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COURT OF APPEALS
DIVISION II

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STATE OF WASHINGTON

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NO. 39778-1-II
COURT OF APPEALS, DIVISION II

STATE OF WASHINGTON,

Respondent,

vs.

FELIZ R. MEJIA III,

Appellant,

APPEAL FROM THE SUPERIOR COURT
FOR THURSTON COUNTY
The Honorable Richard D. Hicks, Judge
Cause No. 09-1-00547-1

BRIEF OF APPELLANT

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A. ASSIGNMENTS OF ERROR

01. The trial court erred by denying Mejia his constitutional right to an open public trial by questioning a potential juror during voir dire in chambers without engaging in a Bone-Club analysis on the record.
02. The trial court erred in permitting Mejia to be represented by counsel who provided ineffective assistance by failing to object to the court questioning a potential juror during voir dire in chambers without engaging in a Bone-Club analysis on the record.
03. The trial court erred in admitting a letter written by Mejia that was not reasonably related to his intent on the day of the incident.
04. The trial court erred in admitting a letter written by Mejia where the substantial prejudice inherent in the letter outweighed its probative value, if any.

B. ISSUES PERTAINING TO ASSIGNMENTS OF ERROR

01. Whether the trial court erred by denying Mejia his constitutional right to an open public trial by questioning a potential juror during voir dire in chambers without engaging in a Bone-Club analysis on the record?
[Assignment of Error No. 1].
02. Whether Mejia's counsel's failure to object to the court questioning a potential juror during voir dire in chambers without engaging in a Bone-Club analysis on the record constituted ineffective assistance?
[Assignment of Error No. 2].

03. Whether the trial court abused its discretion in admitting a letter written by Mejia that was not reasonably related to his intent to inflict great bodily harm on Trina on the day of the incident? [Assignments of Error Nos. 3 and 4].

C. STATEMENT OF THE CASE

01. Procedural Facts

Feliz R. Mejia (Mejia) was charged by fourth amended information filed in Thurston County Superior Court on August 17, 2009, with assault in the first degree while armed with a firearm – domestic violence, count I, unlawful possession of a firearm in the first degree, count II, making a false or misleading statement to a law enforcement officer, count III, and violation of protection order – domestic violence, count IV, contrary to RCWs 9A.36.011(1)(a), 9.94A.602, 9.94A.533(3), 10.99.020, 9.94A.535(3)(h)(i), 9.41.040(1)(a), 9A.76.175, 26.50.110(1), 26.50.010, 26.50.060 and 26.50.070. [CP 36-37].

No pre-trial motions were filed nor heard regarding either a CrR 3.5 or CrR 3.6 hearing. [CP 9]. Trial to a jury commenced on August 24, the Honorable Richard D. Hicks presiding. The parties stipulated that Mejia had a prior conviction for a serious offense that prevented him from

owning or possessing a firearm. [RP 290].¹ Neither objections nor exceptions were taken to the court's instructions at either the trial or the bifurcated aggravating factor phase. [RP 314; RP 08/27/09 35].

The jury returned verdicts of guilty as charged [CP 61-63, 69-72], in addition to finding, following a bifurcated hearing, that the State had proven beyond a reasonable doubt that Mejia's assault conviction was an aggravated domestic violence offense. [CP 76-77]. Based on this, the court imposed an exceptional sentence of 360 months, and timely notice of this appealed followed. [CP 139-140, 155-162].

02. Substantive Facts: Trial

During the evening of March 17, 2009, Trina,² Mejia's wife, told him she was moving out of their residence and wanted a divorce because of his infidelity. [RP 131, 161-62]. Mejia became enraged and grabbed her by her throat, pointed a cocked and loaded handgun at her left temple and yelled that she had ruined his life and that he didn't want to go back to jail. [RP 132-33, 136-38, 164-67]. He eventually let her go and left the premises. [RP 138-140].

The next day, Trina obtained a temporary order of protection,

¹ All references to the Report of Proceedings, unless otherwise designated, are to the transcripts entitled Jury Trial – Volumes I-III.

