

NO. 71217-9-I

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

STATE OF WASHINGTON,

Respondent,

v.

DAIN MCGILL,

Appellant.

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

The Honorable Millie M. Judge, Judge

BRIEF OF APPELLANT

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FILED  
COURT OF APPEALS DIVISION ONE  
STATE OF WASHINGTON  
2014 APR 22 PM 3:57

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A. ASSIGNMENT OF ERROR

The trial court violated Dain McGill's constitutional right to a public trial.

Issue Pertaining to Assignment of Error

Did the trial court violate McGill's constitutional right to a public trial by addressing the prosecutor's objection made during the defense closing argument at a sidebar?

B. STATEMENT OF THE CASE

During closing argument in McGill's jury trial, defense counsel discussed the elements of robbery:

But in an adversarial process, especially a situation like this, it's easiest for you if I tell what I agree with. What do I agree with? I agree that is occurred on June 11<sup>th</sup>. Do I agree it occurred in Edmunds, Washington? Yes. Snohomish County has jurisdiction. Do I agree that Ms. Stewart was robbed on this day? I do.

The prosecutor then objected, stating defense counsel "was approaching the personal comment, person belief is going on. [*sic*]. Maybe I should state that outside the jury [*sic*].

The trial court then held an off-the-record sidebar with counsel. RP 234. The discussion was never put on the record.

A Snohomish County jury found McGill guilty of first degree robbery. CP 28. The trial court imposed a standard range sentence. CP 1-12.

C. ARGUMENT

THE TRIAL COURT VIOLATED MCGILL'S RIGHT TO A PUBLIC TRIAL BY CONSIDERING AN OBJECTION AT SIDEBAR AND NOT PUTTING IT ON THE RECORD.

The Sixth Amendment to the United States Constitution and article I, section 22 of the Washington Constitution guarantee the accused a public trial by an impartial jury. Presley v. Georgia, 558 U.S. 209, 211-12, 130 S. Ct. 721, 175 L. Ed. 2d. 675 (2010); State v. Paumier, 176 Wn.2d 29, 34, 288 P.3d 1126 (2012); State v. Wise, 176 Wn.2d 1, 9, 288 P.3d 1113 (2012).<sup>1</sup> Additionally, article I, section 10 provides that “[j]ustice in all cases shall be administered openly, and without unnecessary delay.” This latter provision gives the public and the press a right to open and accessible court proceedings. Seattle Times Co. v. Ishikawa, 97 Wn.2d 30, 36, 640 P.2d 716 (1982). Sections 10 and 22 “serve complementary and interdependent functions in assuring the fairness of our judicial

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<sup>1</sup> The Sixth Amendment provides in pertinent part that “[i]n all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury . . . .” Article I, section 22 provides that “[i]n criminal prosecutions the accused shall have the right . . . to have a speedy public trial by an impartial jury . . . .”

system." Bone-Club, 128 Wn.2d at 259. The rights serve to ensure a fair trial, remind the prosecutor and judge of their responsibilities and functions, encourage witnesses to participate, and discourage perjury. State v. Brightman, 155 Wn.2d 506, 514, 122 P.3d 150 (2005).

The public trial right is considered to be of such constitutional magnitude that its violation may be challenged for the first time on appeal. Strode, 167 Wn.2d 222, 229, 217 P.3d 310 (2009). Whether a trial court procedure violates the right to a public trial is a question of law this Court reviews de novo. State v. Sublett, 176 Wn.2d 58, 70, 292 P.3d 715 (2012).

1. The trial court "closed" a portion of McGill's trial.

"It is error under § 22 to 'close' the courtroom to any aspect of a criminal trial that is required to be 'open.'" State v. Love, 176 Wn. App. 911, 916, 309 P.3d 1209 (2013). Courts thus first consider whether the proceeding at issue implicates the public trial right, thereby constituting a closure at all. Sublett, 176 Wn.2d at 71.

