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COURT OF APPEALS
DIVISION II
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STATE OF WASHINGTON
BY
DEPUTY

NO. 37551-6-II

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

STATE OF WASHINGTON,

Respondent,

v.

SHANNON LEE ABBEY,

Appellant.

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

The Honorable James J. Stonier, Judge

APPELLANT'S BRIEF

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A. ASSIGNMENTS OF ERROR

1. During voir dire, the trial court erred by removing a juror to a non-public hallway for questioning without using the *Bone-Club* factors to assess the necessity of closing the trial.

2. It was error for the court to deny public access to Appellant Abbey's trial during voir dire.

3. The trial court erred when it excluded Abbey from the hallway discussion with the juror. It deprived Abbey of his right to attend his own trial.

B. ISSUE PERTAINING TO ASSIGNMENTS OF ERROR

The state and federal constitutions guarantee a criminal defendant a public trial. That right is qualified. A court can close a criminal trial if it finds that closure is absolutely necessary and there are no less restrictive alternatives available. In Abbey's case, the court closed the trial during voir dire but did not find, or even assess, a need to do so. Was Abbey and the public deprived of their right to a public trial?

C. STATEMENT OF THE CASE[1]

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[1] 1RP – volume I, pages 1-110
2RP – volume II, pages 111-289
3RP – volume III, pages 290-449

1. The charge. After getting out of the shower, Irina Fedotova noticed a person looking in her bathroom window. 3RP 307-10. Startled, she rushed into her living room and called 9-1-1. 3RP 312. She threw on a towel and stepped out of her apartment. 3RP 312, 320. She stayed on the phone with 9-1-1 until the police arrived. 3RP 320-21. Appellant Shannon Lee Abbey, who was walking by, generally fit the description of the person Fedotova saw in her window. 3RP 341-43. During a one person show up, Fedotova identified Abbey as the man in her window. 3RP 354-55. The police arrested Abbey. 3RP 355. The Cowlitz County Prosecuting Attorney charged Abbey with a single court of voyeurism.[2] CP 5-6.

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[2] RCW 9A.44.115

(1) As used in this section:

(a) "Intimate areas" means any portion of a person's body or undergarments that is covered by clothing and intended to be protected from public view;

(b) "Photographs" or "films" means the making of a photograph, motion picture film, videotape, digital image, or any other recording or transmission of the image of a person;

(c) "Place where he or she would have a reasonable expectation of privacy" means:

(i) A place where a reasonable person would believe that he or she could disrobe in privacy, without being concerned that his or her undressing was being photographed or filmed by another; or

(ii) A place where one may reasonably expect to be safe from casual or hostile intrusion or surveillance;

(d) "Surveillance" means secret observation of the activities of another person for the purpose of spying upon and invading the privacy of the person;

(e) "Views" means the intentional looking upon of another person for more than a brief period of time, in other than a casual or cursory manner, with the unaided eye or with a device designed or intended to improve visual acuity.

(2) A person commits the crime of voyeurism if, for the purpose of arousing or

2. Pre-trial motions. The court heard several pre-trial motions and hearings: Abbey's motion to suppress his out-of-court identification by Fedotova, 1RP 31-86; a lengthy CrR 3.5 hearing, 1RP 88-108, 2RP 246-289, 3RP 290-303; and, under ER 404(b), the State's motion to admit instances of Abbey's prior conduct to prove that Abbey looked in Fedotova's window with the intent to satisfy his sexual need, 1RP 12-18. The court declined to suppress the identification evidence. 1RP 86. It found that some of Abbey's statement were admissible and that none had been coerced. 1RP 107-08, 2RP 287-89, 3RP 300-302. And it found that some of Abbey's prior acts were admissible to prove he acted with a sexual intent. 1RP 18.

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gratifying the sexual desire of any person, he or she knowingly views, photographs, or films:

(a) Another person without that person's knowledge and consent while the person being viewed, photographed, or filmed is in a place where he or she would have a reasonable expectation of privacy; or

(b) The intimate areas of another person without that person's knowledge and consent and under circumstances where the person has a reasonable expectation of privacy, whether in a public or private place.

(3) Voyeurism is a class C felony.

