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Court of Appeals
Division I
State of Washington

IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON

In the Matter of the Personal Restraint of	No. 65651-1-I
ARMANDO VILLALOBOS PEREZ,	DIVISION ONE
Respondent.	UNPUBLISHED OPINION
	FILED: January 21, 2020

APPELWICK, J. — More than a decade ago, Armando Perez sought collateral relief from his 2004 convictions of child molestation. The trial court conducted a portion of voir dire in chambers, and appellate counsel failed to raise on direct appeal whether this was in violation of his right to a public trial. We granted collateral relief. Under In re Personal Restraint of Coggin, 182 Wn.2d 115, 119, 340 P.3d 810 (2014), and In re Personal Restraint of Morris, 176 Wn.2d 157, 161, 288 P.3d 1140 (2012), we concluded that the doctrine of invited error did not prevent Perez from challenging the public trial violation and ineffective assistance was established because the error would have been presumed prejudicial on direct review. The Washington State Supreme Court has remanded for our reconsideration in light of its subsequent decision in In re Personal Restraint of Salinas, 189 Wn.2d 747, 408 P.3d 344 (2018), holding that a petitioner must show prejudice from a courtroom closure. Applying Salinas to the facts here, we

conclude that Perez has failed to meet that burden. Accordingly, he is not entitled to relief. We deny the petition.

FACTS

The State charged Armando Perez with three counts of child molestation.[1] State v. Perez, noted at 135 Wn. App. 1012, 2006 WL 286965, at *1 (Perez 1). The case proceeded to trial, and prior to voir dire, the court provided prospective jurors with a questionnaire stating as follows:

> Some of the questions may call for information of a personal nature that you may not want to discuss in public. If you feel that your answer to any questions may invade your right to privacy or might be embarrassing to you, you may so indicate on the form that you would prefer to discuss your answer in private. The court will give you an opportunity to explain your request for confidentiality in a closed hearing.

The questionnaire informed potential jurors of the nature of the allegations. It also included questions about Perez being a Pentecostal minister, knowledge of the Spanish language and travel to Spanish-speaking countries, and the jurors' personal experiences related to sexual abuse and misconduct. The questionnaire invited jurors to indicate if they preferred to discuss any answers in private.

In total, 15 members of the venire were questioned in chambers. Perez was present and both the prosecutor and defense attorney participated in the questioning. Two of the privately questioned individuals were ultimately selected for the jury.

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[1] Many of the underlying facts are derived from this court's prior unpublished decisions on direct review and in this collateral proceeding. See State v. Perez, noted at 135 Wn. App. 1012, 2006 WL 286965; In re Pers. Restraint of Perez, noted at 194 Wn. App. 1041, 2016 WL 3579042.

The jury convicted Perez as charged. Perez I, 2006 WL 286965, at *1 On appeal, Perez's counsel did not raise a public trial claim. See id. In 2007, on remand from the decision on appeal, Perez was resentenced on two molestation counts and the State dismissed the third count. In re Pers. Restraint of Perez, noted at 194 Wn. App. 1041, 2016 WL 3579042, at *1 (Perez II).

In 2008, after Perez finished serving his sentence, he filed a timely motion under CrR 7.8 to vacate his judgment and sentence in Skagit County Superior Court. Id. He alleged that the courtroom closure during voir dire violated his right to an open and public trial and that appellate counsel rendered ineffective assistance by failing to raise the issue on appeal. See id. at *2-3. His motion was stayed in the superior court, transferred to this court for consideration as a personal restraint petition under CrR 7.8(c)(2), and then stayed again by this court. Id. at *1.

In 2016, in an unpublished per curiam decision, we granted relief. Id. Based on the analysis in Coggin, 182 Wn.2d at 119, we concluded that Perez did not invite the error. Perez II, WL 2016 3579042 at *3. And, relying on Morris, 176 Wn.2d at 161, we held that Perez was entitled to relief based on the ineffective assistance of appellate counsel:

> There is no dispute that the trial court closed the courtroom when it privately questioned potential jurors during voir dire in chambers without first conducting a Bone-Club [2] analysis. This was a violation of Perez's constitutional right to a public trial. Because this error would have been presumed prejudicial on direct appeal, appellate counsel was ineffective for failing to raise it.