The trial court considered the State's objection to defense counsel's closing argument at sidebar, out of the hearing of the public, the jury, and apparently the court reporter. The purpose of the sidebar was to discuss the matter in private.

"It is error under § 22 to 'close' the courtroom to any aspect of a criminal trial that is required to be 'open.'" Love, 176 Wn. App. at 916. No record was made of the private discussion. Cf. People v. Willis, 27 Cal.App. 4th 811, 821–22, 43 P.3d 130 (2002) (courts may use sidebar conferences followed by appropriate disclosure in open court of successful peremptory challenges); People v. Virgil, 51 Cal.4th 1210, 1237–38, 253 P.3d 553, 126 Cal.Rptr.3d 465 (2011) (not every sidebar conference rises to the level of a constitutional violation; brief bench conferences during jury selection about sensitive subjects when the courtroom was open to the public and the defendant was present did not deprive the defendant of his right to a public trial), cert. denied, \_\_\_ U.S. \_\_\_, 132 S. Ct. 1636, 182 L. Ed. 2d 237 (2012). Sublett, 176 Wn.2d 58, 97, 292 P.3d 715, 734 (2012)

2. The trial court erred by failing to apply the Bone-Club factors.

A judge violates a defendant's right to a public trial under the Sixth Amendment by conducting part of jury selection in the judge's chambers without sua sponte considering reasonable alternatives to closure, identifying an overriding interest likely to be prejudiced without closure, and entering specific findings justifying closure. Presley, 130 S. Ct. at 724-25. The same is true under article I, section 22 absent sua sponte consideration of the Bone-Club factors. Wise, 176 Wn.2d at 12-13;

Strode, 167 Wn.2d at 228-29; see Brightman, 155 Wn.2d at 518 ("Because the record in this case lacks any hint that the trial court considered Brightman's public trial right as required by Bone-Club, we cannot determine whether the closure was warranted.").

There are five independent factors that must precede an order to close a portion of trial. "Anyone present when the closure motion is made must be given an opportunity to object to the closure." Bone-Club, 128 Wn.2d at 258-59; see also Ishikawa, 97 Wn.2d at 38.

Importantly, the trial court did not make a showing as to the need for the complete closure. The court also did not consider whether there were less restrictive alternatives to convening in chambers. For example, excusing the venire from the courtroom and questioning prospective juror 7 in open court was a less restrictive alternative. Nor did the court weigh the competing interests of the defendant and the public. See Bone-Club, 128 Wn.2d at 261 ("[T]he existence of a compelling interest would not necessarily permit closure: the trial court must then perform the remaining four steps to weigh thoroughly the competing interests.").

The fifth Bone-Club factor requires the closure be no broader in its application or duration than is necessary to serve its purpose. Bone-Club, 128 Wn.2d at 328. The private questioning at issue here was properly

limited to serve its purpose. Nevertheless, for the aforesaid reasons, the trial court's method fell short of satisfying the Bone-Club requirements.

3. McGill did not waive his public trial right by failing to object and by participating in the sidebar conference.

This Court has consistently held the accused does not waive the right to challenge closure of a portion of trial on appeal by failing to timely object. Wise, 176 Wn.2d at 15; Strode, 167 Wn.2d at 229; State v. Easterling, 157 Wn.2d 167, 173 n.2, 137 P.3d 825 (2006); State v. Marsh, 126 Wash. 142, 145-47, 217 P. 705 (1923). Consistent with this well-established precedent, this Court should find McGill did not waive his right to raise the public trial claim for the first time on appeal.

4. This Court should not apply RAP 2.5(a) to a claim of a public trial violation.

Requiring a party to object to a closure would ignore the trial court's fundamental obligation to protect the right to a public trial. The Court's current course is correct.