² Trina's first name is used for clarity.

which was served on Mejia at the residence later that afternoon by Deputy Hoover. [RP 147-48, 191]. At the time, Mejia informed the deputy that he did not have any handguns but did possess several air soft guns and swords. [RP 191-92]. While the deputy waited for Trina to come home, Mejia left the residence. [RP 193]. When Trina arrived, she gave Hoover permission to search the premises, which produced a loaded and operable handgun in a holster from under the bed mattress in the master bedroom. [RP 193-94, 256-57].

Later that day, Trina, who had gone to a hotel, hung up the phone when Mejia called her before sending her a text message telling her not to come back to the house. [RP 153].

03. Substantive Facts: Aggravating Factor Phase

Trina testified to several prior incidents, all of which involved issues of Mejia's infidelity. On July 27, 2006, Mejia had choked her while she was pregnant with his child. [RP 08/27/09 14-15]. In connection with this, a statement by Mejia was admitted wherein he apologized for unintentionally bruising Trina while pushing her during an argument. [RP 08/27/09 17-18]. The following August 30, there was another argument that ended with Mejia taking a knife away from Trina and putting it against her neck. [RP 08/27/09 20]. As a result of this struggle, Trina suffered scars and bruises. [RP 08/27/09 23]. On March

14, 2007, Mejia choked and pushed Trina, which caused injuries to her legs and neck. The choking was so severe that she passed out. [RP 08/27/09 25-26]. “My arms ended up being placed in a sling for about two weeks.” [RP 08/27/09 26]. Mejia was convicted of assault for this incident. [RP 08/27/09 28-29].

D. ARGUMENT

01. THE TRIAL COURT DENIED MEJIA HIS CONSTITUTIONAL RIGHT TO AN OPEN PUBLIC TRIAL WHEN IT QUESTIONED A POTENTIAL JUROR DURING VOIR DIRE IN CHAMBERS WITHOUT ENGAGING IN A BONE-CLUB ANALYSIS ON THE RECORD.

Following a recess during voir dire, the court, apparently sua sponte, requested potential juror 36 to appear in chambers for questioning with all parties present. [08/24/09 1].

(Juror 36 enters chambers.)

THE COURT: Please come in. Juror 36, please have a seat right here. Here’s the conundrum that we find ourselves in. It is my understanding that maybe as Mr. Kauffman (defense counsel) was leaving the courtroom during the recess that you were coming in.

JUROR 36: I’ve forgotten last names.

THE COURT: But you came in. And when you came in, it was the impression that you may have seen the defendant being placed in handcuffs.

JUROR 36: No.

THE COURT: Well, now it's even more awkward because I've explained that to you. You didn't notice that. That may have been happening but you didn't recognize it was happening.

JUROR 36: I was just heading to my seat.

THE COURT: You didn't do anything wrong. All of this was inadvertent, you understand that.

JUROR 36: Uh-huh.

THE COURT: We go to great lengths to make sure that potential jurors can't figure out or know if a defendant is in custody or out of custody because we don't want any taint that this individual's in custody so, therefore, he must have done something wrong. That's what our goal is.

JUROR 36: I see.

THE COURT: The belief is that you may have saw him being put in handcuffs as he was leaving the courtroom, even though he's nicely dressed, and that would taint you and if you told that to other jurors that would taint all of them and we'd have to start over again. Do you understand what I'm saying, however?

JUROR 36: I understand.

THE COURT: So I'm going to let either attorney ask questions of you, but because I've already told you why you were brought in here I've created a taint in any case so we're going to have to let you go, but we also want you to cooperate and -

JUROR 36: Be silent.

THE COURT: - - be silent and not contact the other jurors and try to help us keep this as clean as possible. Leave the courthouse, as least until we've got the jury picked and the trial is under way. I know you have an interest in law, you're carrying a book entitled Law, but this is what our goal is, if you help us reach that.

JUROR 36: Of course.

[RP 08/24/09 2-4].

Neither attorney posed any questions and both agreed "in handling it this way(.)" [RP 08/24/09 4].