(4) This section does not apply to viewing, photographing, or filming by personnel of the department of corrections or of a local jail or correctional facility for security purposes or during investigation of alleged misconduct by a person in the custody of the department of corrections or the local jail or correctional facility.

(5) If a person is convicted of a violation of this section, the court may order the destruction of any photograph, motion picture film, digital image, videotape, or any other recording of an image that was made by the person in violation of this section.

3. Courtroom closure during voir dire. During voir dire, the court called a prospective juror into a non-public hallway immediately outside the courtroom and asked the juror questions. 2RP 113-116. Only the prosecutor and defense counsel attended this private discussion. 2RP 113-116. Before taking the juror and the voir dire out of the courtroom, the court did not weigh the *Bone-Club* factors, seek permission from the public, or discuss a waiver of the public trial right with Abbey. 2RP 113.

4. Trial facts. Shortly before midnight on July 13, 2007, Shannon Lee Abbey left his home and walked to a nearby store to buy cigarettes. 3RP 383-384. After leaving the store, he decided to walk to an apartment where his friend Cody lived to see if Cody was around. 3RP 384-385. Abbey had to urinate so he went to a dark corner behind Cody's apartment building. 3RP 385. After urinating, he noticed that the lights were off in Cody's apartment so he kept walking. 3RP 388. As Abbey walked away, Longview Police Officer Shawn Close called him over. 3RP 342, 388-89.

Officer Close was at the apartment building in response to a 9-1-1 call. 3RP 340. Irina Fedotova had called 9-1-1 after seeing a man at her bathroom window. 3RP 309-12. She described him to

the 9-1-1 dispatcher as possibly white and wearing a black hat. 3RP 330. Officer Close heard the dispatch, was nearby, and reached the apartment building within a couple of minutes. 3RP 346.

Two other police officers, Timothy Deisher and Angela Avery, arrived shortly thereafter and went to talk to Fedotova. 3RP 350, 361-362. After getting information from Fedotova, they took her outside to see if she could identify Abbey as the man who looked in her window. 3RP 354. Fedotova identified Abbey as the man who looked in her window. 3RP 355. She said that she was sure Abbey was the man. 3RP 323.

It was the State's theory that Abbey had looked into Fedotova's window as part of gratifying his sexual need. 1RP 12-18. To prove Abbey's intent as required by the voyeurism statute, the State presented evidence from Longview Police Officers Robert Huhta and Jason Winker. 3RP 380-381. In 2002, both officers responded to a complaint of a person looking in an apartment window. 3RP 380-381. Both officers contacted Abbey and interviewed him about the complaint. 3RP 380-381. Abbey admitted that he looked in an apartment window to see a naked

woman, had fanaticized about having sex with the woman, and masturbated nearby. 3RP 380-381.

5. Verdict and exceptional minimum sentence upward. A jury found Abbey guilty as charged. CP 27.

Abbey agreed that he had three prior unscored attempted voyeurism misdemeanor convictions. 3RP 439. Prior to charging Abbey, the State filed written notice of its intent to seek an exceptional sentence and to rely on the misdemeanor convictions to support its argument that Abbey's unscored misdemeanor criminal history made his presumptive sentence clearly too lenient in light of the purposes of the SRA.[3] CP 1-2. The court imposed a 60 month minimum and maximum sentence on a 57-60 month presumptive standard range.[4] CP 40. The 60 month minimum was an exceptional sentence upward. The 60-month maximum was the statutory maximum for the offense. CP 40; RCW 9.44.115(3). The court relied exclusively on the unscored misdemeanor history to find that Abbey's 57 month minimum sentence was clearly too lenient. CP 47.

Abbey appeals. CP 51.

D. ARGUMENT

[3] Sentencing Reform Act. See 9.94A.010.
[4] Abbey was sentenced under RCW 9.94A.712.

1. THE CLOSURE OF ABBEY'S TRIAL DURING VOIR DIRE VIOLATED ABBEY'S FEDERAL AND STATE RIGHT TO A PUBLIC TRIAL.

As a criminal defendant, Abbey is guaranteed an open, public trial. While trial courts are given some discretion to close all or a portion of a trial, the court cannot do so without first weighing certain factors often referred to as the *Bone-Club* factors. Without weighing the *Bone-Club* factors, the trial court closed Abbey's trial by interviewing a prospective juror in a non-public hallway with only counsel present and without a waiver of any right from Abbey. The closure of Abbey's trial during voir dire denied Abbey his constitutional right to an open, public trial.