RAP 2.5(a) permits an appellate court to refuse to review any claim of error not raised in the trial court. The customary way to raise a claim of error in the trial court is to object. A timely objection serves to call to the trial court's attention error upon which appellate review may be based so the court has an opportunity to correct it. State v. Fagalde, 85 Wn.2d 730,

731, 539 P.2d 86 (1975). The rule places on trial counsel the burden to timely notify the court that it needs to take action, such as to rule on the admissibility of evidence, provide particular jury instructions or curtail improper argument.

In contrast, the duty to apply the Bone-Club factors is the trial court's, whether a party objects to closure or not. When a trial court is contemplating a closure of any kind, it is aware or should be aware of the implications of its actions. It is the judge and the judge alone who controls public access to his or her courtroom. See Presley, 558 U.S. at 214 ("trial courts are required to consider alternatives to closure even when they are not offered by the parties").

This is the point of this Court's Bone-Club decision. If this Court adopted a contemporaneous objection rule, the parties rather than the trial court would control the Bone-Club requirements. A court would consider the Bone-Club factors only in response to an objection. Such a rule would turn well-established precedent upside down. The trial judge, not the parties, bears the responsibility to ensure justice is administered openly. See Presley, 558 U.S. at 215 ("Trial courts are obligated to take every reasonable measure to accommodate public attendance at criminal trials."); State v. Momah, 167 Wn.2d 140, 158-59, 217 P.3d 321 (2009)

(Alexander, C.J, dissenting) ("Findings spread on the record are particularly critical in a case where no one objects to closure, since in such circumstances the judge has an overriding responsibility to safeguard the constitutional right to a public trial."); Easterling, 157 Wn.2d at 187 (Chambers, J., concurring) ("[T]he constitutional requirement that justice be administered openly is not just a right held by the defendant. It is a constitutional obligation of the courts.").

Furthermore, requiring a contemporaneous objection in the closure context would not foster the purpose of the rule. A contemporaneous objection is designed to call the trial court's attention to possible error so it can be timely corrected. Absent a timely objection, errors go uncorrected. But an unjustified closure of a court proceeding – unjustified because of the failure to apply the Bone-Club factors – is not possible error. It is error that should be obvious to any judge in Washington. See Wise, 176 Wn.2d at 11 ("We typically would never reach the complicated questions presented in Wise's case where a trial court conducts a Bone-Club analysis on the record and concludes that a closure is warranted. This is because, absent an abuse of discretion, we would be assured that the foundational principle of an open justice system is preserved."). A party should have no

burden to call the court's attention to a clear, simple, automatic, per se rule. Applying a waiver rule in this context is misplaced.

Additionally, as this Court held in Strode, a defendant cannot waive the public's article 1, section 10 right to open proceedings. 167 Wn.2d at 229-30. This Court held "the trial court has the independent obligation to perform a Bone-Club analysis." 167 Wn.2d at 230. See Richmond Newspapers, Inc. v. Virginia, 448 U.S. 555, 581, 100 S. Ct. 2814, 2829-30, 65 L. Ed. 2d 973 (1980) ("Absent an overriding interest articulated in findings, the trial of a criminal case must be open to the public.").

The right to a public trial benefits not only the defendant but the criminal justice system at large. "The public has a right to be present whether or not any party has asserted the right." Presley, 558 U.S. at 214. "The process of juror selection is itself a matter of importance, not simply to the adversaries but to the criminal justice system." Press-Enter. Co. v. Superior Court, 464 U.S. 501, 505, 104 S. Ct. 819, 821, 78 L. Ed. 2d 629 (1984). "The Sixth Amendment right to a public trial enures to the benefit of the criminal justice system itself as well as the defendant . . . ." United States v. DeLuca, 137 F.3d 24, 33, cert. denied, 525 U.S. 874 (1st Cir. 1998); see Marsh, 126 Wash. at 147 ("[T]he whole body politic suffers an

actual injury when a constitutional safeguard erected to protect the rights of citizens has been violated[.]")

