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A. ASSIGNMENT OF ERROR

1. Mr. Bristol's right to a public trial was violated.

B. ISSUE PERTAINING TO ASSIGNMENT OF ERROR

Was Mr. Bristol's right to a public trial violated where Mr. Bristol's wife was barred from the courtroom during the testimony of the alleged victim? (Assignment of Error No. 1)

C. STATEMENT OF THE CASE

Factual and Procedural Background

On March 10, 2008, Mr. David Bristol was charged with one count of incest in violation of RCW 9A.64.020. CP 1-5. The aggravating factor of the crime having been an act of domestic violence in violation of RCW 10.99.020 was also alleged. CP 1-5.

Pretrial, the court ruled that Ms. Annicka Bristol, Mr. Bristol's wife and M.B.'s mother, would not be allowed to be present in the courtroom during M.B.'s testimony on the grounds that Ms. Bristol was charged in a separate case with witness tampering based on the events giving rise to the charges against Mr. Bristol. RP 46-48. Ms. Bristol had not been identified as a witness nor was either side intending to call her as a witness. RP 46-48.

Mr. Bristol's trial began on June 25, 2008. RP 53.

M.B. testified that one day in August of 2007, Mr. Bristol had visited M.B. at her job and she had complained to him that she was tired

and exhausted. RP 57. M.B. testified that when Mr. Bristol picked M.B. up from work that he told her he had gotten some massage lotion and was going to give her a massage. RP 58. This was not an unusual occurrence. RP 58, 62, 85. It was common for both Mr. Bristol and Ms. Bristol to give M.B. and her brothers and sisters massages. RP 58. Mr. Bristol had given M.B. many massages after she had gone through puberty where he and she had been alone and there had never been any inappropriate touching. RP 86.

M.B. testified that when she got home Mr. Bristol told her to take a bath and relax. RP 59. M.B. took a bath in her parent's bathroom, which was also not unusual. RP 59, 85. When M.B. finished with her bath, she shorts and a sports bra and went into her parent's bedroom. RP 60. M.B. testified that Mr. Bristol had candles burning and country music playing and had set up for the massage. RP 60-61. M.B. testified that she got under blankets on her parent's bed and Mr. Bristol massaged her. RP 61-62. M.B. testified that, after about ten minutes of massage, she fell asleep. RP 62. M.B. testified that she woke up and felt Mr. Bristol touching her vaginal area softly. RP 63. M.B. testified that she lay there for a minute and Mr. Bristol began to put a finger in her vagina. RP 63. M.B. testified that when Mr. Bristol's finger was inside her vagina "about to the first knuckle" she told him to stop, jumped up, and ran to her room. RP 63.

R.B. testified that she asked Mr. Bristol take her to her boyfriend's house and that she made a deal with Mr. Bristol that, if he took her to her boyfriend's house, she wouldn't tell anybody what had happened. RP 65-66. Mr. Bristol did take M.B. to her boyfriend's house.

Mr. Bristol testified that during the summer of 2007, his relationship with M.B. was deteriorating and the more time she spent with her boyfriend the less she wanted to be at home. RP 192. Mr. Bristol testified that both he and Ms. Bristol attempted to talk to M.B. about the situation but that M.B. would become angry or frustrated. RP 187.

Mr. Bristol testified that he popped M.B.'s back, and massaged her shoulders, feet, and calves. RP 193-194. Mr. Bristol testified that the candles were in the bathroom around the tub and not in the bedroom and that the music was playing on the computer in the bedroom because the computer automatically plays music when it is turned on. RP 195-196. Mr. Bristol denied purchasing or using any massage oils or lotions. RP 196.

Mr. Bristol testified that during the massage he and M.B. began discussing M.B. and her boyfriend and that the discussion turned into an argument. RP 198-199. Mr. Bristol told M.B. that she was not going to spend the night at her boyfriend's house, that her boyfriend was not going to spend the night at M.B.'s house, and that Mr. and Ms. Bristol were

going to impose a curfew on M.B. RP 234. M.B. responded by threatening to allege that Mr. Bristol had molested her if he did not let her go to her boyfriend's house. RP 230-234.

