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Court of Appeals
Division III
State of Washington

26404-1-III

COURT OF APPEALS
DIVISION III
OF THE STATE OF WASHINGTON

STATE OF WASHINGTON, RESPONDENT

v.

AMEL W. DALLUGE, APPELLANT

APPEAL FROM THE SUPERIOR COURT
OF GRANT COUNTY

APPELLANT'S SUPPLEMENTAL BRIEF

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A. STATEMENT OF THE CASE

Mr. Dalluge's charges were tried to a jury. At the outset of *voir dire* the judge instructed the jurors that they could request a private interview if their answers to any questions would involve something they did not want to reveal publicly:

Second, you should not withhold information in order to be seated on a jury or for any other purpose. If answering a question truthfully would require you to say something that you would prefer not to make public, just say, "I'd like to answer privately." If you do, we'll go through a little exercise where you alone and the parties and I go into a side room, we'll take your answer there, and then return to the courtroom. It is much more important that we have the benefit of your candid answer than it is to receive it in a public setting.

(Jury Voir Dire RP 6-7).

During *voir dire*, Juror No. 1 told the court that her daughter had told her details of the incident and she would not be able to set that information aside. (RP 36) Following a brief discussion off the record, defendant and the prosecutor both stated they wished to ask the juror additional questions. (RP 37) Finding such questions should be asked outside the presence of the other jurors, ("And we'll need to do that outside the hearing of the rest of the jury"), the court transferred *voir dire* proceedings to the jury room. (RP 37-39)

In the jury room, after privately being given more detailed information about the charge against Mr. Dalluge, the juror explained she had confused this with another case and did not know the details of the incident in which Mr. Dalluge was involved. (RP 38-39)

Later in the *voir dire* proceedings, Juror No. 27 told the court he believed he would be biased based on his experience in law enforcement. (RP 49-50)

JUROR ADKINSON: Your Honor, I'm in law enforcement, I would have to speak privately about the rest of the matter.

THE COURT: Okay. Are you feeling that your law enforcement -- let me ask you this: Has your law enforcement experience led you to some information or knowledge or experience that's particular to this case?

JUROR ADKINSON: Yes.

(Jury Voir Dire RP 50) At the juror's request, the court again decided to continue individual *voir dire* in the privacy of the jury room:

Okay. All right. We'll need to have No. 27 answer privately. And we're at a good point to I guess do that.

...

Okay. Everyone else, please remain seated. Could we please have No. 27 in the side room.

(RP 50)

In the ensuing private interview, Juror no 27 disclosed the following:

JUROR ADKINSON: I was not aware that Kris Nichols, the victim in this case, I am intimately familiar with his background within the law enforcement, criminal justice system, and am aware of several interactions between law enforcement and Mr. Nichols.

...

THE COURT: Do you think the fact that he is alleged to be the victim of the assault could influence you based on your previous experience with him?

JUROR ADKINSON: No. The only thing I would be concerned about is potentially providing that information -- my knowledge base to the other jurors and deciding what line not to cross if I was in deliberation with fellow jurors.

...

THE COURT: Where is your law enforcement experience?

JUROR ADKINSON: I'm a sergeant with the State Patrol out of the Moses Lake detachment office. I've been over here for two and a half years, with 11 years . . . law enforcement experience.

MS. FAIR: Your main concern is whether or not you'll share some of that information you already have with other jurors?

JUROR ADKINSON: Or would be having to have some particular definition about how much I could speak about that in jury deliberation, or if I was selected for the jury pool.

THE COURT: Let me interrupt here for a moment. The jury would be instructed that their deliberations are to be confined only to the matters in evidence.

JUROR ADKINSON: Okay. Great.

THE COURT: So long as it was something that was not in evidence, it would essentially be taboo. Would you be able to follow that?

JUROR ADKINSON: Yes. Certainly.

(RP 51-53)

B. ARGUMENT

Article I, § 22, of the Washington State Constitution guarantees criminal defendants the right to a speedy public trial. Additionally, Article I, § 10, provides a guarantee of public access to judicial proceedings. “The public trial right protected by both our state and federal constitutions is designed to ‘ensure a fair trial, to remind the officers of the court of the importance of their functions, to encourage witnesses to come forward, and to discourage perjury.’” *State v. Strode*, 167 Wn.2d 222, 226, 217 P.3d 310 (2009) quoting *State v. Brightman*, 155 Wn.2d 506, 514, 122 P.3d 150 (2005).

Although not challenged in the trial court, the procedure followed in this case may be questioned for the first time in this appeal:

‘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.’ *State v. Easterling*, 157 Wash.2d 167, 173–74, 137 P.3d 825 (2006). Such a claim may be raised for the first time on appeal. See *State v. Brightman*, 155 Wash.2d 506, 514-15, 122 P.3d 150 (2005).

State v. Wise, -- Wn.2d --, 288 P.3d 1113 (2012)

“[T]he public trial right in voir dire proceedings extends to the questioning of individual prospective jurors.” *State v. Wise*, *supra*, citing *State v. Momah*, 167 Wn.2d 140, 151–52, 217 P.3d 321 (2009); *State v. Strode*, 167 Wn.2d at 227. The record demonstrates that in this case the court questioned two individual prospective jurors in a room that was not open to the public.