THE COURT: So I think we're okay. We'll continue, and thank you all for coming. And as soon as we're ready, we'll start again and will probably take about four minutes or so. So please go back to the courtroom.

[RP 08/24/09 6].

Both the Sixth Amendment to the United States Constitution and article I, section 22 of the Washington Constitution guarantee criminal defendants the right to a public trial. State v. Russell, 141 Wn. App. 733, 737-38, 172 P.3d 361 (2007), reviewed denied, 164 Wn.2d 1020 (2008). As well, article I, section 10 of the Washington Constitution states, "Justice in all cases shall be administered openly," thereby giving the public, in addition to the defendant, a right to open proceedings. Seattle Times Co. v. Ishikawa, Wn.2d 30, 36, 640 P.2d 716 (1982).

“(T)he right to a public trial also extends to jury selection.” State v. Brightman, 155 Wn.2d 506, 515, 122 P.3d 150 (2005) (citing In re Pers. Restraint of Orange, 152 Wn.2d 795, 804, 100 P.3d 291 (2004)); Presley v. Georgia, ___ U.S. ___, 130 S. Ct. 721, 723-25, ___ L. Ed. 3d ___ (2010). A defendant’s right and the public’s right “serve complementary and independent 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.” State v. Bone-Club, 128 Wn.2d 254, 259, 906 P.2d 325 (1995). And a defendant has standing to voice the public’s interest in public trials. State v. Erickson, 146 Wn. App. 146 Wn. App. 200, 205 n.2, 189 P.3d 245 (2008); State v. Duckett, 141 Wn. App. 797, 804-05, 173 P.3d 948 (2007).

To protect these rights, a trial court may properly close a portion of a trial only after (1) considering the following five requirements enumerated in Bone-Club and (2) entering specific findings on the record to justify so ruling. State v. Bone-Club, 128 Wn.2d at 258-59.

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.

id.

A trial court's failure to conduct the required Bone-Club inquiry "results in a violation of the defendant's public trial rights." State v. Brightman, 155 Wn.2d at 515-16. In such a case, the defendant need show no prejudice; it is presumed. Bone-Club, 128 Wn.2d at 261-62. Additionally, a defendant's failure to "lodge a contemporaneous objection" at the time of the exclusion does not amount to a waiver of his or her right to a public trial. Brightman, 155 Wn.2d at 514-15, 517. The remedy for such a violation is to reverse and remand for a new trial. In re Pers. Restraint of Orange, 152 Wn.2d at 814. This court reviews de novo the question of law of whether a defendant's right to a public trial has been violated. Brightman, 155 Wn.2d at 514.

Recently, in State v. Erickson, 146 Wn. App. at 211, this court held that conducting portions of voir dire in chambers amounts to a "closure" requiring Bone-Club analysis even where the court did not explicitly close

the proceedings. See also this court's similar decision in State v. Heath, 150 Wn. App. 121, 127-28, 206 P.3d 712 (2009); State v. Frawley, 140 Wn. App. 73, 720, 167 P.3d 593 (2007) (Division III holding the same).

Erickson controls in this case, as it did in this court's recent opinion in State v. Heath, 150 Wn. App. at 127-28. In Erickson, as here, without explicitly closing the courtroom, the court interviewed jurors outside the courtroom with only counsel present. At no time in this case did the court engage in a meaningful and required five-part Bone-Club analysis or set forth on the record specific findings to justify so ruling. As recently held by the United States Supreme Court in Presley v. Georgia, 130 S. Ct. at 724, trial courts are required to consider alternatives to closure even when they are not offered by the parties. See also State v. Momah, 167 Wn.2d 140, 145, 217 P.3d 321 (2009) (defendant's right to public trial not violated where closure preceded by trial court's careful consideration of defendant's article I, § 22 rights). And since Mejia's failure to object to the process does not constitute a waiver and because prejudice is presumed, this court must reverse Mejia's convictions and remand for a new trial. State v. Brightman, 155 Wn.2d 514-15.

