

72101-1

72101-1

COA NO. 72101-1-1

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

STATE OF WASHINGTON,

Respondent,

v.

DONALD TURPIN,

Appellant.

REC'D

JAN 05 2015

King County Prosecutor
Appellate Unit

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

The Honorable Dean S. Lum, Judge

BRIEF OF APPELLANT

CASEY GRANNIS
Attorney for Appellant

NIELSEN, BROMAN & KOCH, PLLC
1908 East Madison
Seattle, WA 98122
(206) 623-2373

X

TABLE OF CONTENTS

	Page
A. <u>ASSIGNMENT OF ERROR</u>	1
<u>Issue Pertaining To Assignment Of Error</u>	1
B. <u>STATEMENT OF THE CASE</u>	1
C. <u>ARGUMENT</u>	3
1. TURPIN'S RIGHT TO A PUBLIC TRIAL WAS VIOLATED WHEN THE COURT EXCUSED AN EMPANELED JUROR DURING A COURT RECESS OFF THE RECORD	3
a. The standard of review and analytical framework for assessing public trial claims.....	3
b. The removal of a sitting juror implicates the public trial right under the experience and logic test4
c. The excusal of the sitting juror during a court recess off the record constituted a closure	6
d. This structural error requires reversal of the convictions and remand for a new trial	9
D. <u>CONCLUSION</u>	11

TABLE OF AUTHORITIES

Page

WASHINGTON CASES

In re Pers. Restraint of Orange,
152 Wn.2d 795, 100 P.3d 291 (2004)..... 3, 9, 10

State v. Bone-Club,
128 Wn.2d 254, 906 P.2d 325 (1995)..... 3, 7, 9, 10

State v. Brightman,
155 Wn.2d 506, 122 P.3d 150 (2005)..... 5

State v. Depaz,
165 Wn.2d 842, 204 P.3d 217 (2009)..... 5

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

State v. Elmore,
155 Wn.2d 758, 123 P.3d 72 (2005)..... 5

State v. Jones,
175 Wn. App. 87, 303 P.3d 1084 (2013)..... 7, 8

State v. Jorden,
103 Wn. App. 221, 11 P.3d 866 (2000),
review denied, 143 Wn.2d 1015, 22 P.3d 803 (2001) 5

State v. Leyerle,
158 Wn. App. 474, 242 P.3d 921 (2010)..... 5

State v. Lormor,
172 Wn.2d 85, 257 P.3d 624 (2011)..... 6

State v. Njonge,
__ Wn.2d __, 334 P.3d 1068 (2014)..... 4, 6, 10

State v. Paumier,
176 Wn.2d 29, 288 P.3d 1126 (2012)..... 8

TABLE OF AUTHORITIES

Page

WASHINGTON CASES

State v. Rafay,
168 Wn. App. 734, 285 P.3d 83 (2012),
review denied, 176 Wn.2d 1023, 299 P.3d 1171 (2013) 5

State v. Smith,
__ Wn.2d __, 334 P.3d 1049 (2014)..... 4

State v. Sublett,
176 Wn.2d 58, 292 P.3d 715 (2012)..... 4

State v. Wise,
176 Wn.2d 1, 288 P.3d 1113 (2012)..... 3, 4, 6-10

FEDERAL CASES

Judd v. Haley,
250 F.3d 1308 (11th Cir. 2001) 10

Presley v. Georgia,
558 U.S. 209, 130 S. Ct. 721, 175 L. Ed. 2d 675 (2010)..... 3, 9

Waller v. Georgia,
467 U.S. 39, 104 S. Ct. 2210, 81 L. Ed. 2d 31 (1984)..... 9

RULES, STATUTES AND OTHER AUTHORITIES

RCW 2.36.110 6

U.S. Const. amend. VI 3

Wash. Const. art. I, § 10 3

Wash. Const. art. I, § 22 3

A. ASSIGNMENT OF ERROR

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

Issue Pertaining to Assignment of Error

Whether appellant's right to a public trial was violated because an empaneled juror was excused during a court recess off the record without consideration of the requisite factors to justify the closure?

B. STATEMENT OF THE CASE

The State charged Donald Turpin with second degree burglary, first degree theft, first degree trafficking and leading organized crime for events associated with the removal of copper from the Sound Transit light rail interstitial. CP 1-15, 50-52.

