No. 31225-9-III
(consolidated with No. 31187-2-III)
IN THE COURT OF APPEALS
FOR THE STATE OF WASHINGTON
DIVISION III

STATE OF WASHINGTON,

Plaintiff/Respondent,

vs.

NICOLAS J. JAMES,

Defendant/Appellant.

Appellant's Supplemental Brief

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Did the trial court violate Mr. James' constitutional right to a public trial by allowing the trial to continue past 4 p.m. on eight days during the trial, when a sign on the courthouse door indicated the courthouse closed at 4 p.m., thereby effectively excluding the public from portions of the trial without first doing a *Bone-Club* analysis?

C. SUPPLEMENTAL STATEMENT OF THE CASE

At the time of Mr. James' trial the Yakima County Courthouse hours were 8 a.m. to 4 p.m. *Andy* 5/17/13 RP 14[1]. Court was adjourned or the jury was excused at the following times on the following pertinent dates of Mr. James' trial with the ongoing event after 4 p.m. in parenthesis: 8/27/12 at 4:33 p.m. (pretrial motions and issues), 8/28/12 at 4:19 p.m. (discussion regarding stipulation to defendants' prior convictions), 8/30/12 at 5:08 p.m. (pre-emptory challenges, jury sworn), 9/5/12 at 4:28 p.m. (testimony—Deputy Perry Brown), 9/6/12 at 4:27 p.m.

[1] "Andy" citations refer to the verbatim report of proceedings of a supplemental evidentiary hearing in *State v. Joey A. Andy*, 31018-3-III, held 5/17/13, 5/22/13, and 6/7/13, to determine the Yakima County Courthouse hours and other relevant facts. That

(testimony—Officer Steven Winmill), 9/10/12 at 4:37 p.m. (testimony—Officer Jim Ortiz), 9/12/12 at 4:44 p.m. (closing argument of Mr. Alford), and 9/13/12 at 4:36 p.m. (cautionary instructions to jury upon retiring for the evening from deliberations). CP 3428-46.

The policy in effect at the time of Mr. James' trial was if a trial was still ongoing past 4 p.m., the court would call courthouse security to let them know court was still in session. A security officer would then be theoretically available to admit people wishing to attend that particular court hearing. However, the courthouse was formally closed for all other purposes. *Andy* 5/17/13 RP 16-17. If court staff forgot to call security, the doors would be locked at 4 p.m. *Andy* 5/17/13 RP 22. The record does not indicate whether the security officer on duty received any telephone calls from the court during Mr. James' trial. RP All.

Security officers typically do a "sweep" checking to make sure no courts are still in session before locking the doors. *Andy* 5/17/13 RP 65-66. The record does not indicate whether the security officer on duty did a "sweep" during Mr. James' trial. RP All.

The security officer on duty after 4 p.m. does not stand by the entrance doors. Instead, he or she stands near the metal detector. A

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record is now included as part of the record in this appeal See Commissioner's Ruling granting Appellant's motion to supplement the record, dated April 18, 2014.

person approaching the entrance doors from the street would only see the closed sign, not the security officer. The person could only see the security officer if he or she peered through the door at a certain angle. *Andy* 5/17/13 RP 64.

The sign on or near the entrance door has been updated three times since the shortened hours were implemented around October 3, 2011. *Andy* 5/22/13 RP 148. The sign in place during Mr. James' trial said, "The courthouse closes at 4:00 p.m. Office hours, auditor 9:00 to 3:30, HR, which was human resources, 9:00 to 4:00, district court clerks 8:00 to 4:00, superior court clerks 8:30 to 4:00, all others 8:00 to 4:00. The bottom line on the [sign] says court closes at 5:00 p.m." *Andy* 5/22/13 RP 150, 152. The current sign, installed 3/4/13, after Mr. James' trial, added the phrase, "Courtrooms are open while in session." *Andy* 5/22/13 RP 150, 165.

D. ARGUMENT

The trial court violated Mr. James' constitutional right to a public trial by allowing the trial to continue past 4 p.m. on eight days during the trial, when a sign on the courthouse door indicated the courthouse closed at 4 p.m., thereby effectively excluding the public from portions of the trial without first doing a *Bone-Club* analysis.

A person accused of crime is entitled to a public trial. U.S. Const. amend. VI; Wash. Const. art I, § 22; *State v. Bone-Club*, 128 Wn.2d 254, 257, 906 P.2d 325 (1995). This includes the entire jury selection process. *In re Personal Restraint of Orange*, 152 Wn.2d 795, 804, 100 P.3d 291 (2004). The public and press also have a First Amendment right to public trials. U.S. Const. Amend. I; *Waller v. Georgia*, 467 U.S. 39, 46, 104 S. Ct. 2210, 81 L. Ed. 2d 31 (1984); Wash. Const. art 1, § 10; *State v. Easterling*, 157 Wn.2d 167, 179, 137 P.3d 825 (2006).

The court may not close the courtroom "except under the most unusual circumstances." *Bone-Club*, 128 Wn.2d at 259. Even where only a part of the jury voir dire is improperly closed, it can violate a defendant's constitutional public trial right. *Orange*, 152 Wn.2d at 812. Violations of this right may be raised for the first time on appeal. *Bone-Club*, 128

Wn.2d at 257; *State v. Brightman*, 155 Wn.2d 506, 517, 122 P.3d 150 (2005).

