No. 24957-3-III
(consolidated with 24958-1-III)
IN THE COURT OF APPEALS
FOR THE STATE OF WASHINGTON
DIVISION III

STATE OF WASHINGTON,

Plaintiff/Respondent,

vs.

YOLANDA ELEUTERIA DEVON,

Defendant/Appellant.

APPEAL FROM THE OKANOGAN COUNTY SUPERIOR COURT
HONORABLE LESLEY ALLAN, VISITING JUDGE

APPELLANT'S REPLY BRIEF

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ARGUMENT

Ms. DeVon fully concurs with Mr. DeVon's position that the state's brief does not accurately address the issue of a public trial as required under U.S. Const. amend I and VI, and WA Const. art. 1, §§ 10 and 22. Pursuant to RAP 10.1(g), Ms. DeVon hereby adopts by reference the responsive arguments set forth in Mr. DeVon's Reply Brief. She additionally replies in part to the state's response brief as follows.

The process of juror selection is a matter of importance, not simply to the adversaries but to the criminal justice system.' Press-Enter. Co. v. Superior Court, 464 U.S. 501, 505, 104 S.Ct. 819, 78 L.Ed.2d 629 (1984). The protection of the constitutional guaranty to a public trial requires a trial court to resist a closure motion *except under the most unusual circumstances*.' State v. Bone-Club, 128 Wn.2d 254, 259, 906 P.2d 325 (1995) (emphasis added).

Before a court can properly close any part of a trial to the public, *it must consider and articulate findings* that closure is essential to preserve higher values and is narrowly tailored to serve that interest. In re Personal Restraint of Orange, 152 Wn.2d 795, 806, 100 P.3d 291 (2004) (*quoting* Waller v. Georgia, 467 U.S. 39. 45, 104 S.Ct. 2210, 81 L.Ed.2d 31 (1984)

(emphasis added)). The five factors that must be considered 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 258-89.

Herein, the state complains that "[t]he right to a fair and public trial is not ensured by requiring every instance of a proceeding be open to the public to the detriment of a fair trial ... ." (Amended Brief of Respondent, p. 25) To the contrary, Bone-Club and its progeny do not require every proceeding to be open. The cases simply call for the trial court to thoughtfully consider why the constitutional guaranty of an open proceeding should be altered and to articulate those reasons on the record. There is nothing in this record showing that the trial court considered these five factors.

The state suggests that Ms. Devon "waived" the right to an open process of jury selection. (Amended Brief of Respondent, p. 27) Trial counsel simply mentioned at a pretrial hearing he "was thinking there was quite a lot of publicity about this case so we may have to voir dire some of the jurors individually in chambers ... ." (12/19/05 RP 27) Even if this could be construed as a knowing, intelligent and voluntary waiver of *Ms. DeVon's* constitutional guaranty to an open and public trial, it cannot constitute a waiver of *the public's* constitutional right.

The record shows that neither the court nor the state identified a compelling interest that posed a serious and imminent threat to the defendants' or public's right to a fair and open trial. There is nothing in the record to show anyone present was given the opportunity to object when the decision was made to conduct a portion of jury voir dire in the judge's chambers, outside the presence of the public. The record is devoid of any indication the private jury voir dire was the least restrictive means available for protecting any perceived threatened interests, or was no broader in its application or duration than necessary to serve its undisclosed purpose.

Nor does the record disclose any weighing of the competing interests of private proceedings and the public. The constitutional public

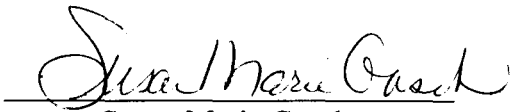
trial right is the right to have a trial open to the public. Orange, 152 Wn.2d at 804-05. "The requirement of a public trial is for the benefit of the accused; that the public may see he is fairly dealt with and not unjustly condemned, and that the presence of interested spectators may keep his triers keenly alive to a sense of their responsibility and to the importance of their functions ... ." Bone-Club, 128 Wn.2d at 259 (citations omitted). Herein, the public, interested spectators and Mr. and Mrs. DeVon's friends and family were not present at the sessions in the judge's chambers, to see that the defendants were dealt with fairly.

Because the trial court failed to analyze the Bone-Club factors before excluding the public from a significant portion of the jury voir dire, the defendants' constitutional right to a public trial was violated. The remedy is reversal and a new trial.

D. CONCLUSION

For the reasons stated herein and in her opening brief, Ms. DeVon's conviction for second-degree manslaughter must be reversed.

Respectfully submitted July 2, 2007.



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