The case proceeded to trial before a jury. After the close of evidence, an on the record discussion was held between the judge and the attorneys regarding the remaining schedule for the day. 1RP¹ 1078-82.² The judge said he would instruct the jury, send them to lunch early, and then have them come back at 1:10 so that proceedings could start at 1:15.

¹ The verbatim report of proceedings is referenced as follows: 1RP - 11 consecutively paginated volumes consisting of 5/6/14, 5/7/14 (before Judge Lum), 5/12/14, 5/13/14, 5/14/14, 5/15/14, 5/19/14 (part one), 5/19/14 (part two), 5/20/14, 5/21/14, 5/22/14, 6/13/14; 2RP 5/7/14 (before Judge Rogers).

² The underlying facts of the case are not relevant to the issue raised on appeal. Only the facts relevant to the public trial issue are set forth.

1RP 1081-82. The jury returned to the courtroom and the court instructed the jury on the law. 1RP 1082-1104. The judge announced both sides had rested, they would be taking an early lunch, and the attorneys would give closing arguments at 1:15. 1RP 1083, 1103-04. The jury was released for lunch. 1RP 1104. The judge then told the attorneys that he would see them after lunch. 1RP 1104. The lunch recess was taken from 11:27 a.m. to 1:22 p.m. 1RP 1104.

The clerk's minutes show the following occurred "off record:" "Due to illness, Juror 3 is excused from further consideration of this cause. The Court instructs the Bailiff to excuse Juror 3." CP 217.

After the recess, when court was back in session on the record, the court told the jury "Juror Number 3 got sick, you probably know that, and so we've excused Juror Number 3." 1RP 1105; CP 217. The alternate juror took Juror 3's place. 1RP 1105. The attorneys gave closing arguments. 1RP 1105-1142. The jury retired for deliberations. 1RP 1142.

The jury, minus the excused juror, returned guilty verdicts and found several aggravating factors. CP 62-67. The court sentenced Turpin to a total of 149 months confinement. CP 182. This appeal follows. CP 190-200.

C. ARGUMENT

1. TURPIN'S RIGHT TO A PUBLIC TRIAL WAS VIOLATED WHEN THE COURT EXCUSED AN EMPANELED JUROR DURING A COURT RECESS OFF THE RECORD.

Turpin has the right to a public trial. Presley v. Georgia, 558 U.S. 209, 212-13, 130 S. Ct. 721, 175 L. Ed. 2d 675 (2010); State v. Wise, 176 Wn.2d 1, 9, 288 P.3d 1113 (2012); U.S. Const. amend VI; Wash. Const. art I, § 22. Additionally, article I, section 10 expressly guarantees the right to open court proceedings. State v. Easterling, 157 Wn.2d 167, 174, 137 P.3d 825 (2006).

In this case, a sitting juror was excused from service when the court was in recess and off the record. This violated Turpin's right to a public trial. Experience and logic dictate that the right to public trial implicates the removal of a sitting juror. To comply with the public trial requirement, the court needed to conduct a Bone-Club³ analysis before the juror was excused during an off the record recess. That did not happen here. This structural error requires reversal.

a. The standard of review and analytical framework for assessing public trial claims.

The right to a public trial is the right to have a trial open to the public. In re Pers. Restraint of Orange, 152 Wn.2d 795, 804-05, 100 P.3d

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

291 (2004). Whether that right has been violated is a question of law reviewed de novo. Wise, 176 Wn.2d at 9. A violation of the public trial right is reviewable for the first time on appeal, despite a lack of objection below. State v. Njonge, __ Wn.2d __, 334 P.3d 1068, 1073-74 (2014) (citing Wise, 176 Wn.2d at 16-19 & n. 11).

The analytical steps of the public trial right framework are: "(1) Does the proceeding at issue implicate the public trial right? (2) If so, was the proceeding closed? And (3) If so, was the closure justified?" State v. Smith, __ Wn.2d __, 334 P.3d 1049, 1056 (2014).

b. The removal of a sitting juror implicates the public trial right under the experience and logic test.

Appellate courts employ the experience and logic test to determine whether a proceeding implicates the public trial right. Smith, 334 P.3d at 1052-53 (citing State v. Sublett, 176 Wn.2d 58, 73, 292 P.3d 715 (2012)). The first part of the test, the experience prong, asks whether the process have historically been open to the public. Sublett, 176 Wn.2d at 73. The logic prong asks "whether public access plays a significant positive role in the functioning of the particular process in question." Id. The "guiding principle" is whether openness will enhance both the basic fairness of the criminal trial and the appearance of fairness so essential to public confidence in the system. Smith, 334 P.3d at 1053.

