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COURT OF APPEALS
DIVISION III
STATE OF WASHINGTON
By _____

No. 251781

IN THE COURT OF APPEALS, DIVISION III,
OF THE STATE OF WASHINGTON

THE STATE OF WASHINGTON,

Respondent,

v.

JOHN E. LIPINSKI,

Appellant.

APPELLANTS SUPPLEMENTAL BRIEF ON

STATE V. WISE, No. 82802-4, (Wash. Nov. 21, 2012)

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I. APPELLANT'S SUPPLEMENTAL STATEMENT OF THE
CASE

Questionnaires were submitted to the jury venire members. RP 187. Those answering "yes" to certain questions on the questionnaire were brought into a jury room for voir dire by the attorneys and the trial court judge, in private. During the voir dire which took place in private, the Defendant was present. RP 1055 . The record does not show any written or oral waiver from the Defendant to give up his right to have voir dire conducted in public.

II. SUMMARY OF ARGUMENT

In *State v. Wise*, No. 82802-4, (Wash. Nov. 21, 2012), the Supreme Court of Washington handed down two rulings that are dispositive of this case; 1) that conducting voir dire in private constitutes a "closure" of the courtroom, and 2) that a failure to object by Defendant or his counsel does not constitute a waiver of the right to have proceedings conducted in public, unless the trial court has conducted the required procedure to justify closure.

III. *STATE V. WISE*

A. Private Questioning of Jurors During Voir Dire is a Closure that Requires Bone-Club Analysis

In *State v. Wise*, No. 82802-4, (Wash. Nov. 21, 2012), during voir dire, the trial court judge indicated to the jury panel members that:

[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. Just let us know. I make a list on my notebook and we take those jurors back into chambers so that we can ask those questions more privately.

Wise, No. 82802-4, slip op. at 2-3.

There had been no prior discussion with counsel as to whether there was any objection to this procedure. In total, in *Wise*, 10 jurors were questioned in private. Two, because they requested it, and the other eight, apparently because the Court determined from their prior answers they should be questioned further in private. *Wise*, No. 82802-4, slip op. at 3.

The subjects discussed with potential jurors in private in *Wise* included personal health matters, relationships with witnesses or other law

enforcement officers, and criminal history. Of the 10 privately questioned in chambers, six were excused for cause. The private questioning was recorded and transcribed. *Id.*

In *Wise*, the trial court did not make reference to the defendant's right to a public trial, consider alternatives to closure, or address the factors from *State v. Bone-Club*, 128 Wn.2d 254, 258-59, 906 P.2d 325 (1995) on the record, or make a record of whether any members of the public were present in the courtroom besides the venire panel. *Id.*

“Neither the State nor the defense objected to conducting a portion of voir dire questioning in the judge's chambers.” *Id.*

The Supreme Court of Washington in *Wise* reviewed whether there had been a closure of the courtroom in violation of the right of the accused to a public trial as guaranteed by Wash. Const. art 1, § 22 and U.S. Const. amend. VI. And discussed the public's right under Wash. Const. art 1, §10, that “Justice in all cases shall be administered openly.” *Wise*, No. 82802-4, slip op. at 6.

The Court had recently held in *State v Momah*, 167 Wn.2d 140 , 151-52, 217 P.3d 321 (2009), and *State v Strode*, 167 Wn.2d 222, 227, 232, 217 P.2d 310 (2009), that the public trial right in voir dire proceedings extends

to the questioning of individual prospective jurors. The Court had found a “closure” in *Strode* from the trial judge’s decision to allow questioning of prospective jurors in chambers, and a denial of the right to a public trial. 167 Wn.2d at 227. A “de facto” closure had been found in *Momah* when jurors were individually questioned outside the courtroom in a room not ordinarily accessed by the public, with the door closed. 167 Wn.2d at 146, 151. *Wise*, No. 82802-4, slip op. at at 9.

The Court in *Wise* found there had been a “closure of the trial in *Wise*’s case” when the trial court questioned prospective jurors in chambers, a room not ordinarily accessible to the public. *Wise*, No. 82802-4, slip op. at at 9.

In *Wise*, the trial court’s complete failure to consider and apply *Bone-Club* was error. *Wise*, No. 82802-4, slip op. at 10.

Unlike the *Momah* case, there had been no “constructive consideration” of the *Bone-Club* factors, which had distinguished *Momah* from *Strode*. *Id.*

(Had the trial court conducted the *Bone-Club* analysis, then, absent an abuse of discretion, the closure would have been upheld. *Wise*, No. 82802-4, slip op. at 7.)

B. Silence is Not a Waiver

While Wise did not object when the trial court moved a portion of voir dire into chambers, “[h]is silence alone is not sufficient to be considered a waiver of his right to a public trial.” *Wise*, No. 82802-4, slip op. at 13. The Court had long held that a defendant does not waive his right to a public trial by failing to object to a closure at trial. *State v. Marsh*, 126 Wash. 142, 145-47, 217 P. 705 (1923). (In contrast, in *Momah*, the defendant had “actively participated” in effecting the courtroom closure during voir dire. 167 Wn.2d at 146. *Wise*, No. 82802-4, slip op. at 13.)

C. Violation of the Public Trial Right is Structural Error, Requiring Reversal

Wrongful deprivation of the right to a public trial has been repeatedly characterized as structural error by the United States Supreme Court. *United States v. Marcus*, ___ U.S. ___, 130 S. Ct. 2159, 2164-65, 176 L. Ed. 2d 1012 (2010); *United States v. Gonzalez-Lopez*, 548 U.S. 140, 148-49, 126 S. Ct. 2557, 165 L. Ed. 2d 409 (2006); *Neder v. United States*, 527 U.S. 1, 8, 119 S. Ct. 1827, 144 L. Ed. 2d 35 (1999) ...

Wise, No. 82802-4, slip op. at 11.

Structural error is a special category of constitutional error that “affect[s] the framework within which the trial proceeds, rather than simply an error

in the trial process itself.” *Arizona v. Fulminate*, 499 U.S. 279, 310, 111 S. Ct. 1246, 113 L. Ed. 2d 302 (1991), *Wise*, No. 82802-4, slip op. at 11-12.

Where there is structural error “a criminal trial cannot reliably serve its function as a vehicle for determination of guilt or innocence, and no criminal punishment may be regarded as fundamentally fair.” *Id.* [*Fulminate*, 499 U.S. at 310.] (quoting *Rose v. Clark*, 478 U.S. 570, 577-78, 106 S. Ct. 3101, 92 L. Ed. 2d 460 (1986) (citation omitted)).

Wise, No. 82802-4, slip op. at 12.

“Structural error, including deprivation of the public trial right, is not subject to harmless analysis.” *Wise*, No. 82802-4, slip op. at 12, citing *Fulminate*, 499 U.S. at 309-10, *State v. Easterling*, 157 Wn.2d 167, 181, 137 P.3d 825 (2006).

Accordingly, unless the trial court considers the *Bone-Club* factors on the record before closing a trial to the public, the wrongful deprivation of the public trial right is a structural error presumed to be prejudicial. *Easterling*, 157 Wn.2d at 181; [*In Re Personal Restraint of*] *Orange*, 152 Wn.2d[795] at 814 [100 P.3d 291 (2004)]; *Bone-Club*, 128 Wn.2d at 261-62.

Wise, No. 82802-4, slip op. at 12.

D. *Wise* Requires Reversal and a New Trial in this Case

The only difference between this case and the facts in *Wise* are that Mr. Lipinski was present during the privately conducted voir dire, while in *Wise*, the defendant’s counsel, but not the defendant, was present. That is not a material difference. The following statement from *Wise* holds true

regardless of whether a defendant is present, or not present, during the violation: “Since Wise did not waive his right to a public trial by not objecting, and prejudice is presumed, a new trial is warranted.” *Wise*, No. 82802-4, slip op. at 13. Substitute “Lipinski” for “Wise” and the occurrence of the violation is the same, and the result should be the same.

Since *Wise* indicates that a failure to object to the closure is not a waiver of the right to a public trial, Mr. Lipinski’s presence cannot add anything to, or detract from, the lack of a waiver of the right to a public trial. The *Wise* opinion does not state or even suggest that the absence of Mr. Wise was the problem. With or without Mr. Lipinski’s presence, there was no waiver here of the right to a public trial.

The rule maintained by *Wise* should be applied here to hold that the error was prejudicial: “ ... a violation of public trial right is per se prejudicial, even where the defendant failed to object at trial.” *Wise*, No. 82802-4, slip op. at 17-18 , citing *Easterling*, 157 Wn.2d at 181; *State v. Brightman*, 155 Wn.2d 506, 517-18, 122 P.3d 150 (2005); *Orange*, 152 Wn.2d at 814.

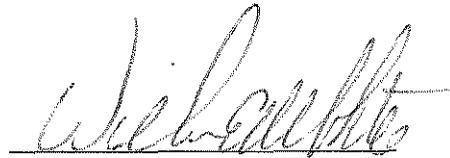
IV. CONCLUSION

The same result as in *Wise* should be afforded in this case, the conviction should be reversed and vacated, and the case remanded “for a

new trial that is open to the public, except as the trial court may direct a closure upon full scrutiny and consideration of the public trial right under *Bone-Club.*” *Wise*, No. 82802-4, slip op. at 19.

Respectfully submitted,

Dated February 7th, 2013

A handwritten signature in cursive script, appearing to read "W. Edelblute", is written over a horizontal line.

William Edelblute

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Certificate of Mailing

I hereby certify that on the 7th day of February, 2013, I mailed true and accurate copies of the foregoing Supplemental Brief of Appellant to Mark Lindsey, Deputy Prosecuting Attorney, 1100 W. Mallon Ave., Spokane WA 99260-2043, and to Appellant John Lipinski, #893835, P.O. Box 2049, Airway Heights, WA 99001.

A handwritten signature in cursive script, appearing to read "William Edelblute", is written over a horizontal line.

William Edelblute