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NO. 36625-8-II

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

STATE OF WASHINGTON,

Respondent,

v.

ERIC WISE,

Appellant.

FILED
COURT OF APPEALS DIVISION II
STATE OF WASHINGTON
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COURT OF APPEALS
DIVISION II
STATE OF WASHINGTON
BY DEPUTY

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

The Honorable Toni A. Sheldon, Judge

BRIEF OF APPELLANT

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A. ASSIGNMENT OF ERROR

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

Issue Pertaining to Assignment of Error

The trial court conducted part of the voir dire of 10 prospective jurors in chambers, with only the judge and parties present. Where the trial court did not analyze the "*Bone-Club*"¹ factors before ordering the private voir dire, did the trial court's exclusion of the public violate the appellant's constitutional rights to a public trial?

B. STATEMENT OF THE CASE

1. Procedural history

The state charged Eric D. Wise with second degree burglary and first degree theft stemming from the forcible entry into a convenience store (Lake Limerick Mini Mart, "Mini Mart") and taking of items therein. CP 41-42. A Mason County jury found Wise guilty as charged. CP 17-18. The trial judge sentenced Wise to concurrent, standard range terms of 57 months for burglary and 22 months for theft. CP 4-16.

¹ *State v. Bone-Club*, 128 Wn.2d 254, 906 P.2d 629 (1995).

2. Substantive facts

At about 11 p.m. on April 4, 2006, Brendan Kerwin stole a saw from a Wal-Mart store while Joseph Reading and Wise were in line to buy a bolt-cutter and/or a crowbar. RP1 55-58, 78-80, 90-91, 141-43; RP2 170-74, 224-26.² Kerwin tripped the alarms as he left the store. RP1 56-57, 79. He ran, jumped into a black Jeep SUV driven by Sasha Buhl, and went to Robbie Childs's residence. RP1 63-65, 75-80, 94-95; RP2 183, 229-30. Buhl was Wise's girlfriend. RP2 174, 190, 228-29. Childs, who was waiting in the Wal-Mart parking lot in his mother's car, picked up Reading and Wise and drove to his residence. RP1 80-81.

Kerwin testified he needed the items from Wal-Mart so he and Reading could break into the Mini Mart. RP2 172-73. He and Reading burglarized the Mini Mart and stole cigarettes, lottery tickets, alcohol and cash registers. RP2 173-74. Neither Wise nor his girlfriend was involved in the burglary. RP 174-80.

Kerwin told police, however, he never left Childs's home. RP2 232-34. After a short time, Reading, Cody Wright, Buhl, and Wise left for

² "RP1" refers to the verbatim report of proceedings labeled "Volume I," and covers proceedings held from June 25, 2007 to June 27, 2007. "RP2" refers to the verbatim report of the June 28, 2007 and July 9, 2007, proceedings and is labeled "Volume II." "RP3" refers to the verbatim report of the June 26, 2007, voir dire proceedings.

about one hour. RP2 232. They came back with cigarettes and beer and then left again. RP2 232-33, 236-38. Kerwin suspected foul play because of the cigarettes and beer. RP2 236. He denied seeing any lottery tickets or burglarizing the Mini Mart. RP2 234-37.

Reading testified everyone went inside Childs's house after returning from Wal-Mart. RP1 80-81. Kerwin, Buhl and Wise left for a few minutes and when they returned, they said the lock at the Mini Mart was broken. RP1 81. Then Reading, Wright, Kerwin, Buhl and Wise got into Buhl's SUV and went to the Mini Mart. RP1 81.

Kerwin, Wright and Wise donned bandanas and went into the Mini Mart after Wise broke the door with a crowbar. RP1 80-81, 84. They ran back to the Jeep and loaded it with cigarettes, lottery tickets, beer, and change. RP1 82-83. Everyone went back to Childs's house and shared the booty. RP1 85-88.

The Mini Mart break-in was discovered early the following morning. RP1 9-12, 16-17, 41-43, 46. Missing from the Mart were cigarettes, beer, lottery tickets, cash registers and other items. RP1 17-21.

A Mini Mart clerk reported the stolen tickets to the state lottery authorities. RP1 19-20, 150-52. Shortly before 1 p.m. that day, police arrested Reading at a Shelton Safeway store after he attempted to cash in

some of the stolen lottery tickets. RP1 37-39, 70-71, 87-89, 113-15, 134-35, 143, 151-52.

About an hour later, a Chehalis police officer responded to a call from a convenience store about a customer attempting to cash in stolen lottery tickets. RP1 61-62, 146, 153-163. As the officer arrived in the parking lot, he saw a black Cherokee SUV backed into a parking spot. RP1 62. Wise sat in the driver's seat of the Jeep, one man sat in the back seat and one stood outside next to the driver's side door. RP1 62-66.