Experience shows sitting jurors are excused from service on the record in open court when the court is in session. See State v. Jorden, 103 Wn. App. 221, 225-26, 11 P.3d 866 (2000), review denied, 143 Wn.2d 1015, 22 P.3d 803 (2001) (court released sleepy, inattentive juror after hearing on the record in open court); State v. Rafay, 168 Wn. App. 734, 817-21, 285 P.3d 83 (2012), review denied, 176 Wn.2d 1023, 299 P.3d 1171 (2013) (court released distracted juror after hearing on the record in open court); State v. Elmore, 155 Wn.2d 758, 764-66, 123 P.3d 72 (2005) (court released deliberating juror after hearing on the record in open court); State v. Depaz, 165 Wn.2d 842, 846-51, 204 P.3d 217 (2009) (same). Undersigned counsel has not located a single case where an empaneled juror was released from service off the record during a court recess. The experience prong is satisfied.

The logic prong is also satisfied. The public trial right encompasses circumstances in which the public's mere presence passively contributes to the fairness of the proceedings, such as deterring deviations from established procedures, reminding the officers of the court of the importance of their functions, and subjecting judges to the check of public scrutiny. State v. Brightman, 155 Wn.2d 506, 514, 122 P.3d 150 (2005); State v. Leyerle, 158 Wn. App. 474, 479, 242 P.3d 921 (2010). Public access to a proceeding where a sitting juror is removed plays a significant

positive role in the functioning of that particular process. Public oversight helps ensure that a juror will not be removed for improper or inadequate reasons. Whether to remove a sitting juror — one slated to deliberate on the defendant's fate after having passed through the voir dire process — is a weighty decision. Public scrutiny through contemporaneous oversight encourages an appropriate exercise of discretion on the matter. See Wise, 176 Wn.2d at 6 (the public nature of trials is a check on the judicial system, providing for accountability and transparency). Public access thus deters the removal of a juror who is not actually unfit to serve under RCW 2.36.110⁴ and provides assurance that the judicial process takes place without the taint of irregularity or bias.

c. The excusal of the sitting juror during a court recess off the record constituted a closure.

"A defendant asserting violation of his public trial rights must show that a closure occurred." Njonge, 334 P.3d at 1074. One type of "closure" is "when the courtroom is completely and purposefully closed to spectators so that no one may enter and no one may leave." State v. Lormor, 172 Wn.2d 85, 93, 257 P.3d 624 (2011). Physical closure of the

⁴ RCW 2.36.110 provides: "It shall be the duty of a judge to excuse from further jury service any juror, who in the opinion of the judge, has manifested unfitness as a juror by reason of bias, prejudice, indifference, inattention or any physical or mental defect or by reason of conduct or practices incompatible with proper and efficient jury service."

courtroom, however, is not the only situation that violates the public trial right.

In State v. Jones, the trial court violated the right to a public trial when, during a court recess off the record, the court clerk drew four juror names to determine which jurors would serve as alternates. State v. Jones, 175 Wn. App. 87, 91, 303 P.3d 1084 (2013), review pending, No. 893217. The Court of Appeals treated this proceeding as a closure: "'The trial court's failure to consider and apply Bone-Club before closing part of a trial' — the alternate juror drawing—was error." Jones, 175 Wn. App. at 103 (quoting Wise, 176 Wn.2d at 13). "Where such a drawing occurs during a court recess off the record, the defendant and the public lack the assurance of a truly random drawing that they would have if the drawing were performed in open court on the record." Id. at 102. "The drawing of alternate jurors occurred off the record during a court recess. The trial court failed to engage in a Bone-Club analysis, resulting in an error that is per se prejudicial." Id. at 96.

In Turpin's case, the excusal of the juror took place during a court recess off the record. CP 217; 1RP 1104-05. Under Jones, that proceeding constituted a closure, notwithstanding that it occurred inside the courtroom. Taking a recess has the effect of notifying members of the public that nothing of substance will take place until court is called back

into session on the record. A member of the public, upon being told that court is in recess until after lunch, has no reason to remain in the courtroom to see if the trial process will continue. The public has been assured that nothing will happen. That is a problem when something of substance actually does happen, as is the case here.

