

NO. 36468-9-II

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

STATE OF WASHINGTON,

Respondent,

v.

CHAMROEUM NAM,

Appellant.

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

The Honorable Richard D. Hicks, Judge

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DIVISION II
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REPLY BRIEF OF APPELLANT

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A. ARGUMENT IN REPLY

1. NAM WAS DENIED HIS DUE PROCESS RIGHT TO A PUBLIC TRIAL.

The State contends a Bone-Club¹ error may be presumed harmless if (a) it does not involve an evidentiary phase of the trial or (b) this Court determines the closure was trivial. This is not the law.

The constitutional right to an open court is not limited to evidentiary phases of criminal trials. State v. Easterling, 157 Wn.2d 167, 174, 137 P.3d 825 (2006). It extends to all proceedings that affect the composition of the jury. Id.

Open jury proceedings are important to our criminal justice system as well as to the parties. In re Pers. Restraint of Orange, 152 Wn.2d 795, 804-05, 100 P.3d 291 (2005); Press-Enter. Co. v. Superior Court, 464 U.S. 501, 505, 104 S. Ct. 819, 78 L. Ed. 2d 629 (1984). While considerations of juror privacy are important, they “do not trump constitutional requirements that the trial be public.” State v. Frawley, 140 Wn. App. 713, 720, 167 P.3d 593 (2007). Washington courts have consistently held that a compelling overriding interest in closing proceedings affecting the composition of the jury must be established on the trial record by means of

¹ State v. Bone-Club, 128 Wn.2d 254, 906 P.2d 325 (1995).

the Bone Club factors. Orange, 152 Wn.2d at 804-05; Easterling, 157 Wn.2d at 180 n.12.

The State invites this Court to determine for itself that a Bone-Club analysis would have justified the closure in this case because the closure was trivial. Brief of Respondent (BOR) at 6. But Washington courts do not attempt to weigh the Bone-Club factors for the first time on appeal; if the trial judge did not make a record, that ends the inquiry. Frawley, 140 Wn. App. at 720. Moreover, our appellate courts do not engage in triviality analysis. Easterling, 157 Wn.2d at 180 n.12.

The State is correct that excluding the public does not always amount to constitutional error. Easterling, 157 Wn.2d at 180; Orange, 152 Wn.2d at 800. But it is the trial court's failure to apply Bone-Club that constitutes the reversible error, not another court's assessment of what the likely result would have been had it done so. Easterling, 157 Wn.2d at 180; Frawley, 140 Wn.2d at 720.

Even where the reason for the proposed closure is to "inhibit the disclosure of sensitive information," the trial court must still establish a compelling governmental interest and find that the proposed closure "is narrowly tailored to serve that interest." Press-Enterprise, 464 U.S. at 510. This applies to juror proceedings. Frawley, 140 Wn. App. at 720.

The authorities relied on by the State are distinguishable. The sole Washington case cited is the pre-Orange decision of State v. Rivera, 108 Wn. App. 645, 32 P.3d 292 (2001). There, the issue was a ‘ministerial’ matter of one juror’s objection to another juror’s personal hygiene. The issue concerned only the jurors and could not have affected the trial. It was resolved by simply changing the seating arrangements. Rivera, 108 Wn. App. at 652-53.

In Nam’s case, by contrast, the purpose of the closed hearing was to decide whether to remove a sitting juror entirely. This cannot be characterized as ‘ministerial.’

The State also cites United States v. Ivester, 316 F.3d 955, 959-60 (9th Cir. 2003), a federal case that discuss “values” to be considered in determining whether a proposed closure would be “too trivial” to implicate the Sixth Amendment. But State v. Brightman, 155 Wn.2d 506, 122 P.3d 150 (2005), distinguishes and rejects Ivester and other federal cases cited in support of a ‘de minimis’ argument. Brightman, 155 Wn.2d at 517. There is no need for our appellate courts to engage in a triviality analysis “if our trial courts correctly apply the Bone-Club guidelines in the first instance.” Easterling, 157 Wn.2d at 180 n.12.

Leaving aside defendants’ constitutional trial rights, reversal is required because failure to apply Bone-Club violates the public’s

independent Const. art. 1, § 10 right to a public trial. Easterling 157 Wn.2d at 180. Const. art. 1, § 10 and judicial precedent require strict adherence to the established guidelines. Easterling, 157 Wn.2d at 177. Failure to do this is not subject to harmless error analysis. Bone-Club, 128 Wn.2d at 261-62. Prejudice is “necessarily presumed.” Frawley, 140 Wn. App. 720, citing Easterling, 157 Wn.2d at 181. “The denial of the constitutional right to a public trial is one of the limited classes of fundamental rights not subject to harmless error analysis.” Id.

Contrary to the State’s argument, a contemporaneous objection is not required. The issue may be raised for the first time on appeal. Easterling, 157 Wn.2d at 177; Bone-Club, 128 Wn.2d at 257.

Where the trial court has not weighed the Bone-Club factors, this Court cannot determine whether closure was warranted, and the appropriate remedy is a new trial. Brightman, 155 Wn.2d at 518; Easterling, 157 Wn.2d at 174; Orange, 152 Wn.2d at 804-05.

2. NAM WAS DENIED DUE PROCESS WHEN THE COURT EXCLUDED CROSS EXAMINATION OF THE CHIEF PROSECUTION WITNESS FOR BIAS.

The State contends the defense made a strategic decision to forgo asking Harris about her alleged statement to Berry because the court had ruled this opened the door for the State to present evidence Berry was a liar. This may be so, but Nam is arguing the court’s ruling was in error.