The officer asked who tried to cash in the lottery tickets and both Wise and the passenger said they knew nothing about such an attempt. RP1 64. Buhl stepped out of the store and said she was the culprit. RP1 64-65. The tickets were stolen from the burglarized Mini Mart. RP1 144. Buhl also claimed ownership of the SUV. RP1 66. The officer arrested Buhl. RP1 65-67. Wise was later arrested in Lewis County. RP1 145.

3. In-chambers voir dire

Toward the beginning of jury selection, the trial court announced, "[I]f there is anything that we're talking about or asking you that is sensitive and you don't want to speak about it in this group setting[,] [j]ust let us know. . . . [W]e take those jurors back into chambers so that we can ask those questions more privately." RP3 11-12. The court and parties

questioned 10 panel members in chambers, with only one potential juror in chambers at a time. RP3 21-37, 70-72.

D. ARGUMENT

1. THE TRIAL COURT VIOLATED WISE'S CONSTITUTIONAL RIGHTS TO A PUBLIC TRIAL.

The trial court questioned 10 venire persons in chambers outside the presence of the rest of the venire and the public. The trial court violated Wise's constitutional rights to a public trial by prohibiting the public from observing this examination. The violation of these rights constitutes structural error and reversal and remand for a new trial are required.

Under both the Washington and United States constitutions, a defendant has a constitutional right to a speedy and public trial. Const. art. I, § 22; U.S. Const. amend. VI; *State v. Easterling*, 157 Wn.2d 167, 174, 137 P.3d 825 (2006). Additionally, article I, section 10 expressly guarantees to the public and press the right open court proceedings. *Easterling*, 157 Wn.2d at 174. The First Amendment implicitly protects the same right. *Waller v. Georgia*, 467 U.S. 39, 46, 104 S. Ct. 2210, 81 L. Ed. 2d 31 (1984). Prejudice is presumed where there is violation of the right to a public trial. *In re Personal Restraint of Orange*, 152 Wn.2d

795, 814, 100 P.3d 291 (2004). The remedy is reversal of the convictions and remand for a new trial. *Orange*, 152 Wn.2d at 814.

The right to a public trial encompasses jury voir. *Press-Enterprise Co. v. Superior Court*, 464 U.S. 501, 508, 104 S. Ct. 819, 78 L. Ed. 2d 629 (1984); *State v. Brightman*, 155 Wn.2d 506, 515, 122 P.3d 150 (2005). Even where, as in Wise's case, only part of jury selection is improperly closed to the public, such closure can violate a defendant's constitutional right to a public trial. *See State v. Frawley*, 140 Wn. App. 713, 719-21, 167 P.3d 593 (2007) (trial court's private portion of jury selection, which addressed each venire person's answers to a jury questionnaire, violated right to public trial).

The right to a public trial is not absolute. *State v. Bone-Club*, 128 Wn. 2d 254, 259, 906 P.2d 325 (1995). A trial court may restrict the right only "under the most unusual circumstances." *Bone-Club*, 128 Wn.2d at 259. Before a trial judge can close any part of a trial from the public, it must first apply on the record the five factors set forth in *Bone-Club*. *Orange*, 152 Wn.2d at 806-07, 809.

The *Bone-Club* requirements are:

1. The proponent of closure . . . must make some showing [of a compelling interest], and where that need is based on a right other than an accused's right to a fair trial, the proponent must show a "serious and imminent threat"

to that right. 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.

Bone-Club, 128 Wn.2d at 258-59 (quoting *Allied Daily Newspapers of Wash. v. Eikenberry*, 121 Wn.2d 205, 210-11, 848 P.2d 1258 (1993)).

In *Brightman*, the trial court told counsel it was barring all spectators from observing jury selection because of safety concerns. *Brightman*, 155 Wn.2d at 511. The court, however, failed to analyze the five *Bone-Club* factors. The *Brightman* court held because the record indicated the trial court did not consider Brightman's public trial right as required by *Bone-Club*, it was unable to determine whether the closure was proper. *Brightman*, 155 Wn.2d at 518. The court remanded for a new trial. *Brightman*, 155 Wn.2d at 518; see also *Frawley*, 140 Wn. App. at 721 (declining state's invitation to apply *Bone-Club* factors for first time on appeal because review is of trial court's consideration of factors as found in record and because trial court record was inadequate to apply factors).

