59525-3

59525-3

FILED
COURT OF APPEALS DIV. #1
STATE OF WASHINGTON
2010 APR 16 AM 10: 34

No. 59525-3-I

COURT OF APPEALS
OF THE STATE OF WASHINGTON
DIVISION ONE

STATE OF WASHINGTON, Respondent,

v.

GREGG H. BELYEU, Appellant.

SUPPLEMENTAL BRIEF OF RESPONDENT

DAVID S. McEACHRAN,
Whatcom County Prosecuting Attorney
By HILARY A. THOMAS
Appellate Deputy Prosecutor
Attorney for Respondent
WSBA #22007

Whatcom County Prosecutor's Office
311 Grand Avenue, Second Floor
Bellingham, WA 98225
(360) 676-6784

TABLE OF CONTENTS

A. SUPPLEMENTAL BRIEF ISSUE 1

B. SUMMARY ANSWER 1

C. ARGUMENT 2

D. CONCLUSION 10

TABLE OF AUTHORITIES

Washington State Court of Appeals

State v. Zakel, 61 Wn. App. 805, 812 P.2d 512 (1991) *affirmed*, 119 Wn.2d 563, 834 P.2d 1046 (1992) 5

Washington State Supreme Court

In re Isadore, 151 Wn.2d 294, 88 P.3d 390 (2004) 5

In re Personal Restraint of Orange, 152 Wn.2d 795, 100 P.3d 291 (2004) 4, 9

State v. Bone-Club, 128 Wn.2d 254, 906 P.2d 325 (1995) 3, 5, 6

State v. Easterling, 157 Wn.2d 167, 137 P.3d 825 (2006) 3, 9

State v. Momah, 167 Wn.2d 140, 217 P.3d 321 (2009) ..... passim

State v. Strode, 167 Wn.2d 222, 217 P.3d 310 (2009) 1, 5, 6

Federal Authorities

Washington v. Recuenco, 548 U.S. 212, 126 S.Ct. 2546, 165 L.Ed.2d 466 (2006) 3

A. SUPPLEMENTAL BRIEF ISSUE

The Court has requested the parties to address the application of State v. Strode, 167 Wn.2d 222, 217 P.3d 310 (2009) and State v. Momah, 167 Wn.2d 140, 217 P.3d 321 (2009) to this case.

B. SUMMARY ANSWER

The majority opinion in Momah clearly holds that unless a trial is rendered fundamentally unfair by a courtroom closure, automatic reversal is not required. A trial is not rendered fundamentally unfair where the courtroom closure occurred to protect the defendant's rights and the defendant wasn't actually prejudiced by the closure. Strode, on the other hand, is a plurality opinion with two justices concurring only in the result. Assuming there was a de facto closure here, and one which Belyeu did not invite[1], Belyeu was not prejudiced by the closure where defense counsel encouraged jurors[2] to seek private questioning if they so desired, part of the voir dire occurred in chambers to avoid tainting the rest of the jury from two jurors' prior knowledge of the case, and the process resulted in

---

[1] The State still asserts, in accord with its response brief, that Belyeu's actions in this case constitute invited error.

[2] The State uses the term "jurors" to refer to members of the venire panel for ease of reference, although the members had not been seated.

one juror being excused for cause based on defense motion.[3] Where, as in Momah, defense counsel assented to and encouraged the in chambers voir dire and where Belyeu suffered no prejudice and actually benefitted from it, no structural error occurred and reversal is not warranted.

C. ARGUMENT

Under the clear majority opinion in Momah no structural error occurred under the facts of this case requiring reversal. In Momah the majority emphasized that the "central aim of any criminal proceeding must be to try the accused fairly," and that a defendant's right to public trial does not exist, and cannot be considered, in isolation from his other constitutional rights. Momah, 167 Wn.2d at 147-48. The public trial right is not absolute, but exists so that the public may see that the defendant is dealt with fairly and that his triers are kept keenly aware of their responsibility and the importance of their function. Id. at 148. In that case the judge and the parties used jurors' responses to a questionnaire to determine which jurors should be questioned individually. Defense counsel not only agreed to question those jurors privately in chambers, but argued for expansion of the in-chambers questioning. Id. at 145-46.

---

[3] The defense attorney ended up using peremptory challenges to exclude three of the other jurors who were questioned in chambers. CP 156-58.

Defense counsel actively participated in the private questioning and counsel exercised a number of challenges for cause as a result of that questioning. Id. at 146-47. The trial court did not conduct a Bone-Club[4] analysis prior to in chambers questioning, although it did consider the defendant's public trial rights and balanced them against the defendant's right to a fair and impartial jury.

