller from November 15th to the 23rd, which indicated the two had planned the shooting of Giles. [RP 486-525]. They texted in code, using "Callie" to mean Giles, "handyman" to reference Hartfield, "tool" to indicate weapon and "roof" as a reference to what was to be taken care of: the killing of Giles. [RP 484-85, 508].

Hatfield, who testified in exchange for a recommendation for a 45-year prison term for a guilty plea to first degree murder with firearm enhancement, first degree burglary with firearm enhancement and unlawful possession of a firearm in the first degree [RP 539], confirmed that Asaria had given him money Miller had provided for purchase of the gun and described his meeting with Miller the evening before the shooting where they discussed the plan to kill Giles, who Miller wanted dead. [RP 549-50, 560]. He admitted to shooting Giles three times, though he never

used the money Miller had provided to purchase the gun. [RP 552-53, 560]. Several days after the shooting, he tossed the gun into the water off a bridge in Olympia [RP 556-57, 718]. The police were unsuccessful in recovering it. [RP 719-20].

When initially interviewed by the police, Miller said he and Giles had lived together almost six years, had adopted one child and had separated that August. [State's Exhibit 93 4-5]. He denied involvement in her shooting, saying he had been asleep on his couch at the time. [State's Exhibit 93 9, 14, 21, 39]. During an interview eight days later following his arrest, while never specifically admitting he planned or participated in the events leading to Giles's death, he admitted he was "pissed off" because Giles was limiting his ability to see his 2-year-old daughter. [State's Exhibit 117 53].

> I was taking (Asaria) home from school one day and I was pissed off just talking and she said well I can take care of the problem. And again I didn't believe it, said no that's stupid. And where it went from there I can't really tell ya.

[State's Exhibit 117 54].

He acknowledged he knew what Asaria and Hartfield were planning [State's Exhibit 117 57; RP 802-03], but "did not think that they would actually do it. I thought maybe they'd get scared, not go through with it." [State's Exhibit 117 57]. He admitted there was some planning

involved. [State's Exhibit 117 73]. "I didn't do anything to stop it cause I didn't think they would actually do it." [State's Exhibit 117 58]. He "didn't think anything would ever come of it." [State's Exhibit 117 75]. When asked what Asaria would say when questioned, he responded:

> If she's honest she'll say that she would take care of the problem. If she's gonna try to lie and stay outta trouble she'll say it was me. I hate to be that way with my daughter but you know this is this is (sic) not taking candy, this is not taking a car. Kay. This is way bigger than any of that.

[State's Exhibit 117 65].

At trial, Miller admitted he had taken Giles's 1998 Jeep Cherokee that she had reported stolen several weeks before the shooting, and that his mother had forged the title, which was contrary to prior statements he had made. [RP 209, 277, 442-43, 749, 797]. He further asserted he had no part in Giles's death, denying he provided money for the gun, denying he asked anyone to kill her, and denying he conspired with anyone to kill her. [RP 750-51].

D. ARGUMENT

01. THE EXCUSAL OF PROSPECTIVE JUROR 28 OFF THE RECORD AND NOT IN OPEN COURT VIOLATED MILLER'S RIGHT TO A PUBLIC TRIAL.

Both the Sixth Amendment to the United States 3

Constitution and article I, section 22 of the Washington Constitution guarantee criminal defendants the right to a public trial. State v. Russell, 141 Wn. App. 733, 737-38, 172 P.3d 361 (2007), reviewed denied, 164 Wn.2d 1020 (2008); Presley v. Georgia, 558 U.S. 209, 130 S. Ct. 721, 723, 175 L. Ed. 2d 675 (2010) As well, article I, section 10 of the Washington Constitution states, "Justice in all cases shall be administered openly," thereby giving the public, in addition to the defendant, a right to open proceedings. Seattle Times Co. v. Ishikawa, 97 Wn.2d 30, 36, 640 P.2d 716 (1982). This court reviews violations of the public trial right de novo. State v. Sublett, 176 Wn.2d 58, 70, 292 P.3d 715 (2012).

