COA NO. 43932-8-I

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

STATE OF WASHINGTON,

Respondent,

v.

MATTHEW AHO,

Appellant.

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

The Honorable Beverly G. Grant

SUPPLEMENTAL OPENING BRIEF OF APPELLANT

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A. ASSIGNMENTS OF ERROR

1. The trial court violated appellant's constitutional right to a public trial by taking for-cause challenges to prospective jurors by an off-the-record chambers conference.

2. The trial court violated appellant's constitutional right to be present at all critical stages of his criminal trial by taking for-cause challenges to prospective jurors by during an off-the-record conference held in chambers, without him present.

Issues Pertaining to Assignments of Error

1. Where the trial court did not analyze the Bone-Club[1] factors before taking for-cause challenges to prospective jurors by secret ballot during an off-the-record conference, did the court violate appellant's constitutional right to a public trial?

2. Did the appellant's absence from the conference violate his constitutional right to be present at all critical stages of trial?

B. STATEMENT OF THE CASE

As stated in the Opening Brief, Mr. Aho was sentenced to 210 months incarceration for complicity to burglary and for other related offenses. He appealed. CP 88. He argued, inter alia, that he did not

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

receive notice of some of the charges, that the trial court erred in allowing the State to amend the original information, that his right to jury unanimity was violated, that he was convicted of an uncharged crime, and that the trial court erroneously sentenced him to three consecutive terms for his three firearm-related offenses.

Voir dire at Mr. Aho's trial occurred in public and was recorded by a court reporter. 8/20-21/12RP. When it came time to exercise for-cause challenges, however, the court conducted a conference off the record, with counsel. 8/20-21/12RP at 102-03. The parties apparently exercised a cause challenges to a prospective juror during this conference, excusing prospective juror 23.

The court did not consider the Bone-Club factors before deciding the challenge process should be away from public sight and hearing. Neither party objected to this portion of jury selection.

C. ARGUMENT

1. THE TRIAL COURT VIOLATED HOPKINS' RIGHT TO A PUBLIC TRIAL BY CONDUCTING PEREMPTORY CHALLENGES AT SIDEBAR.

The Sixth Amendment and article I, section 22 guarantee the accused a public trial by an impartial jury. Presley v. Georgia, 558 U.S. 209, 213, 130 S. Ct. 721, 724, 175 L. Ed. 2d 675 (2010); Bone-Club, 128 Wn.2d at 261-62. Additionally, article I, section 10 of the Washington

Constitution provides that "[j]ustice in all cases shall be administered openly, and without unnecessary delay." This latter provision gives the public and media a right to open and accessible court proceedings. Seattle Times Co. v. Ishikawa, 97 Wn.2d 30, 36, 640 P.2d 716 (1982). There is a strong presumption courts must be open at all stages of the trial. State v. Sublett, 176 Wn.2d 58, 70, 292 P.3d 715 (2012).

Whether a trial court has violated the defendant's public trial right violation is a question of law this Court reviews de novo. State v. Brightman, 155 Wn.2d 506, 514, 122 P.3d 150 (2005). A trial court may restrict the right only "under the most unusual circumstances." Bone-Club, 128 Wn.2d at 259. Before a court can close any part of a trial, it must first apply the five factors set forth in Bone-Club. In re Personal Restraint of Orange, 152 Wn.2d 795, 806-07, 809, 100 P.3d 291 (2004).[2]

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[2] The factors are:

> 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.

Violation of this right is presumed prejudicial even when not preserved by objection. State v. Wise, 176 Wn.2d 1, 16, 288 P.3d 1113 (2012).

"The process of juror selection is itself a matter of importance, not simply to the adversaries but to the criminal justice system." Press-Enterprise Co. v. Superior Court, 464 U.S. 501, 505, 104 S. Ct. 819, 78 L. Ed. 2d 629 (1984) (Press-Enterprise I). Washington courts have repeatedly held that jury voir dire conducted in private violates the right to public trial. See, e.g., State v. Wise, 176 Wn.2d at 15; State v. Paumier, 176 Wn.2d 29, 35, 288 P.3d 1126 (2012); State v. Strode, 167 Wn.2d 222, 217 P.3d 310 (2009) (Alexander, C.J., lead opinion); 167 Wn.2d at 231-36 (Fairhurst, J., concurring); State v. Erickson, 146 Wn. App. 200, 211, 189 P.3d 245 (2008), review denied, 176 Wn.2d 1031 (2013).

The question in Mr. Aho's appeal is whether the exercise of causey challenges is part of voir dire that must be held in public. While peremptory challenges may be exercised based on subjective feelings and opinions, there are important limits on exercise of for-cause challenges.

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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.