(a) Abbey and the public are entitled to an public trial that includes voir dire.

The Sixth Amendment of the United States Constitution and Article I, section 22 of the Washington Constitution each guarantee a criminal defendant the right to a public trial. State v. Brightman, 155 Wn.2d 506, 514, 122 P.3d 150 (2005). Additionally, article I, section 10 of the Washington Constitution states, "Justice in all cases shall be administered openly, " which provides the public itself a right to open, accessible proceedings. Seattle Times Co. v. Ishikawa, 97 Wn.2d 30, 36, 640 P.2d 76 (1982). Article I, section

10's guarantees of public access to proceedings and article I, section 22's public trial right together perform complementary, interdependent functions that assure the fairness of our judicial system. State v. Bone-Club, 128 Wn.2d 254, 259, 906 P.2d 325 (1995).

The right to a public trial extends to jury selection. In re Pers. Restraint of Orange, 152 Wn.2d 795, 804-05,100 P.3d 291 (2004); State v. Bone-Club, 128 Wn.2d at 259. The public's access to jury selection is important, not only to the parties but also to the criminal justice system itself. Orange, 152 Wn.2d at 804. For example, a closed jury selection process prevents a defendant's family from contributing their knowledge or insight during jury selection. Brightman, 155 Wn.2d at 515. Closure also prevents other interested members of the public, including the press, from viewing the proceedings. State v. Erickson, 146 Wn. App. 200, 206, 189 P.3d 245 (2008).

(b) The trial court erred when it closed trial during voir dire.

Conducting voir dire in an area closed to the public is closure of the trial. Erickson, 146 Wn. App. at 209. Although trial closure could be appropriate in some circumstances, protection of the right

to a public trial requires a trial court to resist a closure except under the "most unusual circumstances." Bone-Club, 128 Wn. 2d at 259. A trial court may close a courtroom only after considering the five requirements enumerated in *Bone-Club*[5] and entering specific findings on the record to justify the closure. Id. at 258-59. A trial court's failure to undertake the *Bone-Club* analysis, which directs the trial court to allow anyone present the opportunity to object to the closure, undercuts the guarantees enshrined in both article I, section 10, as well as article I, section 22. Bone-Club, 128 Wn.2d at 258-59. Where, as here, a defendant claims a violation of the right to a public trial, the court's review is de novo. Brightman, 155 Wn.2d at 514.

In Abbey's case, the trial court closed the courtroom during voir dire when it required a prospective juror to answer questions in

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[5] 1. The proponent of closure or sealing 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.

a closed-to-the-public hallway outside of the courtroom with only the prosecutor and the defense attorney present. When the court administered the juror oath to the full jury venire at the start of voir dire, Judge Stonier noticed that one of the jurors, Mr. Munn, did not, in response to the oath, raise his hand or promise to tell the truth. 2RP 113. Without any consideration given to the *Bone-Club* factors, Judge Stonier hastily told Mr. Munn and the two trial counsel to step out in the hallway with him. 2RP 113. Once in the hallway, Judge Stonier and Mr. Munn engaged in a lengthy and seemingly heated discussion about various topics including religious-based objections to jury duty, jury duty as a civic responsibility, the constitutional mandate of jury duty, and the inconvenience of jury duty. The discussion ended with Mr. Munn backing down and agreeing to take the juror oath. 2RP 116. Mr. Munn returned to the courtroom while the judge and counsel stayed in the hallway. At that point, the prosecutor objected to any further hallway juror questioning. 2RP 117. Judge Stonier agreed that no additional voir dire would be conducted in the hallway. 2RP 117.[6]

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[6] Later, in fact, the court conducted individual voir dire of jurors in the courtroom. All of the other jurors were asked to step out of the courtroom. Jurors were called in one-by-one for questioning. Abbey and the public were allowed to remain in the courtroom. During the individual voir dire, trial counsel questioned jurors

(c) Because of the court's error in closing his trial, Abbey is entitled to a new trial.

