

NO. 64158-1-I

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

STATE OF WASHINGTON,

Respondent,

v.

BENITO RODRIGUEZ,

Appellant.

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

REPLY BRIEF OF APPELLANT

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A. ARGUMENT

1. THE TRIAL COURT VIOLATED MR. RODRIGUEZ'S CONSTITUTIONAL RIGHT TO A PUBLIC TRIAL.

In his opening brief, Mr. Rodriguez argued that his convictions must be reversed and his case remanded for a new trial because the trial court violated the constitutional right to a public trial by holding a portion of voir dire in chambers without complying with the procedures set forth in State v. Bone-Club, 128 Wn.2d 254, 258-59, 906 P.2d 325 (1995). Specifically, the trial court failed to (1) identify a compelling interest in closure, (2) show a serious or imminent threat to the unnamed interest, (3) balance the unnamed interest against the public's interest in open proceedings, or (4) enter formal findings and conclusions.

The State's response evidences a misapprehension of waiver, forfeiture, and structural error. Under settled caselaw, the failure to object at trial neither waives the right nor forfeits the issue for appeal. Furthermore, a violation of the constitutional right to a public trial is structural error which cannot be ignored as harmless. Reversal is required.

a. Mr. Rodriguez's failure to object to the private juror questioning did not effect a waiver of his right to a public trial. In its response brief, the State first argues that Mr. Rodriguez waived his right to a public trial by not objecting to the questioning of jurors in chambers. Br. of Resp't at 10. The State is wrong. It is true that the trial court satisfied the second Bone-Club factor here by giving those present an opportunity to object, but the court's failure to address the other factors requires reversal. State v. Strode, 167 Wn.2d 222, 227-29, 217 P.3d 310 (2009) (lead opinion); id. at 236 (concurring opinion); Bone-Club, 128 Wn.2d at 257-59.

Our Supreme Court has long held that a “[d]efendant’s failure to object contemporaneously [does] not effect a waiver.” Bone-Club, 128 Wn.2d at 257.

To the contrary, this court has held an opportunity to object holds no practical meaning unless the court informs potential objectors of the nature of the asserted interests. The motion to close, not Defendant’s objection, triggered the trial court’s duty to perform the weighing procedure.

Id. at 261 (internal quotation omitted). In Mr. Rodriguez’s case, the court did not inform potential objectors of the nature of the interest at stake, and did not perform the required weighing procedure. Accordingly, under Bone-Club, Mr. Rodriguez’s failure to object did

not absolve the court of its duty to address the necessary factors. Id. Rather, “the trial court, as the proponent of closure, was required to identify a compelling interest that the closure was essential to protect” as well as a serious and imminent threat to that compelling interest. In re Personal Restraint of Orange, 152 Wn.2d 795, 809, 100 P.3d 291 (2005).

The Supreme Court reaffirmed the Bone-Club principle in Strode. There, “defense counsel agreed the court should individually voir dire the 11 jurors.” Strode, 167 Wn.2d at 237 (C. Johnson, J., dissenting). Nevertheless, six justices held that the defendant did not waive his constitutional right to a public trial when his attorney acquiesced to the private questioning of jurors. Id. at 229 (lead opinion), and 234 (concurring opinion).

The State relies on Momah, but the concurring justices in Strode explained that Momah was different because Momah’s attorney “affirmatively sought individual questioning of the jurors in private, sought to expand the number of jurors subject to such questioning, and actively engaged in discussions about how to accomplish this.” Strode, 167 Wn.2d at 234 (Fairhurst, J., concurring) (discussing State v. Momah, 167 Wn.2d 140, 217 P.3d 321 (2009)). Indeed, in Momah, the defense attorney is the one

who requested in-chambers voir dire in order to safeguard the defendant's right to a fair trial. Momah, 167 Wn.2d at 151-52. Mr. Rodriguez, however, did not affirmatively seek private questioning of jurors, did not seek to expand the number of jurors subject to such questioning, and did not actively engage in discussions about how to accomplish private voir dire. He merely acquiesced to the court's decision to engage in private juror questioning. Accordingly, he did not waive the right to a public trial. Strode, 167 Wn.2d at 229 and 234; Bone-Club, 128 Wn.2d at 257.

