No. 26476-9-III

IN THE COURT OF APPEALS
FOR THE STATE OF WASHINGTON
DIVISION III

STATE OF WASHINGTON,

Plaintiff/Respondent,

vs.

ANTHONY PARKS,

Defendant/Appellant.

Appellant's Opening Brief

DAVID N. GASCH
WSBA No. 18270
P.O. Box 30339
Spokane, WA 99223-3005
(509) 443-9149
Attorney for Appellant

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A. ASSIGNMENT OF ERROR

The trial court erred by swearing in the jury panel off the record and outside the courtroom without first considering the *Bone-Club*[1] factors, thus excluding the public from that portion of the jury voir dire process, and violating Mr. Park's constitutional right to a public trial.

Issue Pertaining to Assignment of Error

Where the trial court did not analyze the *Bone-Club* factors before swearing in the jury panel off the record and outside the courtroom, did the court violate Mr Park's constitutional right to a public trial by excluding the public from that portion of the jury voir dire process?

B. STATEMENT OF THE CASE

Anthony Parks was convicted by a jury of second-degree rape following a jury trial. CP 122. At the beginning of the trial the court addressed Mr. Parks as follows:

> Mr. Parks, you have a right to be present at all stages of these proceedings. We have a large jury panel. We probably can't get them all in here at any one time. And I would propose that – I would ask if you have any objection to me swearing the jury in the jury assembly room and handing them a questionnaire regarding their history of involvement in sexual abuse. You have a right to be present. I'm asking if you would waive that right?

RP 1.

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[1] *State v. Bone-Club*, 128 Wn.2d 254, 906 P.2d 325 (1995).

Mr. Parks agreed to waive his presence. The judge then left the courtroom to swear in the jury panel in the jury assembly room. That swearing in was not made part of the record. RP 1.

C. ARGUMENT

Since the trial court did not analyze the *Bone-Club* factors before swearing in the jury panel off the record and outside the courtroom, it violated Mr Park's constitutional right to a public trial by excluding the public from that portion of the jury voir dire process.

A criminal defendant has a right to a public trial, including during the jury selection process. Under both the Washington and United States Constitutions, a defendant has a constitutional right to a speedy and public trial. WA Const. art 1, § 22; U.S. Const. amend. VI; *In re Personal Restraint of Orange*, 152 Wn.2d 795, 804, 100 P.3d 291 (2004). Additionally, the public and press have an implicit First Amendment right to a public trial. U.S. Const. amend. I; WA Const. art 1, § 10; *Waller v. Georgia*, 467 U.S. 39, 46, 104 S.Ct. 2210, 81 L.Ed.2d 31 (1984); *State v. Easterling*, 157 Wn.2d 167, 179, 137 P.3d 825 (2006).

The guaranty of open criminal proceedings extends to "the process of juror selection," which "is itself 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). "[A]lthough the public trial right may not be absolute, protection of this basic constitutional right clearly calls for 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). Even when only a part of jury voir dire is improperly closed to the public, it can violate a defendant's constitutional public trial right. *Orange*, 152 Wn.2d at 812, 100 P.3d 291. "Moreover, the defendant's failure to lodge a contemporaneous objection at trial [does] not effect a waiver of the public trial right." *State v. Brightman*, 155 Wn.2d 506, 517, 122 P.3d 150 (2005).

" 'The presumption of openness may be overcome only by an overriding interest based on findings that closure is essential to preserve higher values and is narrowly tailored to serve that interest. The interest is to be articulated along with findings specific enough that a reviewing court can determine whether the closure order was properly entered.' " *Orange*, 152 Wn.2d at 806 (quoting *Waller*, 467 U.S. at 45, 104 S.Ct. 2210).

The Washington Supreme Court requires compliance with five standards before the court can properly close any part of a trial to the public:

> 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.

The holding in *Bone-Club* has been adopted verbatim in subsequent Supreme Court cases. *Orange*, 152 Wn.2d at 812, 100 P.3d 291. A trial court's failure to follow the five-step closure test violates a defendant's right to a public trial under section 22 of the Washington Constitution. *Id.* When the record "lacks any hint that the trial court considered [the defendant's] public trial right as required by *Bone-Club*, [the court on appeal] cannot determine whether the closure was warranted." *Brightman*, 155 Wn.2d at 518, 122 P.3d 150.

The denial of the constitutional right to a public trial is one of the limited classes of fundamental rights not subject to harmless error analysis. *Bone-Club*, 128 Wn.2d at 261-62, 906 P.2d 325; *Neder v. United States*, 527 U.S. 1, 8, 119 S.Ct. 1827, 144 L.Ed.2d 35 (1999). "[P]rejudice is presumed where a violation of the public trial right occurs." *Bone-Club*, 128 Wn.2d at 261-62 (*citing State v. Marsh*, 126 Wash. 142, 146-47, 217 P. 705 (1923)).

In *Brightman*, the trial court *sua sponte* told counsel that for reasons of security, "we can't have any observers while we are selecting the jury." *Brightman*, 155 Wn.2d at 511. The Supreme Court ruled that where jury selection or a part of the jury selection is closed, the closure is not *de minimis* or trivial. *Id.* at 517. The trial court had failed to analyze the five *Bone-Club* factors. Unable to determine from the record below whether the closure was warranted, the Court remanded for a new trial. *Id.* at 518.