Although Abbey did not object to the non-public hallway voir dire of juror Munn, Abbey's failure to object is not fatal. A defendant's right to a public trial is an issue of constitutional magnitude that may be raised for the first time on appeal. *Orange*, 152 Wn.2d at 800; *Bone-Club* 128 Wn.2d at 257; RAP 2.5(a).

Relocation of even a portion of voir dire to some place other than the courtroom violated Abbey's right to a public trial. Both Divisions Two and Three of this Court have found a violation of the right to a public trial under similar facts. State v. Frawley, 140 Wn. App. 713, 167 P.3d 593 (2007) (Division Three, public trial right violated when court conducted individual voir dire in chambers); State v. Duckett, 141 Wn. App. 797, 173 P.3d 948 (2007) (Division Three, public trial right violated when court conducted individual voir dire in jury room); State v. Erickson, 146 Wn. App. 200 (Division Two, private voir dire questioning of jurors in jury room violated right to public trial). In each of these cases, as in Abbey's case, although counsel was present during the voir dire, defendant was not. Erickson, 146 Wn. App. at 204; Duckett, 141 Wn. App at

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about topics of a sensitive nature to include issues of prior sexual abuse of themselves or family members. 2RP 136-178.

801; Frawley, 140 Wn. App. at 713. As in Abbey's case, none of the trial courts considered and weighed the *Bone-Club* factors before closing the courtroom.[7]

The impact on the trial of individual questioning of prospective jurors outside the courtroom is not inadvertent or trivial. Erickson, 146 Wn. App. at 209. Closing the courtroom without assessing the need to do so and considering alternatives to closure is "one of the limited classes of fundamental rights not subject to harmless error analysis." State v. Easterling, 157 Wn.2d 167, 181, 137 P.3d 825 (2006); *see also* State v. Marsh, 126 Wash. 142, 147, 217 P. 705 (1923) (holding that when a defendant is denied a public trial, "the law conclusively presumes that he has suffered an actual injury") (quoting People v. Yeager, 113 Mich. 228, 230, 71 M.W. 491 (1998))); Waller v. Georgia, 467 U.S. 39, 104 S. Ct. 2210, 81 L. Ed. 2d 31 (1984) (recognizing denial of public trial right as structural error). In cases of trial closure without Bone-Club analysis and a defendant's presence or knowing waiver of that

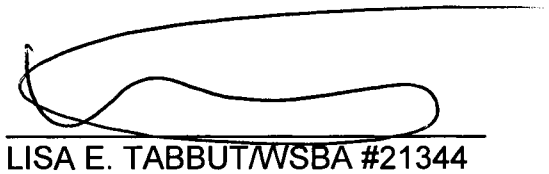
[7] Abbey acknowledges that a contrary result was reached by Division One in State v. Momah, 141 Wn. App. 705, 171 P.3d 1064 (2007) (individual questioning of prospective jurors in chambers and the jury room does not constitute a trial closure.) Abbey is also aware that the state Supreme Court accepted review and heard oral argument on *Momah* on June 10, 2008, and that the Supreme Court accepted and stayed review on *Frawley* and *Duckett* pending its decision in *Momah*.

presence, the presumptive remedy is a new trial. *Orange,* 152 Wn.2d at 814. Abbey is entitled to a new trial.

E. CONCLUSION

The trial court closed Shannon Abbey's trial during voir dire without assessing the need to do so under the *Bone-Club* factors. Moreover, the court did not ask for or obtain a waiver of the right to a public trial from either Abbey or the public. The required remedy is reversal and a retrial.

Respectfully submitted this 31st day of October 2008.



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

STATE OF WASHINGTON, Respondent, vs. SHANNON LEE ABBEY, Appellant.	Court of Appeals No. 37551-6-II CERTIFICATE OF MAILING

I, Lisa E. Tabbut, certify and declare:

That on the 31st day of October 2008, I deposited into the mails of the United States Postal Service, a properly stamped and addressed envelope, containing the Brief of Appellant and Certificate of Mailing (prosecutor only) addressed to the following parties:

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I certify under penalty of perjury pursuant to the laws of the State of Washington that the foregoing is true and correct.

Dated this 31st day of October 2008, in Longview, Washington.

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