A defendant's right to a public trial "serves to ensure a fair trial, to remind the officers of the court of the importance of their functions, to encourage witnesses to come forward, and to discourage perjury." State v. Brightman, 155 Wn.2d 506, 514, 122 P.3d 150 (2005). Comparably, the public's right to an open trial, especially in the context of a criminal proceeding, safeguards that the accused "is fairly dealt with and not unjustly condemned...." State v. Momah, 167 Wn.2d 140, 148, 217 P.3d 321 (2009), cert. denied, 131 S. Ct. 160 (2010). A defendant's right and the public's right "serve complementary and independent functions in assuring the fairness of our judicial system. In particular, the public trial right operates as an essential cog in the constitutional design of fair trial

safeguards." State v. Bone-Club, 128 Wn.2d 254, 259, 906 P.2d 325 (1995). And a defendant has standing to voice the public's interest in public trials. State v. Erickson, 146 Wn. App. 146 Wn. App. 200, 205 n.2, 189 P.3d 245 (2008); State v. Duckett, 141 Wn. App. 797, 804-05, 173 P.3d 948 (2007).

To protect these rights, a trial court may close a portion of a trial only after (1) properly conducting a balancing process of five factors and (2) entering specific findings on the record to justify so ruling. State v. Bone-Club, 128 Wn.2d 254, 258-59, 906 P.2d 325 (1995). A trial court's failure to conduct the required Bone-Club inquiry "results in a violation of the defendant's public trial rights." State v. Brightman, 155 Wn.2d at 515-16. In such a case, the defendant need show no prejudice; it is presumed. Bone-Club, 128 Wn.2d at 261-62. Additionally, a defendant's failure to "lodge a contemporaneous objection" at the time of the exclusion does not amount to a waiver of his or her right to a public trial. Brightman, 155 Wn.2d at 514-15, 517. The remedy for such a violation is to reverse and remand for a new trial. In re Pers. Restraint of Orange, 152 Wn.2d 795, 814, 100 P.3d 291 (2004). This court reviews de novo the question of law of whether a defendant's right to a public trial has been violated. Brightman, 155 Wn.2d at 514.

Given this court's acknowledgement in State v. Wilson, 174 Wn. App. 328, 335-40, 298 P.3d 148 (2013),[2] that the Washington Supreme Court has established that the public trial right applies to jury selection, Miller addresses only whether the trial court's excusal of prospective juror 28 violated Miller's public trial right. See State v. Wise, 176 Wn.2d 1, 11-12, 288 P.3d 1113 (2012).

In Wilson, this court, discussing State v. Paumier, 176 Wn.2d 29, 288 P.3d 1126 (2012), Wise and Sublett, also recognized that our Supreme Court has developed a two-step process for determining whether a particular proceeding implicates a defendant's public trial right:

> First, does the proceeding fall within a specific category of trial proceedings that our Supreme Court has already established implicates the public trial right? Second, if the proceeding does not fall within such a specific category, does the proceeding satisfy Sublett's "experience and logic" test? (footnote omitted).

State v. Wilson, 174 Wn. App. at 335.

The public trial right attaches to jury selection, State v. Brightman, 155 Wn.2d 506, 515, 122 P.3d 150 (2005), which begins from the time the

[2] Miller, for reasons set forth below, respectfully disagrees with this court's decision in Wilson, holding that the defendant's public trial right was not violated where the bailiff excused two jurors prior to the commencement of voir dire. State v. Wilson, 174 Wn. App. at 337-39. Consideration of Wilson's Petition for Review, Supreme Court No. 88818-3, was stayed on 09/04/13 pending resolution of two cases: State v. Slert, Supreme Court No. 87844-7, and State v. Njonge, Supreme Court No. 86072-6.

work of empanelling a jury begins, which here began no later than when the prospective jurors received and signed under oath their Juror Questionnaires. See State v. Irby, 170 Wn.2d 874, 884, 246 P.3d 796 (2011). [Juror Questionnaire].

> In Irby, prospective jurors filled out a questionnaire that was "'designed to elicit information with respect to [their] qualifications to sit as a juror in [Irby's] case'" and that expressly reminded the jurors that "filling out the questionnaire was part of the jury selection process.'" (citation omitted).

State v. Slert, 169 Wn. App. 766, 772, 282 P.3d 101 (1012) review granted in part, 2013 WL 1458851 (Wash. Apr. 8, 2013). While Irby dealt directly with the defendant's right to be present at all critical stages of trial, its analysis and determination of when jury selection begins is equally applicable to the invocation of the public trial right in Miller's setting. A distinction without a difference. See Id. 169 Wn. App. at 774 n.10.