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02. MEJIA'S COUNSEL'S FAILURE TO OBJECT TO THE TRIAL COURT QUESTIONING A POTENTIAL JUROR DURING VOIR DIRE IN CHAMBERS WITHOUT ENGAGING IN A BONE-CLUB ANALYSIS ON THE RECORD CONSTITUTED INEFFECTIVE ASSISTANCE.³

A criminal defendant claiming ineffective assistance must prove (1) that the attorney's performance was deficient, i.e., that the representation fell below an objective standard of reasonableness under the prevailing professional norms, and (2) that prejudice resulted from the deficient performance, i.e., that there is a reasonable probability that, but for the attorney's unprofessional errors, the results of the proceedings would have been different. State v. Early, 70 Wn. App. 452, 460, 853 P.2d 964 (1993), review denied, 123 Wn.2d 1004 (1994); State v. Graham, 78 Wn. App. 44, 56, 896 P.2d 704 (1995). Competency of counsel is determined based on the entire record below. State v. White, 81 Wn.2d 223, 225, 500 P.2d 1242 (1972) (citing State v. Gilmore, 76 Wn.2d 293, 456 P.2d 344 (1969)). A reviewing court is not required to address both prongs of the test if the defendant makes an

³ While it has been argued in the preceding section of this brief that this issue constitutes constitutional error that may be raised for the first time on appeal, this portion of the brief is presented only out of an abundance of caution should this court disagree with this assessment.

insufficient showing on one prong. State v. Tarica, 59 Wn. App. 368, 374, 798 P.2d 296 (1990).

Additionally, while the invited error doctrine precludes review of any instructional error where the instruction is proposed by the defendant, State v. Henderson, 114 Wn.2d 867, 870, 792 P.2d 514 (1990), the same doctrine does not act as a bar to review a claim of ineffective assistance of counsel. State v. Doogan, 82 Wn. App. 185, 188, 917 P.2d 155 (1996) (citing State v. Gentry, 125 Wn.2d 570, 646, 888 P.2d 1105, cert. denied, 116 S. Ct. 131 (1995)).

Should this court determine that counsel's failure to object to the trial court questioning the potential juror in chambers without engaging in a Bone-Club analysis on the record does not constitute constitutional error or that counsel waived the issue or invited the error by failing to object, then both elements of ineffective assistance of counsel have been established.

First, the record does not reveal any tactical or strategic reason why trial counsel would have failed to object, and had counsel done so, the trial court would have granted the objection under the law set forth in the preceding section of this brief. Second, prejudice is presumed where the violation of the public trial right occurs. State v. Bone-Club, 128 Wn.2d at 261-62.

Counsel's performance was deficient, with the result that Mejia was deprived of his constitutional right to effective assistance of counsel, and is entitled to reversal of his convictions.

03. THE TRIAL COURT ABUSED ITS DISCRETION IN ADMITTING A LETTER WRITTEN BY MEJIA THAT WAS NOT REASONABLY RELATED TO HIS INTENT TO INFLICT GREAT BODILY HARM ON TRINA ON THE DAY OF THE INCIDENT.

Over objection [RP 31-34], the trial court admitted a letter written by Majia as probative of his intent to assault Trina on March 17, 2009. [RP 41-42]. The letter, which was read to the jury, stated:

Dear Trina,

Through you I've come to experience Hatred. Now all this time I thought I hated Fred like no other. Boy was I wrong!!!

Because when it comes to you I have Hatred that can kill just by me standing to close to you! That's how powerful it is, that's how much my Emotion for you has grown.

The next problem is my Emotion turns to Jealousy. We'll have to break up, because no man on Earth will be able to stop me from hurting you! Or even killing you! I'm almost certain we should Break up now!

Fuck you and (spend?) the rest of your life in turmoil and Hell! Bitch I hope you Die!

Signed Feliz R. Mejia

[CP 34-35; RP 157-58].

