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STATE OF WASHINGTON
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IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON

DIVISION TWO

STATE OF WASHINGTON,

Respondent,

v.

DEAN M. LORMOR,

Appellant.

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

The Honorable Richard A. Strophy, Judge
Cause No. 08-1-00940-1

BRIEF OF RESPONDENT

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A. ISSUES PERTAINING TO ASSIGNMENTS OF ERROR.

1. Whether the court violated Lormor's right to a public trial when it excluded from the courtroom his three-year-old terminally ill daughter who was wheelchair-bound and required a ventilator to breathe.

2. Whether Lormor received ineffective assistance of counsel because of his attorney's failure to object to the court's exclusion of his daughter from the courtroom.

B. STATEMENT OF THE CASE.

The State accepts Lormor's statement of the procedural and substantive facts of the case.

C. ARGUMENT.

1. The court did not err when it excluded Lormor's daughter from the courtroom. It was not required to conduct a Bone-Club inquiry because it did not close the courtroom.

Upon the motion of the prosecutor, and after the jury had been selected, the court excluded Lormor's daughter from the courtroom. [RP 22] The girl was, at the time of trial, five days short of her fourth birthday and had a terminal medical condition requiring her to be in a wheelchair and breathe with a ventilator. [RP 22, 24] The primary reason for the exclusion was the fact that the ventilator made noise, which the court could hear from the bench, and it concluded the girl's presence would potentially be distracting to the jury. [RP 22-23]

Whether a defendant's constitutional right to a public trial has been violated is a question of law that is subject to de novo review on direct appeal. State v. Easterling, 157 Wn.2d 167, 173-74, 137 P.3d 825 (2006) The right to a public trial is guaranteed by both the Sixth Amendment to the United States Constitution and article 1, section 10 of the Washington Constitution. Id., at 174. The remedy for a violation of the right to a public trial is reversal and remand for a new trial. State v. Wise, 148 Wn. App. 425, 433, 200 P.3d 266 (2009).

The right to a public trial is not absolute, but the courtroom may be closed only for the most unusual of circumstances. State v. Heath, 150 Wn. App. 121, 715, 206 P.3d 712 (2009). The right to open proceedings extends to jury selection and some pretrial motions, and a trial court must, before closing the courtroom, conduct the analysis required by State v. Bone-Club, 128 Wn.2d 254, 906 P.2d 325 (1995),

Lormor argues that the exclusion of his daughter constituted a closure of the courtroom, such that the court was required to engage in the analysis required by Bone-Club and Seattle Times v. Ishikawa, 97 Wn.2d 30, 640 P.2d 716 (1982). In Bone-Club, the court closed the courtroom during a pretrial suppression hearing,

on the State's motion, because an undercover police officer was testifying and he feared public testimony would compromise his work. The Supreme Court found that this temporary, full closure of the courtroom had not been justified because the trial court failed to weigh the competing interests using a five-factor test derived from a series of prior cases, including Ishikawa. Those factors are:

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 the closure and the public.
5. The order must be no broader in its application or duration than necessary for the purpose.

Bone-Club, *supra*, at 258-59.

Lormor cites to other cases in which the courts have applied Ishikawa and Bone-Club. In In re Pers. Restraint of Orange, 152 Wn.2d 795, 100 P.3d 291 (2004), the trial court excluded all spectators, including members of Orange's family and the victim's family, from voir dire because of space limitations. The Supreme Court found this to be a temporary, full closure, the same type as

was at issue in Bone-Club. Orange, *supra*, at 808. Since the trial court had not conducted a Bone-Club analysis, the Supreme Court found a violation of the defendant's right to a public trial, and reversed.

In State v. Brightman, 155 Wn.2d 506, 122 P.3d 150 (2005), the trial court also closed the courtroom to spectators during voir dire. *Id.*, at 511. The Supreme Court found this closure analogous to those in Bone-Club and Orange, and reversed because the trial court had failed to conduct the Bone-Club analysis. Brightman, *supra*, at 517-18. In State v. Heath, *supra*, during voir dire the trial court questioned one juror in chambers. On review, the court of appeals found an intention to exclude the public from this voir dire, even though it did not close the courtroom, and thus Heath's public trial rights were violated. *Id.*, at 715.