Generally, to protect the right to a public trial, a trial court must address the five factors outlined in *State v. Bone-Club*, 128 Wn.2d 254, 258-59, 906 P.2d 325 (1995) prior to trial closure. *State v. Paumier*, -- Wn.2d --, 288 P.3d 1126, 1129 (2012). The five *Bone-Club* factors are: (1) the proponent of closure 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; (3) the proposed method for curtailing open access must be the least restrictive means available for protecting the compelling interests; (4) the court must weigh the competing interests of the proponent of closure and the public; and (5) the order must be no broader in its application or duration than necessary to serve its purpose. *State v. Easterling*, 157 Wn.2d 167, 173-74, 137 P.3d 825 (2006) (citing *Bone-Club*, 128 Wn.2d at 256).

Here, as in *Wise*, there was “no opportunity for objection by the State, defense, or public; there was no articulation of a compelling interest for closure; there was no balancing of whatever that interest might have been against the public trial right; and there was no consideration of alternatives to closure.” *Wise*, 288 P.3d at 1118.

The trial court did not purport to directly address any of these factors. With respect to Juror no. 27, neither party requested closure; the request was made by the juror. In both cases, the judge’s decision to question the juror privately was made without any showing of a compelling interest by either party. Implicit in the court’s decisions is perhaps a recognition that these two individuals might give answers that would disclose information about the case that should not be disclosed to other jurors, and this basis would tend to serve the purpose of ensuring the defendant a fair trial. But this reason does not compel exclusion of the public from further questioning. Excluding the jury pool from the courtroom would clearly afford a less restrictive means of protecting that interest. Moreover, even if the factual information provided by the jurors had not been appropriate for public disclosure, their rehabilitation, such as Juror no. 1’s acknowledgment that she did not have any knowledge of the case, and Juror no 27’s assurance that he could set his knowledge aside, should have been made in open court.

Certainly the court provided no opportunity for anyone to object to the proposed removal of proceedings from the open courtroom. The court made no overt effort to weigh the competing interests of the parties and the public. Indeed, as the ensuing *ex parte* interviews disclosed, the information given by these two individuals, while appropriately made unavailable to the jury pool, was precisely the kind of information that may be relevant to a public assessment of the fairness of the selection process.

As to Juror no 1, the information given in the open courtroom was that the prospect possessed detailed information about the alleged incident. Although this turned out not to be the case, no one in the courtroom would have known how the issue was resolved and thus could not form an opinion as to the propriety of allowing this individual to remain in the jury pool.

As to Juror no. 27, the answers given showed that the prospect did, indeed, have detailed information about the victim, as well as additional professional experience that could give rise to concerns about potential bias. These concerns could only be dispelled by the exchange in which the juror assured the court that he could refrain from sharing his knowledge with other jurors and could set aside his knowledge in

deliberations. The public is entitled to observe and assess the reliability of such assurances in considering whether the trial has been fair.

The trial court failed to conduct a *Bone-Club* analysis, on the record or otherwise.

Failure to conduct the *Bone-Club* analysis is structural error warranting a new trial because *voir dire* is an inseparable part of trial. *State v. Paumier, supra, citing State v. Wise, supra.* Such error is not subject to harmless error analysis; “[v]iolation of the public trial right, even when not preserved by objection, is presumed prejudicial to the defendant on direct appeal.” *State v. Wise, supra.*

An apparent exception to this harmless error rule was made in *Momah*. But, as the Court explained in *Wise, Momah* is “distinguishable from other public trial violation cases” *Wise, supra* at 12-13.

(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; *Strode*, 167 Wn.2d at 234 (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 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.

State v. Wise, supra at 13. Although Mr. Dalluge indicated a desire to question Juror no. 1 “outside the presence . . . ,” this language did not expressly affirmatively assent to *voir dire* outside the presence of the public as opposed to the presence of the other jurors. Certainly, he did not participate in the judge’s decision to conduct *voir dire* in a different room, nor does the record suggest that the trial court gave any consideration to the *Bone-Club* factors or weighed rights at stake. Thus here, as in *Wise* and *Paumier*, the closure of *voir dire* violated the rights of both the defendant and the public and constituted structural error that could not be harmless.

“[A] defendant does not waive his right to a public trial by failing to object to a closure at trial. *State v. Wise, supra*. Here, as in *Wise*, although Mr. Dalluge did not object to closure, he did not waive his right to a public trial.

The trial court’s decision to remove individual jurors from the courtroom for individual *voir dire*, without considering the *Bone-Club* factors, was structural error that requires this court to vacate Mr. Dalluge’s conviction and remand the charges for a new trial. *State v. Wise, supra*.

C. CONCLUSION

In light of the recent decision in *Wise*, Mr. Dalluge's conviction should be vacated and his case remanded for a new trial in accordance with the requirements of our constitutions.

Dated this 23rd day of January, 2013.

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IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON,

DIVISION III

STATE OF WASHINGTON,)	
)	
Respondent,)	No. 26404-1-III
)	
vs.)	CERTIFICATE
)	OF MAILING
AMEL W. DALLUGE,)	
)	
Appellant.)	

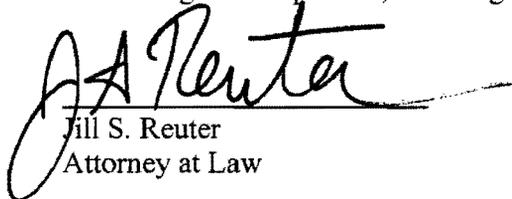
I certify under penalty of perjury under the laws of the State of Washington that on January 23, 2013, I served a copy of the Appellant's Supplemental Brief in this matter by email on the following party, receipt confirmed, pursuant to the parties' agreement:

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