Applying waiver in this context would give defendants and the State control over a fundamental systemic safeguard that courts are obliged to protect. It would deprive the appellate courts of the opportunity to promote system-wide fairness. Finally, it would trigger a flood of ineffective assistance claims. This Court has struggled with this issue and has created a rule that is fair, simple to understand and straightforward to apply. For these reasons, this Court should not apply a waiver rule in this context.

5. Even if RAP 2.5(a) applies, this Court should excuse the failure to object here or find McGill did not knowingly waive his public trial right.

The general rule in Washington is that issues not raised in the trial court may not be raised for the first time on appeal. RAP 2.5(a). The rule, however, is discretionary rather than absolute. State v. Ford, 137 Wn.2d 472, 477, 973 P.2d 452 (1999). RAP 2.5(a) does not expressly prohibit an appellate court from accepting review of an issue not raised in the trial court. The Court of Appeals reviewed the merits of McGill's public trial claim, so its decision is properly before this Court. See State v. Russell, 171 Wn.2d 118, 122, 249 P.3d 604 (2011) (this Court chooses to review

challenge to trial court's failure to give limiting instruction under ER 404(b) because Court of Appeals accepted review of issue). This Court should exercise its discretion and consider the merits of McGill's claim.

Alternatively, this Court should find the record does not establish McGill sufficiently waived this fundamental constitutional right. Like the right to a jury trial, the right to a public trial can be waived only in a knowing, voluntary, and intelligent manner. Strode, 167 Wn.2d at 229 n.3. There is nothing in the record to suggest McGill knew about his right to question jurors in a courtroom open to the public. "[A] defendant must have knowledge of a right to waive it." In re Personal Restraint of Morris, 176 Wn.2d 157, 167, 288 P.3d 1140 (2012). His silence, therefore, cannot be considered an effective waiver.

6. The trial court's error was not de minimis.

McGill anticipates the State will argue the trial court's violation of the right to a public trial should be excused as de minimis. This Court has never seen fit to apply a de minimis standard to courtroom closures. Strode, 167 Wn.2d at 230. In Easterling, this Court noted that although some jurisdictions have determined that improper courtroom closures may not necessarily violate the public trial right, a majority of this Court has not. 157 Wn.2d at 180-81.

The Ninth Circuit recently addressed two such decisions in United States v. Rivera, 682 F.3d 1223, 1231 (9th Cir. 2012). The State in Easterling cited one of them, Peterson v. Williams, 85 F.3d 39, 42 (2nd Cir.1996). Easterling, 157 Wn.2d at 180-81. In Peterson, the courtroom was inadvertently left closed during the defendant's testimony, which lasted about 15 or 20 minutes. 85 F.3d at 41. But defense counsel repeated nearly all the testimony that was relevant during his closing argument. 85 F.3d at 43. The appellate court, noting that "[t]he circumstances of this case are more unique than rare[,]" 85 F.3d at 42, held "that in the context of this case," the closure did not violate the Sixth Amendment because the closure was brief, followed by a helpful summation, and inadvertent. 85 F.3d at 44. See also United States v. Al-Smadi, 15 F.3d 153, 154-55 (10th Cir. 1994) (no violation when closure of courthouse led to brief and inadvertent closure of courtroom to public).

The second case discussed in Rivera was United States v. Ivester, 316 F.3d 955 (9th Cir. 2003). In Ivester, the district court judge questioned an alternate juror alone, and then the rest of the jury, in the closed courtroom about a perceived lack of security. Ivester, 316 F.3d at 957-58. On appeal, the court relied on Peterson and held the closure was too trivial to trigger the Sixth Amendment right to a public trial. Id. at

960. The court reasoned the questioning was brief and addressed only an "administrative jury problem" that did not affect witness testimony or closing arguments, and was not an attack on the government. Id.

In Rivera, the trial court directed Rivera's family members, including his seven-year-old son, to leave the courtroom during sentencing. 682 F.3d at 1230-31. On appeal, the court rejected the government's argument that the closure – which was for about 35 minutes – was brief enough to be considered trivial. The court held brevity alone did not dictate the results in Peterson and Ivester. Instead, the combination of factors present in Peterson, and the subject of the jury questioning in Ivester were the reasons for the holdings there. Id. at 1231.