Georgia v. McCollum, 505 U.S. 42, 49, 112 S. Ct. 2348, 120 L. Ed. 2d 33 (1992) (comparing challenges).

Exercising any juror challenge is a vital part of voir dire. See State v. Wilson, __ Wn. App. __, 298 P.3d 148, 156 (2013) (observing that unlike hardship strikes made by clerk, "voir dire" involves trial court and counsel questioning prospective jurors to determine their ability to serve fairly and to enable counsel to exercise informed challenges for cause and peremptory challenges); State v. Vreen, 99 Wn. App. 662, 668, 994 P.2d 905 (2000) (recognizing "it is the interplay of challenges for cause and peremptory challenges that assures the fair and impartial jury"), aff'd, 143 Wn.2d 923 (2001); People v. Harris, 10 Cal.App.4th 672, 684, 12 Cal.Rptr.2d 758 (Cal. App. 1992) (exercising peremptory challenges in chambers, "tracking" them on paper, and then announcing in open court the names of the stricken prospective jurors, violated federal and state public trial rights, even where such proceedings were reported).

To determine whether the court's method of exercising challenges amounted to a "closure" at Aho's trial, this Court must apply the "experience and logic" test adopted by our Supreme Court in State v. Sublett, 176 Wn.2d 58, 73, 292 P.3d 715 (2012). Under the experience prong of the test, courts ask whether the proceeding has historically been open to the media and public. Id. at 73 (citing Press–Enterprise Co. v.

Superior Court, 478 U.S. 1, 8–10, 106 S. Ct. 2735, 92 L. Ed. 2d 1 (1986)) (Press-Enterprise II). Under the logic prong, courts consider whether public access plays an important role in the functioning of the particular proceeding. Sublett, 176 Wn.2d at 73 (citing Press-Enterprise II, 478 U.S. at 8).

In Press-Enterprise I, the Court observed that the practice of exercising juror challenges in open court has been a part of our legal history since the 15th century. Press-Enterprise I, 464 U.S. at 506-08. See Wilson, 298 P.3d at 155-57 (pre-voir dire excusals for hardship and other "administrative" reasons – such as illness – do not constitute a proceeding historically open to public, "provided that the excusals are not the equivalent of peremptory or for cause juror challenges.").

As for the logic prong, the Court held, "[T]he primacy of the accused's right is difficult to separate from the right of everyone in the community to attend the voir dire which promotes fairness." Press-Enterprise II, 464 U.S. at 508. Open proceedings enhance the fairness of a criminal trial as well as the vital appearance of fairness that bolsters public confidence in the justice system. Id.

Given the important role juror challenges play in voir dire, experience and logic indicate such proceedings must occur in open court for public examination. Cf. Wilson, 298 P.3d at 157-58 (because trial

judge and bailiff have broad discretion to excuse venire members for "hardship" or any reason found proper by the court, public pre-voir dire juror excusal proceeding would not have added to the basic fairness of trial and the critical appearance of fairness).

The trial court in Aho's case violated his right to a public trial by holding the challenge process in conference. Even if the challenge process had occurred by side-bar, it by definition occurred privately, outside the public's scrutinizing eyes and ears, and thus violated Aho's right to a fair and public trial. State v. Slert, 169 Wn. App. 766, 774 n. 11, 282 P.3d 101 (2012) (rejecting argument that no violation occurred if jurors were dismissed at sidebar rather than in chambers because private discussion would have involved dismissal for case-specific reasons, thereby calling for public review), review granted, 299 P.3d 20 (2013); State v. Leyerle, 158 Wn. App. 474, 483, 242 P.3d 921 (2010) (questioning juror in public hallway outside courtroom is a closure despite the fact courtroom remained open to public). By failing to first apply the Bone-Club factors before hearing the peremptory challenges shielded from public sight or sound, the trial court violated Aho's constitutional right to a public trial.

There are two obvious ways to avoid this result, especially when the trial court acts to protect prospective jurors from the perceived

indignity of being stricken by peremptory challenge. First, the court can do what the Supreme Court has repeatedly said it must do: assess the five factors set forth in Bone-Club to determine whether privacy is truly warranted and permitted. The second is to excuse the venire from the courtroom to allow the parties to exercise their peremptory challenges in public. There is nothing wrong with excusing potential jurors from the courtroom before the parties make their challenges. United States v. Warren, 982 F.2d 287, 288 (8th Cir. 1992). After all, prospective jurors are officers of the court and not considered members of the public. State v. Vega, 144 Wn. App. 914, 917, 184 P.3d 677 (2008), review denied, 165 Wn.2d 1024 (2009).

The trial court's failure to do either of these things in Mr. Aho's case is constitutional error, is presumed prejudicial, and requires reversal of his criminal convictions. Strode, 167 Wn.2d at 231; State v. Easterling, 157 Wn.2d 167, 181, 137 P.3d 825 (2006); Orange, 152 Wn.2d at 814.