In State v. Easterling, *supra*, two defendants were joined for trial. At a pretrial hearing to sever, the co-defendant's attorney requested closure and the judge cleared the courtroom of everybody but court personnel, the co-defendant, and the co-defendant's attorney. Easterling and his attorney were excluded. Again the Supreme Court found a constitutional error because the trial court had failed to consider the Bone-Club factors. *Id.*, at 171.

However, not every exclusion of a person from the courtroom constitutes a closure. In contrast to Heath, *supra*, the same division of the Court of Appeals found that there was no closure, and thus no requirement for a Bone-Club analysis, when the trial court conducted a portion of voir dire questioning in chambers. State v. Wise, *supra*, at 436.

The trial court did not order a closure of the courtroom itself and we presume the courtroom and the proceedings conducted there remained open. The court reporter was present in chambers during questioning, as were all parties, and our record contains a full transcript of the proceedings. Closure, if any, was temporary and partial, below the "temporary, full closure" threshold of Bone-Club. . . . We, therefore, hold that the trial court was not required to sua sponte conduct a Bone-Club analysis prior to this temporary relocation of voir dire to chambers for the purpose of asking prospective jurors sensitive questions.

Id., at 436. The Wise court distinguished this case from those listed above by noting that the Supreme Court treated full, temporary courtroom closures as structural error, not subject to harmless error, and not requiring a timely objection from the defendant in order to preserve the issue for appeal. The Court of Appeals held that conducting voir dire on the record in chambers, with counsel and the defendant present, was not a structural error. Id., at 438. The court further held that Wise waived his right to have all voir dire

conducted in open court and to ask prospective jurors sensitive personal questions in public, because he not only failed to object at trial, but his attorney participated in the private questioning of the prospective jurors. *Id.*, at 437-38. “A defendant may waive certain constitutional rights through his conduct without expressly waiving them on the record.” *Id.*, at 437 (citing to State v. Thomas, 128 Wn.2d 553, 559, 910 P.2d 475 (1996)).

A similar situation occurred in State v. Momah, 141 Wn. App. 705, 171 P.3d 1064 (2007), *review granted in part*, 163 Wn.2d 1012, 180 P.3d 1291 (2008). Several prospective jurors were questioned in chambers in the presence of the defendant, all counsel, and the court reporter. It was unclear if the door was closed. *Id.*, at 710. There was no record that any member of the public or press was excluded. *Id.*, at 712. The Court of Appeals cited to language in both Bone-Club and Orange that noted it was the motion to close, and the plain language of the ruling closing the courtroom, that triggered the necessity for a Bone-Club analysis. Because the trial court in Momah had never ordered the proceeding to be closed to any spectators or family members, the appellate court found the Bone-Club analysis was not required. *Id.*, at 714-15.

In Brightman, the court commented that a trivial closure “does not necessarily violate a defendant’s public trial right,” but held that the closure there was analogous to the closures in Bone-Club and Orange. Brightman, *supra*, at 517.

In the Appellant’s Brief, at page 6, Lormor cites to State v. Erickson, 146 Wn. App. 200, 205 n.2, 189 P.3d 245 (2008) for the proposition that a defendant has standing to defend the public’s interest in public trials. The footnote said that while the dissent suggested Erickson lacked standing to invoke the public’s right, the majority disagreed. In Wise, however, the court specifically said:

Even assuming the trial court improperly closed the courtroom, we hold that Wise is not entitled to a new trial on that basis because (1) he waived his own public trial right, and (2) he lacks standing to defend the public’s right to an open trial under article I, section 10 of the Washington Constitution.

Wise, *supra*, at 436. Erickson was filed on July 29, 2008, and Wise on January 27, 2009, both Division II cases.

In Lormor’s case, he did not object to his daughter being excluded from the courtroom. She was the only person excluded. No member of the public or press, and no other member of his family was excluded, nor was the courtroom closed at any time. No

proceedings took place in chambers or any other area apart from the courtroom.

The right to a public trial exists 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. Brightman, *supra*, at 514 (citing to federal cases). The harms associated with a closed trial have been identified as:

[T]he inability of the public to judge for itself and to reinforce by its presence the fairness of the process, . . . the inability of the defendant’s family to contribute their knowledge or insight to the jury selection, and the inability of the venirepersons to see the interested individuals.