The record shows that the prospective jurors, including excused juror 28, completed the Juror Questionnaire. [RP 52-53]. In contrast, there is nothing in the record that can be used to determine how long juror 28 attended the prior proceeding, what she heard, if anything, and whether her attendance would prohibit her from serving as a juror in this case. There is nothing. Nevertheless, it is problematic if the court questioned juror 28 about what she had heard and consequently knew about Miller's

case—the answers to which presumably served as grounds for her excusal—since such questioning is more analogous to the voir dire component of jury selection than to mere administrative excusals. See U.S. v. Greer, 285 F.3d 158, 168-69 (2nd Cir. 2002) (citing United States v. Bordallo, 857 F.2d 519, 523 (9th Cir. 1988), cert. denied, 493 U.S. 818, 110 S. Ct. 71, 107 L. Ed. 2d 38 (1989)).

The decision to excuse prospective juror 28 was part of jury selection for purposes of the public trial right and should have been made in open court with the parties present. There is nothing in the record to demonstrate that Miller was ever advised of his public trial right or that he waived it in any manner. Under these circumstances, the excusal of prospective juror 28 off the record and not in open court violated Miller's right to a public trial, the result of which requires reversal of his convictions and remand for a new trial.

02. THE TRIAL COURT VIOLATED MILLER'S CONSTITUTIONAL RIGHT TO BE PRESENT WHEN IT EXCUSED PROSPECTIVE JUROR 28 OFF THE RECORD AND NOT IN OPEN COURT.

A criminal defendant has a due process right to be present at all critical stages of a trial, State v. Irby, 170 Wn.2d at 880, which includes the voir dire and empanelling stages. Diaz v. United States, 223 U.S. 442, 455, 32 S. Ct. 250, 56 L. Ed. 500 (1912).

Jury selection is the "primary means by which a court may enforce a defendant's right to be tried by a jury free from ethnic, racial, or political prejudice, or predisposition about the defendant's culpability." Gomez v. United, 490 U.S. 858, 873, 109 S. Ct. 2237, 104 L. Ed. 2d 923 (1989).

> (A) defendant's presence at jury selection "bears, or may fairly be assumed to bear, a relation, reasonably substantial, to his opportunity to defend" because "it will be in his power, if present, to give advice or suggestion or even to supersede his lawyers altogether."

State v, Irby, 170 Wn.2d at 883 (quoting 170 Wn.2d at 883 (quoting Snyder v. Massachusetts, 291 U.S. 97, 105-06, 54 S. Ct. 330, 78 L. Ed. 674 (1934), overruled on other grounds by Malloy v. Hogan, 378 U.S. 1, 84 S. Ct. 1489, 12 L. Ed. 2d 653 (1964)). This right attaches from the time jury empanelment begins. Irby, 170 Wn.2d at 883.

As argued above, given that juror 28 was presumably excused because of what she had heard about Miller's case at the prior proceeding, the questioning to elicit this would have been more analogous to the voir dire component of jury selection than to administrative excusals. Supra at 11.

Miller's absence in this context cannot be dismissed as an event failing to abridge his opportunity to defend himself, for the purpose of a defendant's presence during jury selection, as noted above, is to allow him or her the opportunity to give advice and suggestions to counsel or even to

supersede counsel's decisions. Similar to Irby, here the State cannot show that juror 28 had no chance to sit on this jury. And while the issue is subject to harmless error analysis, Irby 170 Wn.2d at 885, it is the State's burden to prove beyond a reasonable doubt that the error was harmless. Id. at 886. The trial court's actions in excusing prospective juror 28 denied Miller the opportunity and right "to give advise or suggestion or even to supersede his (lawyer) altogether" in determining who would ultimately judge his fate.

The State cannot show that Miller's absence during this critical stage was harmless error beyond a reasonable doubt.

E. CONCLUSION

Based on the above, Miller respectfully requests this court to reverse his convictions and remand for a new trial consistent with the arguments presented herein.

DATED this 18th day of October 2013.

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CERTIFICATE

I certify that I served a copy of the above brief on this date as follows:

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DATED this 18th day of October 2013.

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