Mr. Bristol testified that he did not massage M.B. above the knee and denied touching M.B.'s vagina, even accidentally. RP 215, 230. Mr. Bristol testified that he believed M.B. had made the allegations up. RP 230.

The jury found Mr. Bristol guilty of one count of incest and found the aggravating factor of domestic violence. RP 281, CP 92-93.

Mr. Bristol was sentenced to twelve months and one day confinement and 36-48 months community custody. CP 95-104.

Notice of Appeal was timely filed on August 8, 2008.

D. ARGUMENT

Mr. Bristol was denied his right to a public trial when the trial court excluded his wife, a non-witness who was not disruptive or a security threat, from being present during M.B.'s testimony.

The right to a public trial is guaranteed to an accused by both federal and state constitutional provisions.

The right to a public trial in criminal prosecutions is secured by the Sixth Amendment to the United States Constitution which provides in

pertinent part: “In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial”

The constitutional right of the accused to have a public trial is also guaranteed by article 1, section 22 of the Washington State Constitution which provides in part: “In criminal prosecutions the accused shall have the right ... to have a speedy public trial.”

Additionally, under article 1, section 10 of the Washington Constitution, the public is guaranteed access to court proceedings: “Justice in all cases shall be administered openly...” Article 1, section 10; *State v. Bone-Club*, 128 Wn2d. 254, 259, 906 P.2d 325 (1995).

The section 10 guaranty of public access to proceedings and the section 22 public trial right serve complementary and interdependent functions in assuring the fairness of our judicial system. In particular, the public trial right operates as an essential cog in the constitutional design of fair trial safeguards. We echo the sentiments of the United States Supreme Court:

The requirement of a public trial is for the benefit of the accused; that the public may see he is fairly dealt with and not unjustly condemned, and that the presence of interested spectators may keep his triers keenly alive to a sense of their responsibility and to the importance of their functions....

Although the public trial right may not be absolute, ***protection of this basic constitutional right clearly calls for a trial court to resist a closure motion except under the most unusual circumstances.***

Bone-Club, 128 Wn.2d at 259, 906 P.2d 325 (emphasis added), citing *In re Oliver*, 333 U.S. 257, 270 n. 25, 68 S.Ct. 499, 506 n. 25, 92 L.Ed. 682 (1948).

“[T]o protect a defendant’s article I, section 22 constitutional right to a public trial, a trial court faced with a closure request must apply the ‘strict, well-defined standard’ previously prescribed to protect the public’s article I, section 10 right to open proceedings.” *In re Orange*, 152 Wn.2d 795, 805, 100 P.3d 291 (2004), citing *Bone-Club*, 128 Wn.2d at 258, 906 P.2d 325.

In *Bone-Club*, the Washington Supreme Court adopted a five part analysis which must be applied when a trial court is considering a motion to close a courtroom to the public:

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 258-259, 906 P.2d 325.

A criminal defendant's Sixth Amendment right to a public trial “may give way in certain cases to other rights or interests.” *Waller v. Georgia*, 467 U.S. 39, 45, 104 S.Ct. 2210, 2215, 81 L. Ed. 2d 31 (1984).

A court may close a criminal trial over the defendant's objection if the following requirements are met:

[1] the party seeking to close the [trial] must advance an overriding interest that is likely to be prejudiced, [2] the closure must be no broader than necessary to protect that interest, [3] the trial court must consider reasonable alternatives to closing the proceeding, and [4] it must make findings adequate to support the closure.

Waller, 467 U.S. at 48, 104 S.Ct. at 2216, 81 L. Ed. 2d 31, *cited in Vidal v. Williams*, 31 F.3d 67, 69 (2d Cir. 1993).