2. THE FAILURE TO INCLUDE AHO IN THE PROCESS OF EXERCISING JUROR CHALLENGES VIOLATED HIS RIGHT TO BE PRESENT FOR TRIAL.

A criminal defendant has a due process right to be present for jury voir dire. State v. Irby, 170 Wn.2d 874, 883-85, 246 P.3d 796 (2011). When a portion of voir dire occurs outside the defendant's presence,

reversal is required unless the State proves the violation was harmless beyond a reasonable doubt. Irby, 170 Wn.2d at 886. The trial court violated Aho's due process right to be present by having the parties exercise juror challenges during an off-the-record conference.

The State cannot meet the harmless error test. Reversal is warranted.

The Irby court distinguished between the federal and state standards. Under the federal Constitution, "'the presence of a defendant is a condition of due process to the extent that a fair and just hearing would be thwarted by his absence.'" Irby, 170 Wn.2d at 881 (quoting Snyder v. Massachusetts, 291 U.S. 97, 107-108, 54 S. Ct. 330, 78 L. Ed. 2d 674 (1934)). Under the state Constitution, which arguably provides greater rights, the defendant must be present to participate "'at every stage of the trial when his substantial rights may be affected.'" Irby, 170 Wn.2d at 885 (quoting State v. Shutzler, 82 Wash. 365, 367, 144 P. 284 (1914)). Under both standards, a defendant has the right to be present and participate in the process of selecting his jury. Irby, 170 Wn.2d at 885.

A long time ago, the United States Supreme Court emphasized the importance of having the accused present for voir dire:

> The prisoner is entitled to an impartial jury composed of persons not disqualified by statute, and his life or liberty may depend upon the aid which, by his personal presence, he may give

> to counsel and to the court and triers, in the selection of jurors. The necessities of the defense may not be met by the presence of his counsel only. For every purpose, therefore, involved in the requirement that the defendant shall be personally present at the trial, where the indictment is for a felony, the trial commences at least from the time when the work of impaneling the jury begins.

Hopt v. Utah, 110 U.S. 574, 578, 4 S. Ct. 202, 28 L. Ed. 262 (1884).

In Mr. Aho's case, the record does not affirmatively show that Matthew was invited or accompanied the parties to the conference or in any other way participated in counsel's exercise of peremptory challenges to excuse two prospective jurors. It is the State's burden to show that Aho was present for the bench conference. See, Irby, 170 Wn.2d at 884 (quoting Lewis v. United States, 146 U.S. 370, 372, 13 S. Ct. 136, 36 L. Ed. 1011 (1892), in which the Court observed that "where . . . personal presence is necessary in point of law, the record must show the fact."); see also People v. Williams, 858 N.Y.S.2d 147, 150, 52 A.D.3d 94, 95-97 (N.Y. Sup. Ct. 2008) (exclusion of defendant from sidebar conference where jurors were excused by agreement of attorneys violates right to be present; court refuses to speculate that defendant could overhear conversations).

Williams is instructive. At Williams' trial, the court conducted sidebar discussions during voir dire to determine whether three prospective jurors should be excused. At each conference, only the judge,

counsel, and the juror were included in the discussion. One potential juror was retained and ultimately served. Two others were excused on consent of the attorneys based on concern regarding their abilities to put aside previous experiences. Williams, 52 A.D.3d at 95-96.

On appeal, Williams alleged a violation of her right to be present at all critical stages of trial. The Court agreed and reversed her convictions. Williams, 52 A.D.3d at 96. The Court held the exclusion of a prospective juror – without a knowing, intelligent, and voluntary waiver of the right to be present – requires reversal, even when the juror is excused on consent of counsel. Id.

On the existing record, Mr. Aho has proven the trial court unconstitutionally took peremptory challenges in his absence. A violation of the right to be present is subject to the harmless error test. Irby, 170 Wn.2d at 885-86. The only way to show Aho's absence was harmless error, however, is to show a juror excused in violation of the defendant's rights had no chance to sit on the jury. If the prospective juror fell within the range of jurors who ultimately comprised the jury, reversal is required. Irby, 170 Wn.2d at 886.

D. CONCLUSION

The trial court violated Matthew Aho's constitutional rights to a public trial and to be present by taking juror challenges during an off-the-record bench conference. This Court should reverse his convictions and remand for a new trial.

DATED this 16 day of October, 2013.

Respectfully submitted,

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

STATE OF WASHINGTON,	)	
	)	
RESPONDENT,	)	
	)	NO. 43932-8-II
v.	)	
	)	
MATTHEW AHO,	)	
	)	
APPELLANT.	)	

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