The same is true in McGill's case. Although relatively brief, the sidebar was neither inadvertent nor involving an administrative matter. Instead, the subject matter was whether McGill's counsel believed the State presented sufficient of the elements of robbery. RP 234. This was critical to the outcome of the case. For these reasons, the closed session was not trivial or de minimis under the Peterson or Ivester rationale.

Some courts distinguish between total closure, during which no members of the public may attend, and partial closure. See, Snyder v. Coiner, 510 F.2d 224, 230 (4th Cir. 1975) (unauthorized closure of

courtroom by bailiff for short time during arguments of counsel to jury found "entirely too trivial to amount to a constitutional deprivation" because closure was brief and there were no restrictions placed on defendant's family or spectators already in courtroom); State v. Lindsey, 632 N.W.2d 652, 657 (Minn. 2001) (trial court's ejection of two children from otherwise open courtroom considered trivial; court observed that "[a]t no time was the courtroom cleared of all spectators. The trial was open to the general public and the press at all times"; record did not suggest that members of the public and press were absent during any stage of trial, or that defendant, his family, his friends, or any witnesses were improperly excluded); People v. Woodward, 4 Cal. 4th 376, 384, 841 P.2d 954, 958, 14 Cal.Rptr.2d 434 (1992) (cases that address total closures found "inapposite" because "existing spectators were allowed to remain in the courtroom, and any member of the public could enter the courtroom during specified recesses."), cert. denied, 507 U.S. 1053 (1993).

This Court has similarly distinguished a partial closure from a full one. In State v. Lormor, the trial court ordered the exclusion of one person, the defendant's four-year-old, terminally ill daughter, from the courtroom. 172 Wn.2d 85, 87-89, 257 P.3d 624 (2011). The child was wheelchair-bound and used a ventilator to breathe. The judge could hear

the ventilator operating from the bench and did not want the noise to distract jurors. Id. at 87-88. No other member of the public was excluded from the courtroom. Id. at 92-93.

This Court discussed the pertinent closure cases and the requirement that the Bone-Club factors be applied. But it held, "These rules come into play when the public is fully excluded from proceedings within a courtroom." Lormor, 172 Wn.2d at 92. It concluded that excluding one person only and allowing everyone else is not a closure. "Rather, a 'closure' of a courtroom occurs when the courtroom is completely and purposefully closed to spectators so that no one may enter and no one may leave." Id. at 93.

In McGill's case, the trial court effectuated a full closure. No members of the public were invited to the bench. The closure was not trivial. For the above reasons, McGill urges this Court to not adopt a triviality, or de minimis, standard to apply in determining whether a total closure violated a defendant's right to an open and public trial. Or if it chooses to approve of a triviality test, it should find the closure here was not trivial.

For a practical reason as well, this Court should reject a de minimis standard. The standard would not only require a fact-specific, case-by-

case approach, but would necessarily involve awkward and subjective line-drawing that raises obvious questions. For example, would a 30-minute closure be de minimis, but not a 60-minute one? Would private questioning of one prospective juror be trivial, but not three jurors? Would closure of a motion to sever counts or defendant be trivial, but a motion to suppress evidence not?

Adopting a de minimis standard would be a disaster to apply, especially where it is so easy for trial judges to apply the Bone-Club factors before excluding the public. This Court should reject the de minimis standard.