Orange, *supra*, at 812. Here, the exclusion of a nearly four year old child had no effect on any of the purposes for which a public trial is valued. The record is silent as to the girl’s mental status, but even if she was an extremely bright four year old, a child of that age is going to understand virtually nothing of the proceedings, and, if anything, the ordeal of watching her father defend himself at trial would likely be very upsetting to her. She was not present during jury selection, and it is unlikely she would have contributed any knowledge or insight during the trial. Her presence would not further any of the goals of a public trial. Even if her presence in the

courtroom would have provided moral support for Lormor, presumably other family members could provide the same support without putting a terminally ill child on display. The court very appropriately considered her needs to ask for assistance as well as the distracting noise from her ventilator. [RP 23] While the jury was deprived of the ability to observe her during the trial, there is nothing in the record to indicate this in any way prejudiced Lormor, and in fact, may have been to his advantage. It was the prosecutor's impression that Lormor brought the girl into the courtroom to elicit sympathy from the jury, and he may have been correct, but it might well have had the opposite effect of causing disgust at his display of such a severely handicapped child.

Lormor argues that the cases to which he cites require a Bone-Club analysis before a member of the public is excluded from the courtroom, but the cases do not quite say that. The Bone-Club analysis is required before the courtroom is closed, partially or completely, temporarily or for the duration of the proceedings, but none of them have gone so far as to say that excluding one person for justifiable reasons is a closure of the courtroom. Lormor also maintains that the trial court did not recognize nor consider his right to a public trial; [Appellant's Brief 7] however, the court did remark

“ . . . I want you to know that I don’t take that lightly but I would do that in any type of case under the circumstances unless she were a necessary witness . . . ” [RP 23] It is apparent from the record that no one, judge or counsel, understood this to be a courtroom closure such as to trigger a Bone-Club analysis. As indeed it was not.

A judge has the authority to manage his or her courtroom.

RCW 2.28.010 provides:

Every court of justice has power—(1) To preserve and enforce order in its immediate presence. (2) To enforce order in the proceedings before it, or before a person or body empowered to conduct a judicial investigation under its authority. (3) To provide for the orderly conduct of proceedings before it or its officers. (4) To compel obedience to its judgments, decrees, orders and process, and to the orders of a judge out of court, in an action, suit or proceeding pending therein. (5) To control, in furtherance of justice, the conduct of its ministerial officers, and of all other persons in any manner connected with a judicial proceeding before it, in every matter appertaining thereto. (6) To compel the attendance of persons to testify in an action, suit or proceeding therein, in the cases and manner provided by law. (7) To administer oaths in an action, suit or proceeding pending therein, and in all other cases where it may be necessary in the exercise of its powers or the performance of its duties.

In State v. Gregory, 158 Wn.2d 759, 147 P.3d 1201 (2006), the defendant’s aunt was excluded from the courtroom during the testimony of his grandmother, because she appeared to be trying to

coach the witness from the spectator section. The Supreme Court noted that in Orange, Brightman, and Bone-Club, the trial court excluded all spectators from the courtroom for some portion of the trial, and that none of these cases “explicitly limited or undermined the trial court’s inherent authority to regulate the conduct of a trial by excluding one person from the courtroom for a limited period of time. . . . We conclude that Gregory’s right to a public trial was not violated.” Id., at 816. Similarly, the court in State v. Malone, 20 Wn. App. 712, 582 P.2d 883 (1978), found that Malone was not deprived of a public trial when the estranged husband of the victim was removed from the courtroom during her testimony. “The trial court, observing the conduct of an identified spectator, exercised its discretion in removing that spectator. We find no abuse of discretion.” Id., at 714.

