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I. INTRODUCTION.

This court has granted review of a Division II Court of Appeals decision affirming Dean Lormor's conviction for unlawful possession of a controlled substance, methamphetamine. That decision is reported at 154 Wn. App. 386, 224 P.3d 857 (2010). Lormor raised only two issues in the Court of Appeals—that his right to a public trial was violated and that his trial counsel was ineffective for failing to object to the exclusion of his almost-four-year-old, disabled daughter from the courtroom. The order of the Supreme Court is simply that review is granted. On the court's website, the issues have been framed as whether the daughter's exclusion constituted a closure of the courtroom and if it did, whether it was too trivial to implicate Lormor's right to a public trial

II. ISSUES

1. Whether excluding Lormor's daughter from the courtroom constituted a closure that required a Bone-Club¹ analysis.
2. If the exclusion of the daughter constituted a closure, whether it was too trivial to implicate Lormor's right to a public trial.
3. Whether Lormor was denied the effective assistance of counsel.

¹ State v. Bone-Club, 128 Wn.2d 254, 906 P.2d 325 (1995).

III. STATEMENT OF THE CASE.

The substantive and procedural facts of the case are set forth in the opinion of the Court of Appeals. State v. Lormor, 154 Wn. App. at 387-89.

IV. ARGUMENT.

- A. The exclusion of Lormor's four-year-old daughter from the courtroom did not constitute a closure, and thus no Bone-Club analysis was required.

The question as to whether an action by the trial court violates a defendant's right to a public trial is a question of law and is reviewed de novo by an appellate court. State v. Brightman, 155 Wn.2d 506, 514, 122 P.3d 150 (2005).

A defendant's right to a public trial is guaranteed by both the Washington and United States constitutions. The Sixth Amendment to the United Constitution provides, in relevant part, that "[i]n all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial . . .". Article 1, section 10, of the Washington constitution, provides that "[i]n criminal prosecutions the accused shall have the right . . . to have a speedy public trial by an impartial jury . . .". The public's right of an open trial is contained in Article 1, section 22 of the Washington constitution, which provides, in its entirety, that "[j]ustice in all cases shall be

administered openly, and without unnecessary delay.” From these constitutional guarantees has emerged a substantial body of law interpreting them, which Lormor now argues supports his claim that he was denied his right to a public trial because one person, a very young, very ill child was excluded from his trial. The State maintains that the constitutional language quoted above does not stretch far enough to cover this situation.

The Court of Appeals assumed, without analysis, that excluding Lormor’s young daughter constituted a closure. Lormor, 154 Wn. App. at 391. The court then concluded that the closure was too trivial to implicate constitutional concerns and affirmed. Id., at 394.

The majority of the cases dealing with courtroom closures concern a very different situation from what occurred here. For example, in Bone-Club, a pretrial suppression hearing was closed to the public. In In re Pers. Restraint of Orange, 152 Wn.2d 795, 100 P.3d 291 (2004), the courtroom was closed during voir dire. A portion of voir dire occurred in the judge’s chambers in State v. Strode, 167 Wn.2d 222, 217 P.3d 310 (2009), and State v. Momah, 167 Wn.2d 140, 217 P.3d 321 (2009). Only a few cases have dealt with an open courtroom challenge when one person was excluded.

In United States v. Perry, 479 F. 3d 885 (375 U.S. App. D.D. 238, 2007), the court excluded Perry's eight-year-old, apparently healthy son from the courtroom because it felt the child should not witness his father standing trial. The D. C. Circuit Court of Appeals affirmed. The court, without analysis and without explicitly saying so, also assumed that the exclusion of the child constituted a closure, but found it too trivial to implicate the Sixth Amendment. Id., at 890-91. The court noted that a prior Supreme Court case had "suggested, albeit in dicta," that the public trial right includes the right to have "his friends, relatives, and counsel present. . . ." Id., at 890. The Perry court went on to recognize that there are some exclusions which do not implicate the constitutional protections. These include excluding a member of the jury venire who was not chosen to be on the jury, the defendant's former mother-in-law, all spectators during a brief hearing to determine whether the jurors had safety concerns, and an inadvertent closing of the courtroom during the defendant's testimony. Id., at 890.

It is not clear why the Perry court considered excluding one child a closure. Reading the plain language of the constitutional amendments, it is not apparent that such an exclusion in any way affected the public nature of the trial or threatened the interests that

the constitutional guarantees protect. 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. State v. Brightman, 155 Wn.2d 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, 152 Wn.2d at 812.

In Perry, as in this case, not one of these concerns was affected. While the court did find that the closure was trivial, there was no clear answer as to why it was a closure at all. The case does demonstrate that the exclusion of Lormor’s daughter from the courtroom does not violate the Sixth Amendment. The Washington constitution is at a minimum coextensive with the federal, Bone-Club, 128 Wn.2d at 260; the Court of Appeals did not articulate any differences that would require, under the Washington constitution, that the exclusion of Lormor’s daughter be a closure of the courtroom.

In United States v. Shryock, 342 F.3d 948 (2003), a Ninth Circuit Court of Appeals case, the courtroom had been too small to accommodate all of the people who wanted to attend and the defendants claimed a violation of their public trial rights. The court disagreed, finding that:

[T]he public trial guarantee is not violated if an individual member of the public cannot gain admittance to a courtroom because there are no available seats. . . . A public trial implies only that the court must be open to those who wish to come, sit in the available seats, conduct themselves with decorum, and observe the trial process.