The court ultimately held that the trial court's closure did not constitute structural error and therefore automatic reversal was not appropriate. Under Momah whether a closure error constitutes structural error necessarily depends upon the nature of the violation: "If, on appeal, the court determines that the defendant's right to public trial has been violated, it devises a remedy appropriate to the violation." Id. at 149. If the error is structural, automatic reversal is warranted. Id. An error is only structural though if the error "'necessarily render[s] a criminal trial fundamentally unfair or an unreliable vehicle for determining guilt or innocence.'" Id. (*quoting* Washington v. Recuenco, 548 U.S. 212, 218-19, 126 S.Ct. 2546, 165 L.Ed.2d 466 (2006)).

The court noted that in its prior cases of State v. Easterling, 157 Wn.2d 167, 137 P.3d 825 (2006) and In re Personal Restraint of Orange,

---

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

152 Wn.2d 795, 100 P.3d 291 (2004), new trials were required because the trials had been rendered fundamentally unfair by the closure. Id. at 150-51. In Easterling, the closure prevented the defendant from being present at a portion of his own trial, without the court ever having consulted with him. Id. at 150. In Orange, the trial was rendered fundamentally unfair because the closure excluded the defendant's family and friends from being present during voir dire, despite the defendant's repeated requests that they be present. Id. at 150-51. In those cases, where the prejudice was sufficiently clear, the errors were deemed to be structural. Id. at 151.

In distinguishing those prior cases where structural error was found, the Court noted that in Momah's case, the defendant had "affirmatively assented to the closure, argued for its expansion, had the opportunity to object but did not, actively participated in it and benefitted from it." Id. at 151. The court presumed that the defendant made "tactical choices to achieve what he perceived as the fairest result." Id. at 155. In concluding that the closure in Momah was not structural error, the court noted that the closure only occurred after the trial court consulted with the defense and prosecution, and found that the record showed that the closure occurred to protect the defendant's right to an impartial jury and did not prejudice him. Id. at 155-56.

On the other hand, as a plurality opinion Strode provides questionable guidance in addressing the issue under the circumstances of this case. "A plurality opinion has limited precedential value and is not binding on the courts." In re Isadore, 151 Wn.2d 294, 303, 88 P.3d 390 (2004). "Where there is no majority agreement as to the rationale for a decision, the holding of the court is the position taken by those concurring on the narrowest grounds." State v. Zakel, 61 Wn. App. 805, 808, 812 P.2d 512 (1991) *affirmed*, 119 Wn.2d 563, 834 P.2d 1046 (1992). The plurality in Strode found that the record did not reflect that either the closing of the courtroom was necessary to safeguard the defendant's right to a fair trial or that there was a knowing and voluntary waiver of that right. Strode, 167 Wn.2d at 234. In Strode, the plurality opinion would hold that a court must perform a Bone-Club analysis on the record prior to closing a courtroom in unexceptional circumstances, and that failure to do so is structural error that can never be harmless. Strode, 167 Wn.2d at 223.

The concurring opinion took exception, however, to the plurality opinion's requiring an on-the-record colloquy before waiver could be found and permitting a defendant to raise the public's, and the media's, right to open proceedings in order to overturn his conviction. Id. at 235-36.

It concurred in the result in Strode because it concluded that under the facts of the case the defendant's public trial rights had not been waived or safeguarded per Bone-Club, because the court had not weighed the defendant's right to public trial against the competing interests. Id. at 232, 235.

Even if Belyeu's conduct does not rise to the level of invited error, his actions should be taken into consideration, just as the defendant's were in Momah, in determining what, if any, remedy is appropriate. Here, the record demonstrates that the court and the parties held a conversation, albeit not on the record, regarding the conduct of voir dire before it occurred. After speaking with the first juror brought into chambers, the court explained to the second juror:

> We understood on your questionnaire you indicated there was some things you might not want to talk about in chambers and not in a large group. Normally the way our process works is we get all the jurors out there in the courtroom and then we have to administer an oath to the whole group that they'll answer questions truthfully. We haven't had a chance do to (sic) that yet and we thought it more efficient to talk to those jurors individually who said they'd like to do that with regard to some matter.

VDRP 4. The court noted that it had not seen the questionnaire yet. Id. In explaining the process to the next juror, the court stated:

> "We know there was a matter that you wanted to talk in a more private setting about and we said we'll go ahead and start doing this process first."

VDRP at 10. These comments indicate that the court and the parties had discussed how voir dire should occur, in particular how to handle those jurors that had requested to speak privately, and had agreed on the process.