b. Mr. Rodriguez may raise the violation of the right to a public trial for the first time on appeal. The State then argues that even if Mr. Rodriguez did not waive the right, he may not raise the issue for the first time on appeal. Br. of Resp't at 12-13. But as the State acknowledges, many recent Supreme Court decisions hold that the issue may be raised for the first time on appeal. Br. of Resp't at 13 & n.7 (citing, inter alia, Momah, 167 Wn.2d at 155; Strode, 167 Wn.2d at 229; State v. Easterling, 157 Wn.2d 167, 173 n.2, 137 P.3d 825 (2006); Bone-Club, 128 Wn.2d 254). The State argues that this Court should ignore this string of current cases, and instead follow the 1957 case of State v. Collins, 50 Wn.2d 740,

314 P.2d 660 (1957). Br. of Resp't at 13. The argument is frivolous and should be rejected.

c. The error is structural and requires reversal; it cannot be ignored as "de minimis" or "harmless". A final, related argument the State makes is that even recognizing the trial court erred, this Court should affirm because the error was "de minimis" or "harmless." Br. of Resp't at 14-22. Again, the State ignores binding precedent.

Our Supreme Court "has never found a public trial right violation to be de minimis." Easterling, 157 Wn.2d at 180. Similarly, this Court recently held that although "only a limited portion of voir dire was held outside the courtroom, ... that does not excuse the failure to engage in a Bone-Club analysis." State v. Paumier, ___ Wn. App. ___, ___ P.3d ___, 2010 WL 1675171 (filed April 27, 2010) at ¶ 11 (citing State v. Duckett, 141 Wn. App. 797, 809, 173 P.3d 948 (2007)).¹

Furthermore, "[t]he denial of the constitutional right to a public trial is one of the limited classes of fundamental rights not subject to harmless error analysis." Easterling, 157 Wn.2d at 181. Rather, automatic reversal is required. Id.; Orange, 152 Wn.2d at

¹ In any event, the closure at issue in this case was a "temporary, full closure" like the one in Bone-Club, not the exclusion of one observer as in the case the State cites (State v. Lormor, 154 Wn. App. 386, 224 P.3d 857 (2010)). See Orange, 152 Wn.2d at 807 (explaining types of closure).

814; Strode, 167 Wn.2d at 231 (lead opinion); and 236 (concurring opinion).

The State wrongly argues that the Supreme Court applied harmless error analysis in Momah. On the contrary, in Momah, the Court held that there was no error. Momah, 167 Wn.2d at 145. On the same day, six justices reaffirmed the automatic reversal rule for cases in which the constitutional right to a public trial is violated.

Strode, 167 Wn.2d at 223 & 231 (lead opinion); and 236 (concurring opinion). Automatic reversal is required not only under state-court precedent, but also under United States Supreme Court precedent. Waller v. Georgia, 467 U.S. 39, 49-50, 104 S.Ct. 2210, 81 L.Ed.2d 31 (1984).

In sum, where, as here, the trial court erroneously conducts a portion of the proceedings in private without engaging in a full Bone-Club analysis, reversal is required. Strode, 167 Wn.2d at 223, 236; Paumier at ¶¶ 22-23.

2. THE STATE FAILED TO PROVE THAT MR.
RODRIGUEZ COMMITTED MALICIOUS MISCHIEF.

For this argument Mr. Rodriguez relies on his opening brief at pages 11-14.

B. CONCLUSION

For the reasons set forth above and in his opening brief, Mr. Rodriguez respectfully requests that this Court reverse his conviction on Count I and dismiss the charge with prejudice. In the alternative, all three convictions should be reversed and the case remanded for a new trial based on the public trial violation.

DATED this 4th day of June, 2010.

Respectfully submitted,



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Attorneys for Appellant

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)	
APPELLANT.)	

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