The state argued Brightman failed to prove the trial court in fact closed the courtroom during jury selection and if it was closed, the closure

was de minimis. *Brightman*, 155 Wn.2d at 515-17. The court rejected both arguments. The court first ruled when the plain language of a trial judge's ruling calls for closure, the state bears the heavy burden to overcome the strong presumption the courtroom was closed. *Brightman*, 155 Wn.2d at 516. Second, the court held where jury selection or a part of the selection is closed, the closure is not de minimis or trivial. *Brightman*, 155 Wn.2d at 517.

The trial court's conduct found to be improper in *Storer Broadcasting Co. v. Circuit Court*³ is remarkably similar to that of Wise's trial judge. The trial court allowed private questioning, limited to three subjects, of those prospective jurors who requested such examination in open court. *Storer*, 131 Wis.2d at 345-46. The court held no formal hearing and entered no factual findings. *Storer*, 131 Wis.2d at 346. As in Washington, the Wisconsin Supreme Court required trial courts to follow a particular procedure before closing jury voir dire, which included the court to recite on the record the factors compelling closure and why those factors override the presumptive value of a public trial. *Storer*, 131 Wis.2d at 348.

³ 131 Wis.2d 342, 388 N.W. 633 (Wis. App. Ct. 1986).

Storer held the trial court abused its discretion by failing to follow the Supreme Court's procedure. *Storer*, 131 Wis.2d at 349-350. The court found the trial court based its closure decision on its unsupported belief the defendant could not receive a fair trial without partially private voir dire. *Storer*, 131 Wis.2d at 350. The appellate court held instead of the private examination of certain jurors, the trial court could simply have moved the rest of the venire panel out of the courtroom and questioned individual in open court. *Storer*, 131 Wis.2d at 350. Using that easy method, the reviewing court held, the risk of contaminating the entire panel would have been avoided without trampling on the public's right to know what was happening during trial. *Storer*, 131 Wis.2d at 350.

This same alternative to private jury voir was available to Wise's trial judge. Rather than questioning the potential jurors in chambers, the trial court could have removed the rest of the panel and conducted individual questioning in open court. By not considering this alternative, or applying the *Bone-Club* factors before barring the public from viewing voir dire, the trial judge violated Wise's right to a public trial. *Orange*, 152 Wn.2d at 812.

The state may argue this Court should reject Wise’s public trial claim under *State v. Momah*.⁴ Momah contended the trial court violated his constitutional rights to a public trial by conducting a portion of voir dire in chambers. *Momah*, 171 P.3d at 1067. He also maintained the state bore the burden of proving (1) there was no closure and (2) the trial court balanced the *Bone-Club* factors before engaging in the challenged voir dire. *Momah*, 171 P.3d at 1067.

Division One disagreed with each assertion. The court first held the record failed to indicate the trial court closed part of voir dire for the purpose of precluding public access. *Momah*, 171 P.3d at 1067. The record also did not demonstrate any members of the public were excluded from the individual voir dire. *Momah*, 171 P.3d at 1067. The court refused to “speculate on whether the trial court would have ordered closure” had any citizen requested entry into chambers or the jury room. *Momah*, 171 P.3d at 1067-68.

The court distinguished the pertinent Supreme Court authority, finding the common thread tying those cases together was an order from the trial court that the courtroom be closed to the public. *Momah*, 171 P.3d at 1068 (discussing *Bone-Club*, 128 Wn.2d at 256, 261; *Orange*, 152

⁴ State v. Momah, __ Wn. App. __, __, 171 P.3d 1064 (2007).

Wn.2d at 802; *Brightman*, 155 Wn.2d at 511, 516). The court rejected Momah's contention a proceeding is per se closed to the public if it takes place in chambers. *Momah*, 171 P.3d at 1069. The court held, "Of course, a 'door' to a courtroom being closed, which occurs in most court proceedings, is not the same as a 'proceeding' in that courtroom being closed to the public." *Momah*, 171 P.3d at 1069.

Wise urges this Court to reject *Momah's* reasoning. *Momah* relied on the absence of an express trial court order banning the public from certain proceedings to distinguish its facts from those in *Brightman*, *Orange*, and *Bone-Club*. This is a distinction without a difference. The core holding of the Supreme Court's well established authority is a trial court may not conduct trial proceedings outside the public eye.

No Washington court until *Momah* has conditioned a defendant's right to a public trial on the existence of an express closure order. The proper inquiry is whether the trial court used a procedure that effectively barred public observation, not whether the court expressly ordered the procedure.

Momah's strict construction of the language of the trial court's declaration of closure prohibits reviewing courts from making presumptions or drawing inferences from that language. Such slavish

adherence to a trial court's words is contrary to *Orange*, where the court held the nature of the closure is defined by "the presumptive effect of the plain language of the ruling itself[.]" *Orange*, 152 Wn.2d at 808. See *State v. Duckett*, ___ Wn. App. ___, ___, 173 P.3d 948, 953 n.2 (2007) ("To the extent that the State's argument is that the court did not enter a closure order, we look to the record to determine the presumptive effect of the court's directive. The trial judge stated she intended to interview the selected jurors in a jury room. The State bears the burden on appeal to show that, despite the court's ruling, a closure did not occur.").