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

Id. at *2

The State sought discretionary review. The Washington State Supreme Court stayed the matter pending its resolution of Salinas, and then remanded Perez's petition for our reconsideration in light of its decision.

ANALYSIS

Like Perez, Hector Salinas argued for the first time on collateral review that a portion of voir dire conducted in chambers violated his right to a public trial. Salinas, 189 Wn.2d at 749, 753. He also argued that his appellate counsel rendered constitutionally inadequate assistance by failing to raise the issue on direct appeal. Id. at 753. Before Salinas's trial on charges of rape and kidnapping, defense counsel proposed three juror questionnaires. Id. at 750-51. Each proposal included questions about jurors' experiences with sexual abuse or misconduct and allowed jurors to indicate a preference to discuss their answers in private. Id. The prosecutor did not propose a questionnaire, did not agree with some of the questions included in the defense questionnaires, and did not request in-chambers voir dire. Id. 751. The trial court provided a questionnaire that included some of the questions proposed by the defense and, consistent with the submissions of the defense, allowed jurors to indicate if they wished to discuss any answers privately. Id. Seven prospective jurors requested privacy, and following in-chambers voir dire, three potential jurors were excused for cause. Id. at751, 753.

Following Salinas's convictions by a jury and the resolution of his direct appeal, Salinas sought post-conviction relief, alleging a public trial violation. Salinas, noted at 188 Wn. App. 1018, 2015 WL 3766689, rev'd, 189 Wn.2d 747, 408, P.3d 344. This court granted relief on Salinas's petition. Salinas, 2015 WL 3766689, at *3. In our unpublished decision, we relied on Coggin to conclude that Salinas's conduct did not rise to the level of invited error. Id. And, citing Morris, we held that "[b]ecause the [courtroom closure] error would have been presumed prejudicial on direct appeal, appellate counsel was ineffective for failing to raise it." Id. at *2.

Our Supreme Court granted the State's motion for discretionary review, reversed, and denied collateral relief. Salinas, 189 Wn.2d at 753. The court disagreed with our conclusion that Salinas did not invite the error. Id. at 758. Whereas Coggin merely advocated for private questioning pretrial and agreed with the questionnaire drafted by the prosecutor, the court observed that Salinas's counsel "played the initiating and sustaining role" that led to private questioning. Id. at 756-57. The court concluded that, "[u]nlike Coggin, the defense here actively participated in designing the trial closure." Salinas, 189 Wn.2d at 758. Having invited the error, Salinas was precluded from challenging it.

The court then rejected Salinas's claim of ineffective assistance of appellate counsel claim on two bases. First, Salinas could not have raised a meritorious public trial claim on direct review because the "impetus for closure" originated with him. Id. at 759. Second, Salinas's claim failed because the United States Supreme Court's then-recent decision in Weaver v. Massachusetts, __ U.S. __,

137 S. Ct. 1899, 1913, 198 L Ed. 2d 420 (2017), refuted the notion that a courtroom closure—as "structural error"—is presumptively prejudicial. Salinas, 189 Wn.2d at 764-65. Relying on Weaver, the court held that Salinas could not establish ineffective assistance of appellate counsel because he was required and failed to demonstrate prejudice caused by the courtroom closure. Id.

The factual record in Perez's case reveals little about the extent to which the defense advocated for private questioning of potential jurors or was responsible for the design of the court closure. The State submitted the declaration of the prosecutor who, having reviewed the questionnaire provided to the venire almost six years after the trial, believed it was requested and prepared by the defense. This limited evidence does not allow us to conclude that Perez was the driving force behind the in-chambers questioning or that he played a leading role in formulating the method of questioning. On these facts, Salinas does not alter our decision that Perez is not barred by the doctrine of invited error from challenging the courtroom closure.