A trial court has wide discretion to conduct a trial with “dignity, decorum and dispatch.” State v. Johnson, 77 Wn.2d 423, 426, 462 P.2d 933 (1969); *see also* State v. Towne, 13 Wn. App. 954, 538 P.2d 559 (1975); State v. Pacheo, 107 Wn.2d 59, 726 P.2d 981 (1986); State v. Russell, 141 Wn. App. 733, 172 P.3d 361 (2007). In Lormor’s case, while his daughter was excluded for the duration of the trial, the trial lasted for one afternoon. Her condition

was not going to change in that time, and thus the reason for her exclusion continued for the length of the trial. When the facts here are compared to those of the cases cited above, it is obvious that there was no courtroom closure such as to trigger the necessity of the Bone-Club analysis. There was no violation of his right to a public trial, and thus no prejudice will be presumed. He has not argued that there was any prejudice. The court did not err when it excluded his daughter without conducting a Bone-Club analysis.

2. Defense counsel was not ineffective for failing to object to the exclusion of Lormor's daughter from the courtroom without a Bone-Club analysis because such an analysis was not required.

To prevail on a claim of ineffective assistance of counsel, an appellant must show that (1) counsel's performance was deficient; and (2) the deficient performance prejudiced him. State v. Thomas, *supra*, at 225-26. Deficient performance occurs when counsel's performance falls below an objective standard of reasonableness. State v. Stenson, 132 Wn.2d 668, 705, 940 P.2d 1239 (1997), *cert. denied*, 523 U.S. 1008 (1998). An appellant cannot rely on matters of legitimate trial strategy or tactics to establish deficient performance. State v. Hendrickson, 129 Wn.2d 61, 77-78, 917 P.2d 563 (1996). Prejudice occurs when but for the deficient performance, the outcome would have been different. In the Matter

of the Personal Restraint Petition of Pirtle, 136 Wn.2d 467, 487, 965 P.2d 593 (1996). There is great judicial deference to counsel's performance and the analysis begins with a strong presumption that counsel was effective. Strickland v. Washington, 466 U.S. 668, 689, 104 S.Ct. 2052, 80 L. Ed. 2d 674 (1984); State v. McFarland, 127 Wn.2d 332, 335, 899 P.2d 1251 (1995). A reviewing court is not required to address both prongs of the test if the appellant makes an insufficient showing on one prong. State v. Fredrick, 45 Wn. App. 916, 923, 729 P.2d 56 (1989). Moreover, counsel's failure to offer a frivolous objection will not support a finding of ineffective assistance. State v. Briggins, 11 Wn. App. 687, 692, 524 P.2d 694, *review denied*, 84 Wn. 2d 1012 (1974).

A defendant must overcome the presumption of effective representation and demonstrate (1) that his lawyers' performance in not objecting to the comparability of his offenses was so deficient that he was deprived of "counsel" for Sixth Amendment purposes and (2) that there is a reasonable probability that the deficient performance prejudiced his defense. Strickland v. Washington, *supra*, at 687.

As argued above, the court was correct to exclude the defendant's daughter from the courtroom without conducting a

Bone-Club analysis. Such an objection would have been unsuccessful, if not frivolous, and therefore neither prong of the test has been met. Counsel was not ineffective.

D. CONCLUSION.

The exclusion of Lormor's very young, very ill daughter from the courtroom did not constitute a closure such as to require the analysis demanded by Bone-Club. His right to a public trial was not violated, and the State respectfully asks this court to affirm the conviction.

Respectfully submitted this 9th day of July, 2009.

Carol La Verne
Carol La Verne, WSBA# 19229
Attorney for Respondent

CERTIFICATE OF SERVICE

I certify that I served a copy of the Brief of Respondent, on all parties or their counsel of record on the date below as follows:

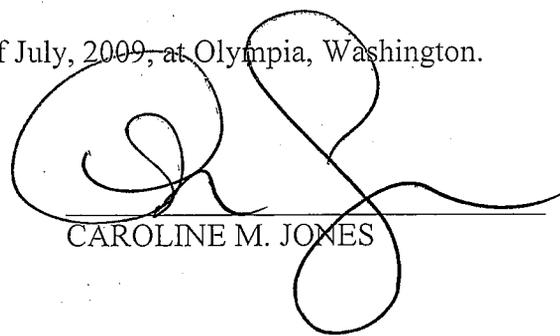
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BY 
DEPUTY

I certify under penalty of perjury under laws of the State of Washington that the foregoing is true and correct.

Dated this 10th day of July, 2009, at Olympia, Washington.


CAROLINE M. JONES