To be admissible, evidence must be relevant. ER 402. Evidence is relevant if it has any tendency to make the existence of any fact that is of consequence more or less probable than it would be without the evidence. ER 401. As a condition precedent to the admissibility of evidence, the connection between the evidence sought to be admitted and relevant issues must be “reasonable and not latent or conjectural.” State v. Bebb, 44 Wn. App. 803, 814, 723 P.2d 512 (1986) (quoting State v. Wilson, 38 Wn.2d 593, 616, 231 P.2d 288, cert. denied, 342 U.S. 855, 72 S. Ct. 81, 96 L. Ed. 644 (1951)). Even if relevant, evidence may be excluded if its probative value is substantially outweighed by the likelihood it will mislead the jury. ER 403. Simply, in admitting evidence, the trial court must first determine whether the evidence is relevant and, if so, whether its probative value outweighs its potential for prejudice. ER 401; State v. Kelly, 102 Wn.2d 188, 198, 685 P.2d 564 (1984); ER 403; State v. Robtoy, 98 Wn.2d 30, 42, 653 P.2d 284 (1982).

A trial court’s determination on the admissibility of evidence is reviewed for abuse of discretion. State v. Pirtle, 127 Wn.2d 628, 648, 904 P.2d 245 (1995), cert. denied, 518 U.S. 1026, 116 S. Ct. 2568, 135 L. Ed.

2d 1084 (1996). Thus, this court will not disturb the trial court's ruling unless it is manifestly unreasonable or based on untenable grounds. State v. Perrett, 86 Wn. App. 312, 319, 936 P.2d 426, reviewed denied, 133 Wn.2d 1019 (1997).

In admitting the letter, the trial court reasoned that it provided a window “into the mind and subconsciousness, the unconscious, but nevertheless the mind of the alleged perpetrator here.” [RP 40].

This rationale is unpersuasive. While acknowledging that the State “couldn't establish when this letter was written [RP 37-38](,)” and further noting that Mejia's testimony placed the date “within 18, 19 months” of the incident [RP 39], the court was understandably without explanation as to how the letter would thus translate to Mejia's intent to assault Trina perhaps one and a half years down the road, for such a connection is not reasonable and amounts to nothing more than mere conjecture and is even to remote to invoke the doctrine res gestae. See State v. Powell, 126 Wn.2d 244, 263, 893 P.2d 615 (1995). The evidence showed that Mejia reacted to Trina's disclosure on March 17 that she was moving out of their residence and wanted a divorce because of his alleged infidelity. He was not angry nor harboring any ill intent because of what he had written at some uncertain previous date and then put in some undisclosed location in the garage with his other belongings. If anything, the letter, as Mejia

explained, and the court assumed as true for the purpose of addressing the issue [RP 39], may have served, as the trial court observed, “as part of some moral recognition theory treatment....” [RP 39].

The State’s position therefore boils down to arguing that Mejia intended to inflict great bodily harm on Trina on March 17 because he had authored the above letter, which was undated and stored in a garage. The flaw in this argument is that there was no proof that the evidence was reasonably related to Mejia’s intent on the day of the incident. Given that Mejia did not contest that he was angry upon being told by his wife that she was moving out and seeking a divorce, the probative value of the written statement is minor at best. In this context, the substantial prejudice inherent in the evidence outweighs the probative value, if any. The trial court erred in admitting it.

The impact of the admission of the evidence was significant. And the error was not harmless. This court examines evidentiary, non-constitutional error to see if the error, within reasonable probability, materially affected the outcome of the trial. See State v. Bourgeois, 133 Wn.2d 389, 403, 945 P.2d 1120 (1997). The jury may have given Trina undue credibility and assigned undue weight to Mejia’s response to her disclosures on the day of the incident. Because the issue came down to whether Mejia intended to inflict great bodily harm on Trina, and the

admission of the evidence goes toward his character in this context, it is reasonably possible that had the trial occurred without the admission of the letter, Mejia might not have been convicted as charged. The court should reverse on this basis.

E. CONCLUSION

Based on the above, Mejia respectfully requests this court to reverse his convictions.

DATED this 19th day of March 2010.

Respectfully submitted,

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