A public trial right is considered an issue of such constitutional magnitude that it may be raised for the first time on appeal and a "defendant's failure to lodge a contemporaneous objection at trial [does] not effect a waiver." *State v. Strode*, 167 Wn.2d 222, 229, 217 P.3d 310 (2009) (citations omitted). Moreover, a defendant cannot waive the public's right to open proceedings. *Strode*, 167 Wn.2d at 230. "As we observed in *Bone-Club*, the public also has a right to object to the closure of a courtroom, and the trial court has the independent obligation to perform a *Bone-Club* analysis. The record reveals that the public was not afforded the opportunity to object to the closure, nor was the public's right to an open courtroom given proper consideration." *Id*. (citations omitted).

To overcome the presumption of openness, the trial court must find on the record that closure is the only way to preserve a specific, more important, interest and that the closure is narrowly tailored to serve that interest. The findings must be specific enough to enable this court to determine whether closure was proper. *Orange*, 152 Wn.2d at 806; *Waller*, 467 U.S. at 45. The court must perform five steps:

> 1. The proponent of closure must make some showing of a compelling interest. If that interest is an accused's right to a fair trial, the proponent must show a likelihood of jeopardy.
>
> 2. Anyone present must be given an opportunity to object to the closure.
>
> 3. The protective method must be the least restrictive means available to protect the threatened interest.
>
> 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; *Federated Publications, Inc. v. Kurtz*, 94 Wn.2d 51, 62, 615 P.2d 440 (1980). Failure to follow these steps violates the public trial clause of Wash. Const. art I, § 22. *Orange*, 152 Wn.2d at 812.

The trial court herein effectively closed the courtroom on its own motion by conducting portions of the trial after 4 p.m. when the courthouse was formally closed. The fact that the courtroom itself was open or that the courthouse was unlocked with a security officer available to allow entry makes no difference because the sign on the entrance door effectively barred the public from entering the courtroom. The public cannot be expected to know it may enter the courthouse on its own volition contrary to the public posting that the courthouse is closed.

The first line on the sign says the courthouse closes at 4 p.m. The sign then lists five sets of office hours all closing at 4 p.m. or earlier. The bottom line on the sign says court closes at 5:00 p.m., an apparent contradiction to the other lines. How many members of the public will read beyond the first line, or assuming they do, how many will comprehend the meaning of the last line? Considering the unambiguous message of the first line that the courthouse closes at 4 p.m., common sense dictates that most people would logically assume admittance is barred after 4 p.m. and leave.

Furthermore, even assuming the security guard followed the implemented policies and was available to admit court attendees, the public would not be aware of his presence. The security officer on duty after 4 p.m. does not stand by the entrance doors. Instead, he stands near the metal detector. A person approaching the entrance doors from the street would only see the closed sign, not the security officer unless that person peered through the door at a certain angle. *Andy* 5/17/13 RP 64.

Due process guarantees the right to an open and public trial. If the public is not "aware" of the open and public proceedings, this right loses all meaning. *Press-Enter. Co. v. Superior Court*, 464 U.S. 501, 509, 104 S. Ct. 819, 78 L. Ed. 2d 629 (1984). Even if a courthouse is technically

unlocked, secret proceedings unfairly diminish or eliminate this public trial right. *Id*. The law requires "reasonable measure to accommodate public attendance" at court proceedings. *State v. Leyerle*, 158 Wn. App. 474, 478, 242 P.3d 921 (2010); *Presley v. Georgia*, 558 U.S. 209, 130 S.Ct. 721, 175 L.Ed.2d 675 (2010). Moreover, court proceedings must not only be open, they must be "accessible." *Leyerle*, 158 Wn. App. at 479-80; *Easterling*, 157 Wn.2d at 174.

Yakima County's policy of closing the courthouse at 4:00 p.m. while unlocking the courthouse doors during times of trial, with no additional direction to the public that proceedings remain open, is not a reasonable measure to accommodate public attendance. Seeing the sign outside the courthouse that the building is closed, the public is unlikely to be "aware" of ongoing public proceedings afterhours. Although the courthouse may be technically unlocked, it is not sufficiently "accessible." Unlocking the courthouse door, without more, cannot constitute "reasonable measures" to "accommodate public attendance." The proceedings in this case may as well have been behind locked doors. It is difficult to imagine many members of the general public who would be brave enough to assert the public trial right and enter the courthouse when all posted hours announce that the courthouse is in fact closed.

The measures taken in this case by the Yakima County Superior Court did not make the courthouse sufficiently "accessible," did not make the public "aware" of the ongoing public trial, and were not "reasonable" to "accommodate public attendance." Significant portions of Mr. James' trial were effectively closed and his conviction should be reversed in favor of a new and public trial.

Finally, the denial of the constitutional right to a public trial is not subject to harmless error analysis. *Bone-Club*, 128 Wn.2d at 261-62; *Neder v. United States*, 527 U.S. 1, 8, 119 S. Ct. 1827, 144 L. Ed. 2d 35 (1999). Since denial of the public trial right is deemed to be a structural error, prejudice is presumed. *Bone-Club*, 128 Wn.2d at 261-62; *Orange*, 152 Wn.2d at 812. The only appropriate remedy is to remand for a new trial. *Brightman*, 155 Wn.2d at 518.

E. CONCLUSION

For the reasons stated, the convictions should be reversed, and the case remanded for a new trial.

Respectfully submitted April 18, 2014,

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PROOF OF SERVICE (RAP 18.5(b))

I, David N. Gasch, do hereby certify under penalty of perjury that on April 18, 2014, I mailed to the following by U.S. Postal Service first class mail, postage prepaid, or e-mailed by prior agreement (as indicated), a true and correct copy of the supplemental brief of appellant:

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