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COURT OF APPEALS
DIVISION III
STATE OF WASHINGTON
By _____

NO. 28885-4-III

IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON
DIVISION THREE

STATE OF WASHINGTON,

Respondent,

v.

SAMUEL CASTRO,

Appellant.

ON APPEAL FROM THE SUPERIOR COURT OF THE
STATE OF WASHINGTON FOR KITTITAS COUNTY

The Honorable Michael E. Cooper, Judge

REPLY BRIEF OF APPELLANT

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A. ARGUMENT IN REPLY

THE TRIAL COURT VIOLATED CASTRO'S AND THE PUBLIC'S CONSTITUTIONAL RIGHT TO A PUBLIC TRIAL.

In its response brief, the State essentially makes three arguments: (1) there was no violation because Castro's motions in limine were successful, (2) there was no right to public trial given the nature of the motions, and (3) any error was harmless. See Brief of Respondent, at 2. None of these arguments are persuasive.

First, neither a defendant's nor the public's right to open and public proceedings turns on the degree to which the trial court rules in the defendant's favor. These rights ensure the defendant is dealt with fairly at all times and that the court is fully cognizant of its sense of responsibility and the importance of the proceedings. State v. Bone-Club, 128 Wn.2d 254, 259, 906 P.2d 629 (1995). The State cites to nothing in support of its argument that so long as the court rules for the defendant, the proceedings can be completely closed to the public.

Second, it has already been established that the court's consideration of motions in limine must occur under the public's watchful eye. See State v. Heath, 150 Wn. App. 121, 125-129, 206

P.3d 712 (2009). This Court should reject the State's argument that Castro's case is similar to State v. Momah, 167 Wn.2d 140, 217 P.3d 321 (2009). See Brief of Respondent, at 3. The cases are easily distinguished.

The State charged Momah, a gynecologist, with committing sex offenses against several patients. Momah, 167 Wn.2d at 145. Momah's case was "heavily publicized" and "received extensive media coverage." Id. As a result, the court summoned more than 100 prospective jurors and gave them a written questionnaire. By agreement of the parties, jurors who said they had prior knowledge of the case, could not be fair, or requested private questioning, were questioned individually in chambers. Id. at 145-146.

Concerned about poisoning the entire panel, defense counsel also argued for expansion of the private voir dire:

Your Honor, it is our position and our hope that the Court will take everybody individually, besides those ones we have identified that have prior knowledge. Our concern is this: They may have prior knowledge to the extent that that might disqualify themselves, or we have the real concern that they will contaminate the rest of the jury.

Momah, 167 Wn.2d at 146. The trial court compiled a list of jurors to be questioned individually. Defense counsel agreed with the list. Id. And both the defense and prosecution actively participated in

the in-chambers jury selection, most of which focused on prospective jurors' knowledge of the case gained from media publicity. Id. at 146-147 and n.1.

The six-justice majority in Momah noted that when "the record lack[s] any hint that the trial court considered the defendant's right to a public trial when it closed the courtroom[.]" the error is "structural in nature" and reversal is required. Momah, 167 Wn.2d at 149-151. The majority found reversal was not required for Momah, however, because despite failing to explicitly discuss the Bone-Club factors, the trial court balanced Momah's right to a public trial with his right to an impartial jury. Momah, 167 Wn.2d at 156. In addition, drawing on the invited error doctrine, the Court essentially found Momah "waived" his public trial right: "Momah affirmatively assented to the closure, argued for its expansion, had the opportunity to object but did not, actively participated in it, and benefited from it. Moreover, the trial judge in this case not only sought input from the defendant, but he closed the courtroom after consultation with the defense and the prosecution." 167 Wn.2d at 151; see also 167 Wn.2d at 153-154 (discussing invited error).

The Momah court reiterated this theme later in the opinion, presuming Momah made the following "tactical choices to achieve what he perceived as the fairest result[:]"

- Before any private voir dire, the parties and the judge discussed numerous proposals concerning juror selection;
- Although Momah was given a chance to object to the in-chambers procedure, he never objected;
- Momah never suggested closed voir dire might violate his right to public trial;
- Defense counsel deliberately chose to pursue in-chambers questioning to avoid tainting the panel; counsel "affirmatively assented to, participated in, and even argued for the expansion of in-chambers questioning."

Momah, 167 Wn.2d at 155.

Counsel's affirmative and aggressive pursuit of a private hearing is an atypical and distinctive feature of Momah. Because the Momah Court relied so heavily on counsel's unusually assertive conduct, its holding will apply only in the rare case. There is no indication of similar efforts by Castro's counsel. Rather, the record merely reveals the absence of a defense objection to a closed hearing on the motions in limine. The mere failure to object does not waive the right; nor does it waive the issue for appeal. See State v. Strobe, 167 Wn.2d 222, 229, 217 P.3d 310 (2009); In the

Matter of the Personal Restraint of Orange, 152 Wn.2d 795, 801-802, 100 P.3d 291 (2004); Heath, 150 Wn. App. at 128.

The State also cites to State v. Sublett, 156 Wn. App. 160, 231 P.3d 231 (2010) and State v. Rivera, 108 Wn. App. 645, 32 P.3d 292 (2001), review denied, 146 Wn.2d 1006 (2002), arguing there was no right to a public hearing on the motions in limine because the motions dealt with purely ministerial or legal issues. See Brief of Respondent, at 4-5. But Sublett merely involved the court's answer to a jury question involving a jury instruction, a purely legal matter that did not involve an "adversary proceeding" or the resolution of disputed facts. Sublett, 156 Wn. App. at 181-182. Similarly, Rivera dealt with a juror issue – one juror complained about a fellow juror's lack of personal hygiene. Rivera, 108 Wn. App. at 652. "It did not involve any consideration of evidence, or any issue related to trial." Id. at 653. The same cannot be said for Castro's motions, which dealt exclusively with issues related to trial, including the State's witnesses and the admissibility of certain evidence. See CP 9-10.

Finally, the State argues that Castro is not entitled to a new trial because any error was harmless, again relying on the fact Castro prevailed on his motions in limine and noting the court

placed its rulings on the record. See Brief of Respondent, at 6-7. But this error is not subject to harmless error analysis. See Strobe, 167 Wn.2d at 231, State v. Easterling, 157 Wn.2d 167, 181, 137 P.3d 825 (2006); Orange, 152 Wn.2d at 814. In Washington, reversal of the defendant's conviction is the remedy for violations of the right to public trial during pretrial motion hearings. See Easterling, 157 Wn.2d at 167-182 (motion to sever co-defendants' trials); Orange, 152 Wn.2d at 812-814 (voir dire); Bone-Club, 128 Wn.2d at 257, 261-262 (suppression hearing); Heath, 150 Wn. App. at 125-129 (motions in limine and a portion of voir dire). And that is the remedy here.

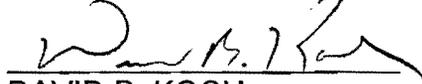
B. CONCLUSION

For the reasons discussed in Castro's opening brief and above, his conviction should be reversed and his case remanded for a new and public trial.

DATED this 13th day of October, 2010.

Respectfully submitted,

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