“Prejudice is presumed where a violation of the public trial right occurs.” *Orange*, 152 Wn.2d at 813, 100 P.3d 291.

The importance of a defendant having his friends and relatives present was underscored in *In re Oliver*, 333 U.S. 257, 68 S.Ct. 499, 92 L. Ed. 682 (1948), after reviewing the law across the United States: “without exception all courts have held that an accused is at the very least entitled to have his friends, relatives and counsel present, no matter with what offense he may be charged.” *Oliver*, 333 U.S. at 271-272, 68 S.Ct. 499,

92 L. Ed. 682. *See Vidal*, 31 F.3d at 69 (habeas corpus writ granted after court excluded defendant's parents from testimony of police officer); *State v. Ortiz*, 981 P.2d 1127 (Haw. 1999) (new trial necessary when trial was closed "to all of Ortiz's family members").

a. The trial court's exclusion of Ms. Bristol violated Mr. Bristol's right to a public trial.

As discussed above, under both the United States and the Washington Constitutions, a defendant in a criminal trial has a right to a public trial. Here, the trial court excluded Mr. Bristol's wife, Ms. Bristol. As the U.S. Supreme Court held in *Oliver*, at the very least, a defendant is entitled to the presence of his attorney and family during a criminal trial. The exclusion of Ms. Bristol violated Mr. Bristol's right to a open and public trial.

b. The trial court failed to perform the mandatory five part analysis in excluding Ms. Bristol from the courtroom.

Here, the State moved to exclude Ms. Bristol from the courtroom during the testimony of M.B. because "a child testifying about sexual abuse and facing the abuser is challenging enough, but to know also that her mother doesn't believe her and is, I guess, a hostile witness towards

her would make it even worse.” RP 47.¹ Counsel for Mr. Bristol objected and pointed out to the court that the trial was a public hearing, Ms. Bristol had a right to be there, Ms. Bristol was not going to be called as a witness, Ms. Bristol and M.B. had talked about the case many times, and Ms. Bristol was going to be in the courtroom to support her husband. RP 47-48. The trial court ruled that Ms. Bristol would be excluded from the courtroom during the testimony of M.B. because Ms. Bristol was facing the witness tampering charge, even though the jury was unaware that Ms. Bristol was facing the witness tampering charge. RP 48.²

Prior to excluding Ms. Bristol, the trial court engaged in none of the five analytical steps mandated in *Bone-Club*. The State made no showing of a compelling interest in excluding Ms. Bristol and the court made no effort to weigh the interests of the State in excluding Ms. Bristol and Mr. Bristol’s right to a public trial.

c. *The proper remedy is remand for a new trial.*

“Whether a criminal accused’s constitutional public trial right has been violated is a question of law, subject to de novo review on direct appeal. The presumptive remedy for a public trial right violation is

¹ Ms. Bristol was facing charges of witness tampering based on her convincing M.B. to withdraw her statement to the police about the alleged incest and write a new letter to the police telling them that M.B.’s initial accusations were a lie. RP 46-48, 72, 75-79.

² Ultimately, the witness tampering charge against Ms. Bristol was dismissed and Ms. Bristol addressed the court at Mr. Bristol’s sentencing hearing. RP 4-5, August 8, 2008.

reversal and remand for a new trial.” *State v. Easterling*, 157 Wn.2d 167, 173-174, 137 P.3d 825 (2006), *citing Bone-Club*, 128 Wash.2d at 256, 906 P.2d 325.

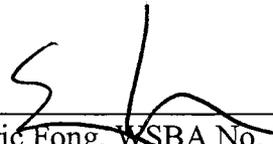
Here, the exclusion of Ms. Bristol from the trial violated Mr. Bristol’s right to a public trial. The proper remedy is vacation of his conviction and remand for a new trial.

E. CONCLUSION

For the reasons state above, this court should vacate Mr. Bristol’s conviction and remand the case for a new trial.

DATED this 19 day of November, 2008.

Respectfully submitted,


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