That the excusal was announced to jurors in open court following the recess, when court was back in session, does not retroactively cure the closure that already took place. See Jones, 175 Wn. App. at 102 ("a court staff member conducted the drawing during an afternoon court recess, which was announced to Jones, counsel, and the jurors after it occurred. Thus, the alternate juror drawing occurred off the record and outside of the trial proceedings."). A later reconstruction of events or subsequent public access does not retroactively immunize a closure that took place without justification under the Bone-Club factors. See, e.g., State v. Paumier, 176 Wn.2d 29, 32-33, 288 P.3d 1126 (2012) (public trial violation where in-chambers questioning of prospective jurors "was recorded and transcribed by the court"); Wise, 176 Wn.2d at 7-8 (public trial violation where prospective jurors questioned in chambers where "[t]he questioning in chambers was recorded and transcribed just like the portion of voir dire done in the open courtroom.").

d. This structural error requires reversal of the convictions and remand for a new trial.

Before a trial court closes the jury selection process off from the public, it must consider the five factors identified in Bone-Club on the record. Wise, 176 Wn.2d at 12. Under the Bone-Club test, (1) the proponent of closure must show a compelling interest for closure and, when closure is based on a right other than an accused's right to a fair trial, a serious and imminent threat to that compelling interest; (2) anyone present when the closure motion is made must be given an opportunity to object to the closure; (3) the proposed method for curtailing open access must be the least restrictive means available for protecting the threatened interests; (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.⁵ Bone-Club, 128 Wn.2d at 258-60; Wise, 176 Wn.2d at 10.

⁵ The Bone-Club components are comparable to the requirements set forth by the United States Supreme Court in Waller v. Georgia, 467 U.S. 39, 46, 104 S. Ct. 2210, 81 L. Ed. 2d 31 (1984). Orange, 152 Wn.2d at 806; see Waller, 467 U.S. at 48 ("[T]he party seeking to close the hearing must advance an overriding interest that is likely to be prejudiced, the closure must be no broader than necessary to protect that interest, the trial court must consider reasonable alternatives to closing the proceeding, and it must make findings adequate to support the closure."); Presley, 558 U.S. at 214 ("trial courts are required to consider alternatives to closure even when they are not offered by the parties.").

There is no indication the court considered the Bone-Club factors before it excused the sitting juror from service. The Bone-Club analysis itself must be done on the record. Judd v. Haley, 250 F.3d 1308, 1317-18 (11th Cir. 2001). The trial court errs when it fails to conduct the Bone-Club test before closing a court proceeding to the public. Wise, 176 Wn.2d at 5, 12. The court here erred in failing to articulate a compelling interest to be served by the closure, give those present an opportunity to object, weigh alternatives to the proposed closure, narrowly tailor the closure order to protect the identified threatened interest, and enter findings that specifically supported the closure. Orange, 152 Wn.2d at 812, 821-22.

"Where experience and logic counsel that a particular proceeding must be open, a trial court's failure to conduct a Bone-Club analysis justifying a closure will result in a new trial." Njonge, __ Wn.2d __, 334 P.3d at 1073. The violation of the public trial right is structural error requiring automatic reversal because it affects the framework within which the trial proceeds. Wise, 176 Wn.2d at 6, 13-14.

As argued above, the juror was excused during a court recess off the record and that proceeding was not justified by an on the record balancing of the Bone-Club factors. Turpin's convictions must therefore be reversed due to the public trial violation.

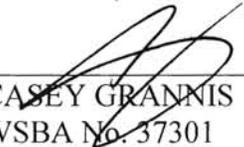
D. CONCLUSION

For the reasons set forth, Turpin requests reversal of the convictions.

DATED this 5th day of January 2015

Respectfully Submitted,

NIELSEN, BROMAN & KOCH, PLLC.



CASEY GRANNIS
WSBA No. 37301
Attorneys for Appellant

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

STATE OF WASHINGTON/DSHS)

Respondent,)

v.)

DONALD TURPIN,)

Appellant.)

COA NO. 72101-1-1

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 5TH DAY OF JANUARY, 2015 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] DONALD TURPIN
DOC NO. 261459
WASHINGTON STATE PENITENTIARY
1313 N. 13TH AVENUE
WALLA WALLA, WA 99362

SIGNED IN SEATTLE WASHINGTON, THIS 5TH DAY OF JANUARY, 2015.

x Patrick Mayovsky

Handwritten notes and a large 'X' mark on the right side of the page.