7. The trial court's error was structural.

The trial court's error was structural under the Sixth Amendment. See Neder v. United States, 527 U.S. 1, 8, 119 S. Ct. 1827, 1833, 144 L. Ed. 2d 35 (1999) (violation of right to public trial is structural, citing Waller v. Georgia, 467 U.S. 39, 46, 104 S. Ct. 2210, 81 L. Ed. 2d 31 (1984)); Arizona v. Fulminante, 499 U.S. 279, 309-10, 111 S. Ct. 1246, 113 L. Ed. 2d 302 (1991) (same); State v. Grenning, 169 Wn.2d 47, 60 n.11, 234 P.3d 169 (2010); State v. Levy, 156 Wn.2d 709, 724 n.3, 132 P.3d 1076 (2006)

The same is true under the state constitution. This Court has consistently found the denial of the right to a public trial to be structural error presumed to be prejudicial. Wise, 176 Wn.2d at 14; Easterling, 157 Wn.2d at 181; Orange, 152 Wn.2d at 814; Bone-Club, 128 Wn.2d at 261-62; Marsh, 126 Wash. at 146-47. The structural error remedy of reversal will always apply absent extraordinary circumstances. See Strode, 167 Wn.2d at 226 (right to public trial is "strictly guarded to assure that proceedings occur outside the public courtroom in only the most unusual circumstances"), citing Easterling, 157 Wn.2d at 174-75.

The only case in which this Court held the closure of part of voir dire was not structural error was Momah, 167 Wn.2d at 156. Momah is easily distinguishable because of its unusual facts. In Momah, defense counsel affirmatively assented to the closure, argued for its expansion, and did not object to closure when given the chance. Momah's counsel deliberately chose to pursue an in-chambers conference. Momah, 167 Wn.2d at 155. This Court found that "due to the publicity of Momah's case, the defense and the trial court had legitimate concerns about biased jurors or those with prior knowledge of Momah's case." Id. at 156.

None of those facts exist in McGill's case. Defense counsel did not affirmatively assent to the sidebar, did not argue for its expansion, and was

not directly asked whether he objected. The trial court, not the parties, chose to have the sidebar rather than excusing the jury.

As a practical matter, reversal and retrial is the only available remedy for improper closure of voir dire absent extraordinary circumstances. A suppression hearing, such as the one found to be improperly closed in Waller, can be easily redone. The sidebar came during closing argument of the trial. It was not recorded. Placing the conversation on the record now is too late and does not cure the error. The proper remedy for McGill is the structural error remedy – a new trial.

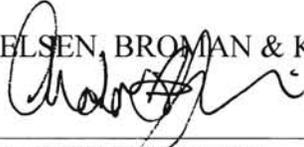
D. CONCLUSION

The trial court violated McGill's constitutional right to a public trial. This Court should reverse the conviction and remand for a new trial.

DATED this 22 day of April, 2013.

Respectfully submitted,

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

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STATE OF WASHINGTON	)	
	)	
Respondent,	)	
	)	
vs.	)	COA NO. 71217-9-I
	)	
DAIN McGILL,	)	
	)	
Appellant.	)	

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**DECLARATION OF SERVICE**

I, PATRICK MAYOVSKY, DECLARE UNDER PENALTY OF PERJURY UNDER THE LAWS OF THE STATE OF WASHINGTON THAT THE FOLLOWING IS TRUE AND CORRECT:

THAT ON THE 22<sup>ND</sup> DAY OF APRIL 2014, I CAUSED A TRUE AND CORRECT COPY OF THE **BRIEF OF APPELLANT** TO BE SERVED ON THE PARTY / PARTIES DESIGNATED BELOW BY EMAIL AND/OR DEPOSITING SAID DOCUMENT IN THE UNITED STATES MAIL.

- [X] SNOHOMISH COUNTY PROSECUTOR'S OFFICE  
3000 ROCKEFELLER AVENUE  
EVERETT, WA 98201  
[Diane.Kremenich@co.snohomish.wa.us](mailto:Diane.Kremenich@co.snohomish.wa.us)
  
- [X] DAIN McGILL  
DOC NO. 308536  
COYOTE RIDGE CORRECTIONS CENTER  
P.O. BOX 769  
CONNELL, WA 99326

**SIGNED** IN SEATTLE WASHINGTON, THIS 22<sup>ND</sup> DAY OF APRIL 2014.

x *Patrick Mayovsky*