During the general voir dire process, defense counsel stated that the questionnaires the people had answered had been provided to counsel and "that resulted in some of the jurors going back into chambers and talking about things that they didn't want to talk about in open court. *Certainly if any of you have anything else that you want to talk about not in front of the entire panel let us know that.*" VDRP 72. (emphasis added). Later, after determining that two jurors had prior knowledge of the case, the court stated:

> "What I'm going to do, rather than me asking you questions about what you may have heard, I don't want anything that you say or anything that you think you may have heard influence anybody else, we'll probably talk to the two of you gentlemen at a later time when we can go back in my chambers and discuss that there."

VDRP 36. At the end of general voir dire, the court conducted voir dire of those two jurors in chambers. VDRP 150-155. The bailiff then apparently brought into chambers another juror who had mentioned that there was an incident the juror thought the court might want to know about. Id. at 156. It turned out the incident involved a sexual assault on her two daughters by a relative who was represented by the same defense counsel that was

representing Belyeu, although at the time the juror didn't realize it. Id at 156, 160-63.

The record demonstrates that the process the court followed in this case, conducting partial voir dire of seven jurors in chambers who requested to speak in private and/or had previous knowledge of the case occurred after a conversation with the parties and with the assent of the parties. In addition to not objecting to the process and actively participating in it[5], Belyeu's counsel assented to the process and encouraged it. Presumably he did so for the same reason in Momah, as a tactical decision to achieve the fairest trial for Belyeu.

Belyeu also benefitted from the in chambers process. One of the seven jurors was excused for cause upon defense motion and the parties agreed to excuse another because of the potential for bias against defense if and when she realized that defense counsel was the attorney representing the defendant in a sexual abuse case in which her daughters were the victims. Three of the others were excused based on defense peremptory challenges. CP 156-58.

---

[5] VDRP 8-9, 14-16, 22-26.

Conducting individual jury voir dire in chambers regarding jurors' prior familiarity with the case and/or sensitive issues regarding the jurors' experiences with domestic violence and sexual assault[6] promoted the jurors' ability to be candid and prevented other prospective jurors from being tainted by any information they would learn from such questioning. VDRP 2-4, 10, 150, 153, 156. As such, conducting individual jury voir dire in chambers safeguarded Belyeu's right to a fair and impartial jury and did not prejudice him[7].

Although there was no discussion regarding the defendant's right to a public trial here like there was in Momah, defense counsel did not simply fail to object to the in chambers process, he assented to it, encouraged it and Belyeu benefitted from it. The process itself safeguarded Belyeu's right to an impartial jury. There is no showing of prejudice to the defendant as there was in Orange and Easterling. As such, no structural error occurred. As the court summarized in Momah:

> ... courts grant automatic reversal and remand for a new trial only when errors are structural in nature. An error is structural when it

---

[6] One juror was excused because he indicated he suffered from panic attacks and was concerned the circumstances would trigger one during trial. VDRP 2-3.

[7] *See*, Commonwealth v. Horton, 753 N.E.2d 119, 128 (Mass. 2001) ("In light of the defendant's consent to the procedure, his presence throughout the voir dire, and the fact that the less public setting for the voir dire in all likelihood helped rather than harmed the defendant, we find no prejudice to the defendant from the setting in which this voir dire was conducted.")

> necessarily renders a criminal trial fundamentally unfair or an unreliable vehicle for determining guilt or innocence. In each case, the remedy must be appropriate to the violation.

217 P.3d at 155-56. A new trial would not be an appropriate remedy in this case because the closure here did not render Belyeu's trial fundamentally unfair.

D. CONCLUSION

The in chambers voir dire of seven jurors, which safeguarded Belyeu's right to an impartial jury, did not result in any prejudice to Belyeu and did not render his trial fundamentally unfair. Under Momah, no structural error occurred and reversal is not warranted.

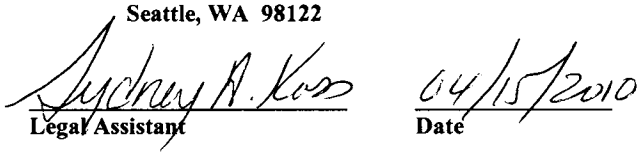
Respectfully submitted this 14th day of April, 2010.

HILARY A. THOMAS, WSBA #22007
Appellate Deputy Prosecutor
Attorney for Respondent

CERTIFICATE

I certify that on this date I placed in the mail with proper U.S. postage thereon, or otherwise caused to be delivered, a true and correct copy of the foregoing document to this Court, and appellant's counsel of record, Andrew P. Zinner, addressed as follows:

Nielsen, Broman & Koch, PLLC
1908 East Madison Street
Seattle, WA 98122



Legal Assistant **Date**