COA NO. 72101-1-I

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

STATE OF WASHINGTON,

Respondent,

v.

DONALD TURPIN,

Appellant.

ON APPEAL FROM THE SUPERIOR COURT OF THE
STATE OF WASHINGTON FOR KING COUNTY

The Honorable Dean S. Lum, Judge

REPLY BRIEF OF APPELLANT

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A. ARGUMENT IN REPLY

1. TURPIN'S RIGHT TO A PUBLIC TRIAL WAS VIOLATED WHEN THE COURT EXCUSED AN EMPANELED JUROR DURING A COURT RECESS OFF THE RECORD.

a. The removal of a sitting juror implicates the public trial right under the experience and logic test.

The State begins by setting up a straw man argument: because Turpin has never challenged the judge's determination that the sitting juror was ill, the trial court must be deemed to have properly exercised its discretion to remove the juror. Brief of Respondent (BOR) at 4-5. Whether the trial court properly exercised its discretion in removing the juror is not the issue on appeal, but the State's attempt to make it one illustrates its misunderstanding of what the public trial right is all about.

In cases where a public trial violation is present, there is no determination that the trial court abused its discretion or otherwise did anything improper during the closed proceeding at issue. See, e.g., State v. Wise, 176 Wn.2d 1, 7, 13-15, 18, 288 P.3d 1113 (2012) (trial court violated right to public trial by questioning prospective jurors in chambers; no determination that judge's questions were improper or that any jurors were wrongly excused thereafter); State v. Easterling, 157 Wn.2d 167, 179-82, 137 P.3d 825 (2006) (right to public trial violated where the trial court entertained a co-defendant's motions for severance and dismissal in a

closed courtroom without justifying the closure; no determination that trial court abused its discretion in deciding the motion).

The State's argument that removing an unfit juror is a discretionary determination is therefore wide of the mark. Of course it is a discretionary decision. Discretionary decisions are no more shielded from public scrutiny than non-discretionary ones. See State v. Anderson, __Wn. App.__, __P.3d__, 2015 WL 2394961, at *7 (slip op. filed May 19, 2015). ("Removing a prospective juror for cause is a discretionary decision, but the excusal must still be open to the public."). A public trial violation occurs when the proceeding at issue implicates the public trial right and it is closed to the public in the absence of a Bone-Club[1] analysis. State v. Smith, 181 Wn.2d 508, 513, 334 P.3d 1049 (2014). The discretionary nature of a judge's decision-making authority does not enter into the analysis.

The State's reliance on State v. Wilson, 174 Wn. App. 328, 298 P.3d 148 (2013) is misplaced. In Wilson, the public trial right was not triggered when the bailiff excused two prospective jurors for illness-related reasons before voir dire began in the courtroom. Wilson, 174 Wn. App. at 331. Unlike Wilson, Turpin's case involves the removal of n empaneled juror by a judge. That juror had already gone through the rigor

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

of the full jury selection process, including voir dire. That juror (juror 3) was slated to deliberate on Turpin's fate, having been excused only after all the evidence was taken. See 1RP 139 (jurors 13 and 14 were the designated alternates); 1RP 1105 (timing of excusal).

The State claims logic does not support Turpin's public trial claim, criticizing Turpin for not providing any examples of trial courts that have improperly dismissed a juror for illness-related reasons. BOR at 12. There is no authority for the State's implicit assertion that the public trial right turns on whether some undefined threshold for historical abuse of a proceeding has been met.

The State misses the bigger picture. "There is a strong presumption that courts are to be open at all stages of the trial." State v. Sublett, 176 Wn.2d 58, 70, 292 P.3d 715 (2012). The importance of fairness, not only in fact, but also in appearance, animates the public trial right. See Anderson, 2015 WL 2394961, at *7 ("the appearance of fairness and deterrence of deviation from established procedures are important functions of the public trial right").

The State does not and cannot deny that it is possible for a trial court to abuse its authority in releasing a juror on the purported ground of illness. Suppose a judge observes a juror during the course of trial and concludes the juror is suffering from some affliction that renders her unfit

to continue to serve. The juror, upon questioning, acknowledges she is ill but not so ill as to render her unfit. But the judge decides to excuse her anyway because the juror closed her eyes a few times during a boring part of the trial involving tedious expert testimony. Now suppose that juror is the only black juror, and the case is a highly publicized one involving the shooting death of a black man by a white police officer. The decision to remove that juror is fraught with significance. The public is watching. Yet the State would have the proceeding on whether to excuse that juror closed to the public because the basis for excusal is only on the purported ground of illness.

Of course, most trials present more mundane circumstances, as do most removals of jurors on grounds of illness or any other ground of unfitness. But there is always the possibility that the juror could be excused when the facts do not justify it. The potential for abuse is there. Appellate courts, when faced with deciding whether a given proceeding triggers the public trial right, must be mindful of different factual scenarios that could conceivably arise because the threshold question is whether the "type of proceeding" at issue implicates the public trial right. Wilson, 174 Wn. App. at 336. A determination that a "type of proceeding" does not implicate the public trial right is a categorical determination, steamrolling over different fact patterns in consigning the

proceeding at issue to the oblivion of secrecy on the whim of a judge. So appellate courts must tread carefully. With this in mind, Turpin points out the State's proposed rule would be difficult to limit. Based on the State's rationale, any decision to remove a juror under RCW 2.36.110 or CrR 6.5, for any reason of unfitness, not just illness, would be insulated from public oversight.

Turpin has framed the type of proceeding at issue here as one in which a sitting juror is excused based on a determination that he or she is unfit to serve. The State seeks to narrow the type of proceeding at issue, framing it as the excusal of sitting juror who is excused due to illness. Either way, the experience and logic test is met.

Under the logic prong, we look to the "values served by open courts" and "must consider whether openness will 'enhance[ ]both the basic fairness of the criminal trial and the appearance of fairness so essential to public confidence in the system.'" Sublett, 176 Wn.2d at 74-75 (quoting Press-Enterprise Co. v. Superior Court, 464 U.S. 501, 508, 104 S. Ct. 819, 78 L. Ed. 2d 629 (1984)). Such fairness is enhanced where "the public's mere presence passively contributes to the fairness of the proceedings, such as deterring deviations from established procedures, reminding the officers of the court of the importance of their functions, and subjecting judges to the check of public scrutiny." State v. Bennett,

168 Wn. App. 197, 204, 275 P.3d 1224 (2012). "[T]he purposes underlying a *public* trial include ensuring that the public can see that the accused is dealt with fairly and reminding officers of the court of their responsibilities to assure that the defendant receives a fair trial." State v. Sadler, 147 Wn. App. 97, 116, 193 P.3d 1108 (2008).

The values driving the public trial right attach to the excusal of sitting jurors for any reason, including an illness-related reason. Indeed, public scrutiny ensures that the ground for excusal is justified and real. Openness ensures that the factual basis for the excusal is not kept secret, but made known to the public. A trial court is capable of deviating from established procedure in removing a juror for unfitness. A court could summarily remove a juror for unfitness where no ground for unfitness is present. The check of public scrutiny plays an important role here.

The State suggests it is the impractical that sitting jurors who claim illness be excused in open court and nothing positive can come of it. BOR at 11. Contrary to the State's suggestion, Turpin does not argue that a sick juror must be kept at the courthouse until the juror can be excused on the record in open court. The physical location of the juror under such circumstances is immaterial. What matters is where and under what circumstances the proceeding involving the judicial act of excusal takes place. The decision to excuse any sitting juror, and the discussion with the

parties attending that decision, must be done in open court. That is the proceeding at issue.

The three cases cited by the State in support of its argument that sick jurors are traditionally dismissed during a recess do not actually establish the point. See State v. Pinkerton, 72 Wn.2d 898, 902, 435 P.2d 661 (1968) (when court resumed after lunch recess, the judge was informed that juror No. 9 had become ill, had been sent to the hospital, and would probably not be able to return, whereupon judge discussed with parties the alternatives of getting a new jury or choose a replacement juror); State v. Fisch, 22 Wn. App. 381, 382, 588 P.2d 1389 (1979) (a juror became ill and had to be taken to the hospital by ambulance during deliberations); State v. Wirth, 121 Wn. App. 8, 12, 85 P.3d 922 (2004) (juror fell ill and was taken to the hospital during deliberations). These cases demonstrate that jurors with emergent illnesses have been physically removed from the courthouse for treatment. None of those cases show the decision to excuse the juror from further service was made during a recess. There is no factual description of that event in the opinions.

There are cases showing the excusal of a sitting juror for health-related reasons, and the discussion surrounding it, have been made in open court on the record. See State v. Lane, 40 Wn.2d 734, 735, 246 P.2d 474 (1952) ("On the second day of the trial, after a jury of twelve had been

impaneled and sworn, a juror became ill. Counsel for one of the accused urged the court to excuse that juror and proceed with the trial with the remaining jurors. The court so ordered, after both defendants and their counsel stipulated with counsel for the state it be done, and the jury of eleven returned a verdict of guilty against both defendants.");[2] State v. Hansen, 69 Wn. App. 750, 758-59, 762, 850 P.2d 571 (1993) (decision to stipulate to excusal of ill juror made on record). Experience supports Turpin's argument that the public trial right is implicated.

b. The excusal of the sitting juror during a court recess off the record constituted a closure; alternatively, the record should be reconstructed to decide the point.

The State argues no closure occurred because there is no showing the courtroom was closed to the public during the lunch recess. BOR at 13. It cites State v. Lormor, 172 Wn.2d 85, 93, 257 P.3d 624 (2011) for the proposition that a "closure" occurs "when the courtroom is completely and purposefully closed to spectators so that no one may enter and no one may leave." BOR at 13. The State's view of when a closure occurs is too narrow and rigid.

"[S]uch a closure of the entire courtroom is not the only action that constitutes a closure. A closure also occurs when the public is excluded

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[2] We know all this occurred on the record because the appellate court was able to recite it.

from particular proceedings within a courtroom." Anderson, 2015 WL 2394961, at *2. The Court of Appeals in Anderson thus held a trial court effectively closed the proceedings when challenges to jurors for cause took place at a sidebar conference, even though the courtroom remained open to the public. Id. The record in that case showed "the trial court neither barred the public from the courtroom during the sidebar conference nor held the conference in a physically inaccessible location." Id. But "the entire purpose of a sidebar conference is to prevent anyone other than those present at the sidebar — an audience typically limited to the judge, counsel, and perhaps court staff — from hearing what is being said." Id. The sidebar constituted a closure because the court "prevented meaningful access to the proceedings by conducting the challenges for cause in a manner such that the public could not hear what was occurring." Id.

The record in Turpin's case, as it presently exists, does not show whether the excusal of the empaneled juror took place at sidebar. "[T]he appellant bears the responsibility to provide a record showing that such a closure occurred in the first place." State v. Koss, 181 Wn.2d 493, 503, 334 P.3d 1042 (2014). If the existing record is insufficient, then the record should be supplemented to enable the reviewing court to determine what happened. State v. Slert, 181 Wn.2d 598, 608, 334 P.3d 1088 (2014); Koss, 181 Wn.2d at 503-04. Turpin has therefore requested that

his case be remanded to reconstruct the record in a separate motion. See Motion to Reconstruct, filed March 19, 2015. The commissioner passed the merits of that motion to the panel considering Turpin's case. See Ruling entered on April 6, 2015. If this Court deems that the record as it currently exists is insufficient to show a closure occurred because the record does not show the excusal took place at sidebar or in a manner that otherwise prevented public access to the event, then Turpin's motion to reconstruct the record should be granted.

That being said, Turpin maintains excusing a sitting juror off the record during the lunch recess itself constituted a closure. The Court of Appeals has held the trial court violated the right to a public trial when, during a court recess off the record, the court clerk drew four juror names to determine which jurors would serve as alternates. State v. Jones, 175 Wn. App. 87, 91, 303 P.3d 1084 (2013), review pending, No. 893217. The Court of Appeals treated this proceeding as a closure requiring a Bone-Club analysis because it occurred off the record during a court recess. Jones, 175 Wn. App. at 96, 102-03. The State does not attempt to engage Jones on this point.

As argued in the opening brief, taking a recess after announcing when court proceedings will resume has the effect of notifying members of the public that nothing of substance will take place until court is called

back into session on the record. A member of the public, upon being told that court is in recess until after lunch, has no reason to remain in the courtroom to see if the trial process will continue. The public has been assured that nothing will happen. That is a problem when something that implicates the public trial right actually does happen, as is the case here. The State criticizes Turpin for providing no authority for that argument, but Jones is the authority. Turpin's argument also has common sense on its side.

The State further claims Turpin's argument "ignores the reality that a court may announce a recess and then unexpectedly resume proceedings." BOR at 16 (emphasis added). As an example, the State points out the court recessed for jury deliberations and then resumed proceedings on the record to address a jury question." BOR at 16 n. 7. That is not a helpful example for the State for two reasons.