In *Orange*, the trial court closed the courtroom during more than half of the time spent on jury voir dire, because of limited courtroom space and for security reasons. *Orange*, 152 Wn.2d at 808-10. The *Orange* Court held the trial court's failure to analyze the five *Bone-Club* factors before ordering the courtroom closed violated Orange's right to a public

trial. *Orange*, 152 Wn.2d at 812. The *Orange* Court also held the constitutional violation was presumptively prejudicial and would have resulted in a new trial had the issue been raised in Orange's direct appeal. *Id.*

Here, the swearing in of the jury panel is clearly part of "the process of juror selection." The trial court excluded the public from witnessing that process by swearing in the jury panel off the record and outside the courtroom. The reason stated by the court for this closure was the same one enunciated in *Orange*—limited courtroom space. Since the trial court did not analyze the *Bone-Club* factors before swearing in the jury panel off the record and outside the courtroom, it violated Mr Park's constitutional right to a public trial. *Orange*, 152 Wn.2d at 812.

Mr. Parks did not waive his right to a public trial

The State may argue that Mr. Parks waived his right to an open and public trial because he waived his right to be present during the swearing in of the jury panel, and neither Parks nor his counsel objected to the proceedings being held off the record and outside the courtroom. However, this position is contradicted by past precedent and was clearly addressed recently by this Court's opinion in *State v. Duckett,* 141 Wn. App. 797, 173 P.3d 948 (2007):

> Here, the court never advised Mr. Duckett of his public trial right or asked him to waive it. He certainly could not then make a knowing, intelligent and voluntary waiver of this constitutional right. While Mr. Duckett was told he had the right to be present during individual questioning of the selected jurors, and validly waived that right, that is all he waived. We disagree that he "presumably was aware of the right to have the public present" and impliedly waived it, when this right was never addressed . . . Moreover, we question whether Mr. Duckett could waive the public's right to open proceedings. Any closure of a public judicial proceeding required the trial court to engage in the Bone-Club analysis. That was not done here.

Duckett, 141 Wn. App. 797, 173 P.3d at 953. See also *State v. Frawley*, 140 Wn. App. 713, 720, 167 P.3d 593 (2007) ("Here, Mr. Frawley was never presented with an opportunity to waive his right to have the public present at the individual *voir dire*, therefore he cannot have knowingly and intelligently waived that right.").

Under the *Bone-Club* criteria, the burden is placed upon the trial court to seek the defendant's objection to the courtroom closure. See *Easterling,* 157 Wn.2d at 176 ("Additionally, under the *Bone-Club* criteria, the burden is placed upon the trial court to seek the defendant's objection to the courtroom closure. The record in this case shows that the trial court did not affirmatively provide Easterling with such an opportunity.").

Here, Mr. Parks only waived his personal right to be present for the swearing in of the jury panel. He did not waive his right to a public trial,

nor did the trial court seek his objection to the courtroom closure. Because Mr. Parks did not waive his right to a public trial, there is no reason for this Court to reach the issue of whether reversal is required in a criminal case where only the public right to open proceedings survives. However, it appears that this Court and our Supreme Court have already answered this question:

> Were we to conclude that the closure did not violate Easterling's constitutional right to a public trial, the trial court's failure to comply with *Bone-Club* still constitutes a violation of the public's right under article I, section 10 to an open public trial, which exists separately from Easterling's right.

Easterling, 157 Wn.2d at 179. The Court continued:

> However, contrary to what case law and constitutional protections required, the trial court erred when it neither identified a compelling interest warranting the public's exclusion from the pretrial process nor made specific findings that showed it weighed the competing interest of Jackson as the proponent of closure against the public's interest in maintaining unhindered access to judicial proceedings . . .It was the request to close itself, and not the party who made the request, that triggered the trial court's duty to apply the five-part *Bone-Club* requirements. The trial court's failure to apply that test constitutes reversible error.

Id. at 179-80.

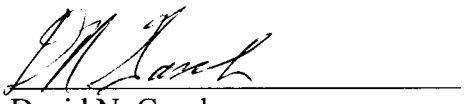
Any argument to the contrary "fails to appreciate the court's independent obligation to safeguard the open administration of justice. Article I, section 10 is mandatory." *Duckett,* 173 P.3d at 951; citing *Rauch v. Chapman,* 16 Wash. 568, 575, 48 P. 253 (1897). "Moreover, the right

secured by article I, section 10 is fully present even when a defendant asserts only rights under article I, section 22 and the Sixth Amendment, as the court has adopted the *Ishikawa*[2] analysis in this context." *Duckett,* 173 P.3d at 951-52; citing *Bone-Club,* 128 Wn.2d at 259 (noting "the same closure standard for both the section 10 and section 22 rights").

D. CONCLUSION

For the reasons stated, the conviction should be reversed.

Respectfully submitted February 29, 2008.



David N. Gasch
Attorney for Appellant
WSBA #18270

[2] *Seattle Times Co. v. Ishikawa*, 97 Wash.2d 30, 36-39, 640 P.2d 716 (1982).