This Court held in Nam's first appeal that Harris's credibility was essential to the prosecution and whether she told Berry she would say or do anything to make sure Nam went to jail was highly relevant. Appellant's Brief, Appendix at 10-11. Nam contends the trial court once again erred in excluding this evidence on different grounds.

A criminal defendant has a constitutional right to impeach prosecution witnesses with bias evidence. State v. Spencer, 111 Wn. App. 401, 408, 45 P.3d 209 (2002). Bias evidence may be elicited from the witness herself in the form of a prior statements to a third party. ER 613; State v. Simonson, 82 Wn. App. 226, 234, 917 P.2d 599 (1996). When a prior statement is introduced as extrinsic evidence of bias, it is sufficient to give the witness an opportunity to explain or deny the statement. No foundation is needed beforehand. Spencer, 111 Wn. App. at 408.

The State offers no authority that this opens the door for the opposing party to introduce extrinsic evidence to impugn the character of the third party recipient of the prior statement. The prosecution cannot use impeachment as a means of submitting otherwise inadmissible evidence to the jury. State v. Miles, 139 Wn. App. 879, 885, 162 P.3d 1169 (2007).

A prior statement that shows the State's witness's bias toward the defendant is merely extrinsic evidence of bias. Spencer, 111 Wn. App. at 410-11. The trial court erred in using a legally spurious penalty to inhibit

the defendant from exercising his constitutional right to impeach the State's witness with extrinsic evidence of bias. The State concedes the trial court was "overly cautious." BOR 10. This is an understatement. The court was in error.

3. NAM WAS DENIED EFFECTIVE ASSISTANCE OF COUNSEL.

The State urges the Court not to address Nam's ineffective assistance of counsel claim because he did not present them as separate assignments of error. This argument is without merit. So long as the appellant sets forth assignments of error, argues the issues raised by those assignments of error, and cites to legal authority, this Court will review all the issues in the interests of justice. In re Perkins, 93 Wn. App. 590, 594, 969 P.2d 1101 (1999).

a. Hearsay Violation.

The State does not dispute that the trial court expressed extreme discomfort at the scope of Oplinger's hearsay testimony. The Court clearly communicated that the detail included in Harris's out-of-court statements as reported by Oplinger put the statements beyond the bounds of the excited utterance exception. Effective trial preparation by defense counsel would have included discovery of Oplinger's proposed hearsay

testimony. And the court's comments show that a timely objection would have kept Oplinger's corroboration of Harris's evidence from the jury.

The State wrongly contends Oplinger's testimony did not prejudice the defense because Harris testified. But this is beside the point. Oplinger, in his capacity as a law enforcement officer, repeated and appeared to corroborate details of Harris's story. This very likely enhanced Harris's credibility and established her testimony as fact in the minds of the jury. It was not harmless beyond a reasonable doubt.

b. Uncharged Crime Violation.

This Court previously reversed Nam's robbery conviction for taking Harris's purse. The State concedes that Oplinger's gratuitous disclosure that Nam took Harris's purse was constitutional error, but contends the failure to object was harmless. This argument cannot stand.

Constitutional error requires reversal unless the State proves it was harmless beyond a reasonable doubt. State v. Davis, 154 Wn.2d 291, 304, 111 P.3d 844 (2005); State v. Guloy, 104 Wn.2d 412, 425, 705 P.2d 1182 (1985). The reviewing court begins with the presumption a constitutional error's potential for mischief was fully realized. Delaware v. Van Arsdall, 475 U.S. 673, 684, 106 S. Ct. 1431, 89 L. Ed. 2d 674 (1986). Here, we must presume the jury inferred criminal propensity from Oplinger's testimony.

The State cites to no authority for its conclusory assertion that juries rarely pay attention to minor details such as uncontroverted statements that reveal the defendant's criminal propensity. Accordingly, this Court may presume the State, "after diligent search, has found none." Roberts v. Atlantic Richfield Co., 88 Wn.2d 887, 895, 568 P.2d 764 (1977). Arguably, one reason we seat twelve jurors is to ensure that every relevant detail is recalled and considered during deliberations.

We cannot say with confidence this error did not affect the outcome of Nam's trial. A major part of the jury's task was to determine the relative credibility of Harris and Nam. By the allowing evidence of an uncharged robbery to pass without objection, defense counsel deprived Nam of the benefit of his successful appeal of the issue to this Court.

B. CONCLUSION

For the foregoing reasons and for the reasons stated in the opening brief, this Court should reverse Nam's conviction.

DATED this ____ day of March, 2008.

Respectfully submitted,

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**IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON
DIVISION II**

STATE OF WASHINGTON)	
)	
Respondent,)	
)	
vs.)	COA NO. 36468-9-II
)	
CHAMROEUM NAM,)	
)	
Appellant.)	

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 14TH DAY OF MARCH 2008, I CAUSED A TRUE AND CORRECT COPY OF THE **BRIEF OF APPELLANT** TO BE SERVED ON THE PARTY / PARTIES DESIGNATED BELOW BY DEPOSITING SAID DOCUMENT IN THE UNITED STATES MAIL.

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SIGNED IN SEATTLE WASHINGTON, THIS 14TH DAY OF MARCH 2008.

x *Patrick Mayovsky*

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