First, when the jury retires for deliberations, it is obvious to all, including members of the public, that the jury may require court intervention at any time because of a question, a deadlock, or the returning of a verdict. That is the nature of the deliberative process. There is nothing unexpected about those events. They are to be expected, and there is no assurance from the judge that the jury will not do something for a set period of time that requires the court's attention.

But where, as here, the trial court announces a lunch recess and the time that the trial process will resume, such an announcement sends a message to members of the public that they will not be missing a part of the trial process when they go to lunch. If something happens that implicates the public trial right during that off the record recess, then the public has been misled. Public access is thwarted in this manner. In determining whether a closure occurred, the salient question is whether the "trial court's action actually impeded public scrutiny." Anderson, 2015 WL 2394961, at *2. A trial court that announces a court session is in recess and will not resume for a set period of time actually impedes public scrutiny when a trial proceeding in fact takes place during that recess.

Second, the problem here is that the trial court here did not officially resume proceedings during the recess. The resumption of proceedings is supposed to take place on the record. See RCW 2.08.030 ("[t]he superior courts are courts of record."); RCW 2.32.050(2) ("[I]t is the duty . . . of each county clerk for each of the courts for which he is clerk . . . . [t]o record the proceedings of the court."). If the proceeding is not on the record, then it is not an official proceeding at all from a public perspective. The Oregon Supreme Court recognizes "[a] criminal trial should be conducted on the record. The trial courts of this state are courts of record and nothing of importance bearing on the conduct of the trial

should be 'off the record.'" State v. Lutz, 306 Or. 499, 503, 760 P.2d 249 (Or. 1988) (discharge of juror without record showing defendant's consent to proceeding with less than 12 jurors violated due process). Washington is no different. When a trial court conducts court business off the record, it ceases to fulfill its function as a court of record open to the public. See Jones, 175 Wn. App. at 102 ("Where such a drawing occurs during a court recess off the record, the defendant and the public lack the assurance of a truly random drawing that they would have if the drawing were performed in open court on the record."). Conducting proceedings off the record diminishes public confidence in the justice system.

A thought experiment illuminates the issue. No one would dispute that taking the testimony of a witness during a criminal trial implicates the public trial right. See Easterling, 157 Wn.2d at 174 ("The public trial right extends beyond the taking of a witness's testimony at trial."). Suppose a trial judge announced that the court would be in recess for one hour, and then, after members of the public cleared out of the courtroom, took testimony from a key prosecution witness off the record. When members of the public returned after one hour, the court announced that the witness's testimony had been taken during the recess. Or suppose the same scenario, except that the judge announced the court would be at

recess until the following day, and then resumed the trial later that night off the record after members of the public had gone home.

Under the State's logic, there would be no public trial violation in those scenarios. Under the State's logic, any proceeding that indisputably implicates the public trial right could be conducted during an off the record recess and there would be no public trial violation. On an instinctive level, that seems wrong. On an analytical level, it is wrong. A trial court taking such action actually impedes public scrutiny. The conclusion applies equally to what happened in Turpin's case.

B. CONCLUSION

For the reasons set forth above and in the opening brief, Turpin requests reversal of the convictions.

DATED this 7th day of May 2015

Respectfully Submitted,

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DIVISION ONE

STATE OF WASHINGTON/DSHS	)	
Respondent,	)	
v.	)	COA NO. 72101-1-I
DONALD TURPIN,	)	
Appellant.	)	

DECLARATION OF SERVICE

I, PATRICK MAYOVSKY, DECLARE UNDER PENALTY OF PERJURY UNDER THE LAWS OF THE STATE OF WASHINGTON THAT THE FOLLOWING IS TRUE AND CORRECT:

THAT ON THE 27TH DAY OF MAY, 2015 I CAUSED A TRUE AND CORRECT COPY OF THE **REPLY BRIEF OF APPELLANT** TO BE SERVED ON THE PARTY / PARTIES DESIGNATED BELOW BY EMAIL AND/OR DEPOSITING SAID DOCUMENT IN THE UNITED STATES MAIL.

[X] DONALD TURPIN
DOC NO. 261459
WASHINGTON STATE PENITENTIARY
1313 N. 13TH AVENUE
WALLA WALLA, WA 99362

SIGNED IN SEATTLE WASHINGTON, THIS 27TH DAY OF MAY, 2015.

X Patrick Mayovsky