The *Momah* court refused to consider the presumptive effect of the trial court's use of its chambers to question individual venire members. The court disregarded the nature of a court's chambers and the reasons for convening a portion of voir dire in chambers. See *Houston Chronicle Pub. Co. v. Shaver*, 630 S.W.2d 927, 932 (Tex. Crim. App. 1982) (conducting part of hearing in chambers "is the functional equivalent of closing the court to spectators and news reporters."); *B.H. v. Ryder*, 856 F.Supp. 1285, 1290 (N.D.Ill. 1994) ("The privacy of the judge's chambers historically has provided an atmosphere conducive to candor and conciliation. No one who knows anything about litigation is unfamiliar

with this phenomenon.”). In other words, proceedings occur in chambers to facilitate privacy.

The *Momah* court ignored the practical reality of in-chambers proceedings. The decision in *Momah* is illogical and contravenes the Supreme Court’s intent to foster open proceedings. Where a trial court, as here, obviously moves to chambers to shield prospective jurors from public scrutiny, the burden should be on the state to show the proceedings were open. *Duckett*, 173 P.3d at 953 n.2. The *Momah* court erred by shifting the burden to the defendant because “the trial court simply never ordered the proceeding be closed to any spectators or family members.” *Momah*, 171 P.3d at 1068.

For these reasons, Wise requests this Court to reject *Momah*. In the alternative, or in addition to, the above argument, this Court should not apply *Momah* to Wise’s case because it is factually distinguishable. The purpose of in-chambers voir dire in *Momah* was to insulate the entire venire from potential contamination caused by answers from individuals with knowledge of the case. *Momah*, 171 P.3d at 1066, 1069. The trial court was not motivated by the desire to protect panelists from public embarrassment.

In contrast, the court convened in-chambers questioning in Wise's case to protect concerned panelists from the scrutiny of the remaining members of the venire as well as anyone else seated in the courtroom. Otherwise there would have been no reason to retreat to chambers and question each prospective juror individually. This distinction takes Wise's case out of *Momah's* scope. Rather, this court should follow *Duckett* and *Frawley* and hold the trial court violated Wise's constitutional right to a public trial.

The State may also argue because there is no showing Wise's counsel objected to the closed jury voir dire, the issue is waived. That argument fails. *Orange*, 152 Wn.2d at 801-02; *Brightman*, 155 Wn.2d at 517. Moreover, the waiver of a constitutional right must be knowing and voluntary. *Frawley*, 140 Wn. App. at 720.

The state may also attempt to distinguish Wise's case from *Brightman* because only a portion of jury voir dire was private. Such an argument is also unavailing. The *Brightman* court ruled where jury selection or a part of the jury selection is closed, the closure is not de minimis or trivial. *Brightman*, 155 Wn.2d at 517. The *Frawley* court also found the defendant's right to a public trial violated where the trial court

questioned individual venire members privately only as to their answers to a questionnaire. *Frawley*, 140 Wn. App. at 719-21.

The state may also contend Wise's case is distinguishable because in *Brightman* and *Orange* the trial courts closed the courtrooms rather than conducting partial voir dire in chambers. But the constitutional public trial right is the right to have a trial open to the public. *Orange*, 152 Wn.2d at 804-05. This right is for the benefit of the accused because it guarantees the electorate may observe he is dealt with fairly and emphasizes to the court, prosecutors and jurors the importance of their responsibilities. *Bone-Club*, 128 Wn.2d at 259.

Whether jury voir dire is conducted in a closed courtroom, a jury room, or a judge's chambers is a distinction without a difference. The point of the constitutional rights to a public and open trial is to guarantee access to the public, which the trial court failed to do when it conducted questioning of Wise's potential triers in chambers.

Wise's convictions should be reversed and the cause remanded for a new trial. *Easterling*, 157 Wn.2d at 182.

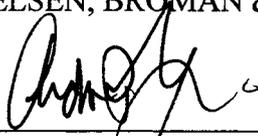
D. CONCLUSION

The trial court violated Wise's constitutional rights to a public trial by conducting portions of voir dire in chambers. This Court should reverse Wise's convictions and remand for a new trial.

DATED this 29 day of January, 2008.

Respectfully submitted,

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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 29TH DAY OF JANUARY 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 29TH DAY OF JANUARY 2008.

x Patrick Mayovsky