Nevertheless, our conclusion that Perez established ineffective assistance of appellate counsel rested on the premise that a public trial violation is presumptively prejudicial as a structural error, even when raised for the first time in a collateral proceeding. Weaver and Salinas reject this premise and make it clear that where a defendant does not object to a courtroom closure at trial and fails to raise a public trial claim on direct review, he is not entitled to automatic reversal without a showing of prejudice stemming from the closure.

In Weaver, the Court addressed and answered the following question: "[W]hat showing is necessary when the defendant does not preserve a structural error on direct review but raises it later in the context of an ineffective-assistance-of-counsel claim?" Weaver, 137 S. Ct. at 1910. The answer is that, in accordance with Strickland v. Washington, 466 U.S. 668, 104 S. Ct. 2052, 80 L. Ed. 2d 674 (1984), a defendant must show deficient performance and resulting prejudice:

> [N]ot every public-trial violation will in fact lead to a fundamentally unfair trial. Nor can it be said that the failure to object to a public-trial violation always deprives the defendant of a reasonable probability of a different outcome. Thus, when a defendant raises a public-trial violation via an ineffective-assistance-of-counsel claim, Strickland prejudice is not shown automatically. Instead, the burden is on the defendant to show either a reasonable probability of a different outcome in his or her case or . . . to show that the particular public-trial violation was so serious as to render his or her trial fundamentally unfair.

Weaver, 137 S .Ct. at 1911 (citation omitted); Salinas, 189 Wn.2d at 763.

In Salinas's case there was no objection at trial and no assertion of a public trial violation on direct appeal. Applying Weaver, our Supreme Court held that Salinas bore the burden to establish prejudice. Salinas, 189 Wn.2d at 764-65. He could not meet this burden because, apart from a limited portion of voir dire, the remainder of Salinas's trial was held in open court. Id. Weaver applies in exactly the same manner here because Perez did not object to the courtroom closure at trial and did not assert a public trial claim on direct appeal. In this situation, he is required to show prejudice.

Perez does not attempt to make this showing. Instead, he insists that, despite not objecting at trial or raising the public trial issue on direct review, he is entitled to "automatic reversal" due to the structural nature of his claim. He claims that inquiry into prejudice is required only when a public trial claim "could not have been raised or would not have resulted in reversal on direct appeal."

Perez's argument ignores the clear and express holding of Salinas and misses the point of Weaver. Salinas clearly controls and holds, based on Weaver, that a closure of voir dire is not presumed prejudicial when there is no objection at trial and no assertion of a public trial violation on direct appeal.[3] Weaver, 137 S. Ct. at 1910; Salinas, 189 Wn.2d at 764-65.

Perez has not met his burden to establish prejudice under Strickland. The apparent goal of the questioning was to enable jurors to more freely discuss potential bias arising out of experiences with sexual abuse or sexual offenses. Although the courtroom was closed for a portion of voir dire, the questioning was not conducted in secret or in a remote location and there is a record of the proceeding. Both parties participated in the voir dire questioning. The remainder of voir dire and the trial were held in open court. Perez cannot show a reasonable probability the outcome would have been different and the violation did not "pervade the whole trial or lead to basic unfairness." See Weaver, 137 S. Ct. at

[3] Perez relies on the fact that the court in Salinas merely distinguished, but did not expressly overrule its decision in Morris. Salinas, 189 Wn.2d at 759. Nevertheless, to the extent that Morris and In re Personal Restraint of Orange, 152 Wn.2d 795, 814, 100 P.3d 291 (2004), hold that a petitioner who raises an unpreserved public trial claim for the first time on collateral review in the context of ineffective assistance of counsel is entitled to a presumption of prejudice, those decisions are inconsistent with Salinas and Weaver.

1913. For this reason, in light of Salinas, Perez is not entitled to relief and his petition is denied.

WE CONCUR: