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COURT OF APPEALS
DIVISION III
STATE OF WASHINGTON

By _____



25178-1-III

COURT OF APPEALS

DIVISION III

OF THE STATE OF WASHINGTON

STATE OF WASHINGTON, RESPONDENT

v.

JOHN E. LIPINSKI, APPELLANT

APPEAL FROM THE SUPERIOR COURT

OF SPOKANE COUNTY

SECOND SUPPLEMENTAL BRIEF OF RESPONDENT

STEVEN J. TUCKER
Prosecuting Attorney

Mark E. Lindsey
Senior Deputy Prosecuting Attorney
Attorneys for Respondent

County-City Public Safety Building
West 1100 Mallon
Spokane, Washington 99260
(509) 477-3662

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CONSTITUTIONAL PROVISIONS

ARTICLE I, §22 3

I.

PROCEDURAL STATEMENT

Respondent, State of Washington, respectfully submits this second supplemental brief concerning the jury selection process and the applicability of the decision in *State v. Wise*, ___ Wn.2d ___, 288 P.3d 1113 (2012), as requested by the Court's ruling January 18, 2013.

II.

STATEMENT OF FACTS

The record reflects that the case was highly publicized and the subject of numerous television and newspaper reports. As a result, the defense and the prosecutor agreed upon an eleven-part questionnaire that the trial court submitted to all potential jurors. RP 187. The questionnaire focused on the subjects of pre-trial publicity, experience with domestic violence, and the effect of graphic evidence of the adult and infant victims. *E.g.*, RP 1056-1057, 1065-1068. The answers to the questionnaire of fifty-one of the sixty individuals in the venire panel prompted the individual inquiry to ensure the seating of a fair and impartial jury to try defendant's case. The defense and State agreed with the Court on the procedure for questioning the individual jurors. RP 262, 320. Nothing in the record reflects that anyone in the gallery observing the trial objected to

the proposed method of conducting the individual *voir dire*. Nothing in the record indicates that the court entered an order closing the courtroom to the public. Individual *voir dire* was conducted in the jury room with the full participation of the defendant and counsel. RP 1055-1325.

The record reflects that defense counsel and defendant actively participated in the individual *voir dire* process. *E.g.*, RP 1056-1057, 1065-1068, 1055-1327. The record demonstrates that the active participation of the defendant and counsel in the individual *voir dire* resulted in a wealth of additional information which most likely would not have been discovered absent the format utilized. RP 1055-1327. The record reflects that the individual *voir dire* of the prospective jurors uncovered a sufficient basis for defense counsel to convince the trial court to strike *seventeen* members of the venire panel for cause during the process. RP 1327.

III.

ISSUE PRESENTED

- (1) Does the Supreme Court's *Wise* decision apply to this case?

IV.

ARGUMENT

A. THE *WISE* DECISION DOES NOT APPLY TO THE CIRCUMSTANCES PRESENTED BY THIS CASE BECAUSE THE DEFENDANT ACTIVELY PARTICIPATED IN THE DESIGN AND EXECUTION OF THE INDIVIDUAL *VOIR DIRE*.

As noted previously, defendant has based his claim on Article I, §22 of the Washington Constitution entitled “Rights of the Accused.” In pertinent part, it provides: “In criminal prosecutions the accused shall have the right ... to have a speedy public trial by an impartial jury” Jury selection is part of the public trial. *In re Orange*, 152 Wn.2d 795, 804, 100 P.3d 291 (2004).

In *State v. Wise*, the Court acknowledges that the right to a public trial is not an “inflexible right.” *State v. Wise*, 288 P.3d at 1115. The Court further acknowledges that the public trial right is not an “absolute right” as it held in *State v. Momah*, 167 Wn.2d 140, 152, 217 P.3d 321 (2009), *cert. denied*, ___ U.S. ___, 131 S. Ct. 160, 178 L. Ed. 2d 40 (2010). The *Wise* Court recognized that the public trial right can be subordinate to the right to a fair and impartial jury. *Wise*, 288 P.3d at 1117 (*citing State v. Momah*, 167 Wn.2d at 152).

A careful reading of the Court’s reasoning in *Wise* reveals that the Court cited to its *State v. Momah* decision frequently as authority to

support its holding in *Wise*. Nevertheless, the Court factually distinguished the circumstances in *Wise* from those presented in *Momah*. The *Wise* Court clearly did not overrule its analysis in *Momah* despite having the opportunity. Instead, the *Wise* Court focused upon the fact that the trial court therein did not afford either the State or the defendant the opportunity to object to the individual *voir dire* of venire members.

The *Wise* Court was so confident in the uniqueness of the facts of *Momah* that it provided the following insightful and distinguishing analysis:

While this court stated in *Momah* that not all closures are fundamentally unfair and thus not all closures are structural errors, *Momah* presented a unique set of facts. 167 Wash.2d at 150–52, 217 P.3d 321. This court distinguished the public trial right violation in *Momah* from the public trial right violations in *Easterling*, *Brightman*, *Orange*, and *Bone-Club*, which all involved structural error. *Id.* *Momah* was distinguishable from other public trial violation cases on two principal bases: (1) more than failing to object, the defense affirmatively assented to the closure of *voir dire* and actively participated in designing the trial closure and (2) though it was not explicit, the trial court in *Momah* effectively considered the *Bone-Club* factors. *Id.* at 151–52, 217 P.3d 321; *Strode*, 167 Wash.2d at 234, 217 P.3d 310 (Fairhurst, J., concurring). At bottom, *Momah* presented a unique confluence of facts: although the court erred in failing to comply with *Bone-Club*, the record made clear—without the *1120 need for a post hoc rationalization—that the defendant and public were aware of the rights at stake and that the court weighed those rights, with input from the defense, when considering the closure.

In *Momah*, we implied that “fundamental unfairness” was the test for structural error. However, the United States Supreme Court has clearly stated that “fundamental unfairness” is not the sole criterion of structural error and that there are other relevant considerations, including “the difficulty of assessing the effect of the error” and “the irrelevance of harmlessness.” *Gonzalez-Lopez*...

...The unique facts of *Momah* are not present in Wise's case. We emphasize that it is unlikely that we will ever again see a case like *Momah* where there is effective, but not express, compliance with *Bone-Club*.

State v. Wise, 288 P.3d at 1119-1120 (citations omitted & emphasis added).

Here, as in *Momah*, the trial court faced the situation where the defendant was very much a proponent of the individual *voir dire* process to ensure that a fair and impartial jury was empaneled to try his case. Here, the benefit defendant gained through the very process that he now contends deprived him of a constitutionally guaranteed fair and impartial jury to try his case far exceeded the prejudice claimed. The individual *voir dire* only occurred at the request of the defendant, with the assistance and avid participation of the defense counsel. The record reflects that the benefits of conducting the individual *voir dire* definitely inured to the defendant because he was able to identify fifty-one individuals with a potential bias or prejudice that might render them inappropriate as a juror on his case. RP 1055-1327. Experience in trials involving sensitive issues

like graphic evidence, publicity, and bias against domestic violence has demonstrated the value of conducting individual *voir dire* as a means of protecting the venire panel from being poisoned by those same problems identified by the completed questionnaire. It takes only one prospective juror to articulate some prejudicial perspective and the entire venire panel can be poisoned to the point of necessitating calling in an entirely new panel. The defendant's ability to utilize the individual *voir dire* process to strike seventeen of sixty prospective jurors enabled him to effectively eliminate at least twenty-four or over one-third of the panel to thereby ensure his trial by a fair and impartial jury. The record from the individual *voir dire* reflects just how significant was the potential for such an event occurring in this case.

During the individual *voir dire*, defense counsel asked questions of each juror to follow up on and explore the depth of the potential bias or prejudice identified by their responses to the questionnaire. See RP 1055-1327. As a result of defendant's aggressive participation in the individual *voir dire* process, seventeen prospective jurors were challenged by the defendant and excused for cause by the trial court.

During the individual questioning of prospective jurors No. 4, 15, 23, 33, 34, 37, 42, and 46, defense counsel discovered that pretrial publicity had so impacted their abilities to presume the defendant innocent

that they could not be fair and impartial. RP 1065-1070, 1119, 1148-1153, 1194-1198, 1199-1202, 1209-1215, 1234-1244, and 1272-1274.

During the individual questioning of prospective jurors No. 5, 18, 34, and 41, defense counsel discovered that evidence of domestic violence would so impact their abilities to presume the defendant innocent that they could not be fair and impartial. RP 1071-1076, 1127, 1199-1202, 1245-1256.

During the individual questioning of prospective jurors No. 3, 41, 44, and 46 defense counsel discovered that graphic evidence would make it so difficult to maintain the presumption of innocence that these jurors could not be fair and impartial. RP 1061-1064, 1245-1256, 1265-1267, and 1272-1274.

As noted, the record demonstrates that this case is more properly resolved under the reasoning set forth in *State v. Momah* rather than that of *State v. Wise*. In *Momah*, the Court recognized that conducting individual questioning at defendant's request and with defense counsel's active participation is acceptable to ensure that defendant receives a trial by a fair and impartial jury. *State v. Momah*, 167 Wn.2d at 152. Such is precisely what occurred herein because the defendant took advantage of the individual questioning to actively participate in the process and thereby discover sufficient evidence of bias and prejudice to convince the trial

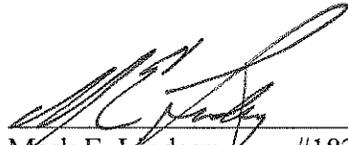
court to strike for cause seventeen prospective jurors before the need to exercise one peremptory challenge arose. Defendant's failure to object to the individual questioning of the prospective jurors clearly removed this case from the control of *State v. Wise* and placed it under the analysis of *State v. Momah*.

V.

CONCLUSION

For the reasons stated herein, the State maintains that the circumstances of this case make it properly resolved under the holding in *State v. Momah* as distinguished from *State v. Wise* due to the actions of the defense.

Respectfully submitted this 15th day of February, 2013.



Mark E. Lindsey #18272
Senior Deputy Prosecuting Attorney
Attorney for Respondent