Id., at 974.

From these cases one can reasonably conclude that a courtroom closure does not necessarily follow each time some person who would like to be in the courtroom cannot be there.

The Court of Appeals distinguished State v. Gregory, 158 Wn.2d 759, 147 P.3d 1201 (2006), where the defendant's aunt was excluded from the courtroom while a particular witness was testifying, apparently because the aunt was prompting the witness, partly on the grounds that it did not involve the complete exclusion of a family member from both voir dire and the trial. Lormor, 154 Wn. App. at 390. The courts have recognized the value to the defendant of the insight his family members could bring to jury

selection. Nevertheless, it still does not follow that the exclusion of a four-year-old, extremely ill child causes the courtroom to be closed. Every other member of the defendant's family, his friends, his acquaintances, total strangers, and the press were free to watch voir dire and the trial. Nothing in the constitutional language requires a finding that the exclusion of one person from the trial is a courtroom closure. Such exclusion might implicate other rights; for example, if the defendant himself is excluded there are issues of his right to be present and confront witnesses, but it does not become a courtroom closure. The State maintains that the Washington constitution does not require that the exclusion of Lormor's daughter be considered a closure of the courtroom. It follows that if the courtroom was not closed, there was no requirement for the court to conduct a Bone-Club analysis.

- B. Even if the courtroom was closed, any violation of the defendant's public trial right was too trivial to require a remedy.

Division Two of the Court of Appeals, in State v. Erickson, 146 Wn. App. 200, 211, 189 P.3d 245 (2008), agreed with Division Three's opinion in State v. Duckett, 141 Wn. App. 797, 173 P.3d 948 (2007), that the public trial right is not subject to a de minimus

exception under the Washington constitution. This court, in State v. Easterling, 157 Wn.2d 167, 137 P.3d 825 (2006), discussed trivial or de minimus violations of the right to a public trial, but said, “Even if we were to indicate a tolerance for so called ‘trivial closures,’ the closure here could not be placed in that category because it was deliberately ordered and was neither ministerial in nature nor trivial in result.” Id., at 180-81. In Easterling, not only the public, but Easterling and his attorney, were excluded from pretrial hearings concerning a codefendant. The State agrees that such a circumstance is not trivial.

In Lormor’s case, however, the situation was much different. The court below adopted the federal concept that a trivial closure does not violate the defendant’s right to a public trial.. Lormor, 154 Wn. App. at 393-94. “Trivial closures have been defined as those that are brief and inadvertent.” State v. Strode, 167 Wn.2d 222, 230, 217 p.3d 310 (2009) (citing to United States v. Al-Smadi, 15 F.3d 154-55 (10th Cir. 1994)). Harmless and trivial error can be synonymous:

A harmless error is an error which is trivial, or formal, or merely academic, and was not prejudicial to the substantial rights of the party assigning it, and in no way affected the outcome of the case.

.....
“One very common test which is applied in a variety of situations is whether or not the error affected the result. If it did not, then it is not reversible error.”

State v. Britton, 27 Wn.2d 336, 341, 178 P.2d 341 (1947) (quoting from 3 Am. Jur. 563, section 1007).

Reversal is automatic if errors are structural in nature. “An error is structural when it necessarily renders a criminal trial fundamentally unfair or an unreliable vehicle for determining guilt or innocence. In each case, the remedy must be appropriate to the violation.” State v. Momah, 167 Wn.2d 140, 155-56, 217 P.3d 321 (2009). Some courtroom closures, even if they constitute error, are not fundamentally unfair and therefore not structural errors. Id., at 150. A new trial is required when the closure caused the trial to be fundamentally unfair. Id., at 150.

In Lormor’s case, the exclusion of a four-year-old child did nothing to cause the trial to be fundamentally unfair. It did not affect the evidence that was presented. It did not prevent Lormor from presenting his defense. The only difference it made was to prevent the jury from being distracted. Lormor may have thought that the sight of the child would make the jury more sympathetic to

him, and perhaps it would have. But that has nothing to do with the search for the truth, and juries are routinely instructed not to let sympathy or prejudice influence their decisions. Every purpose of a trial was fulfilled without the child being present. If a new trial is held, nothing will change in the conduct of the trial itself.

The Bone-Club court, citing to State v. Marsh, 126 Wash. 142, 146-47, 217 P. 705 (1923), found that when a violation of the right to a public trial occurs, prejudice is presumed. Bone-Club, 128 Wn.2d at 261-62. Prejudice has not always been presumed just because a Bone-Club analysis was not conducted by the trial court. Brightman noted that trivial closures might not violate a defendant's right to a public trial. Brightman, 155 Wn.2d at 517. The court in Momah affirmed even though the Bone-Club analysis had not been done. Prejudice does not inevitably follow the failure to consider the Bone-Club factors.

At Lormor's trial the court was concerned not only about the welfare of the child but the distraction that her ventilator would be to the jury. The Court of Appeals was correct in holding that the ruling advanced Lormor's right to a fair trial. Lormor, 154 Wn. App. at 394.

C. Lormor was not denied effective assistance of counsel.

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, 109 Wn.2d 222, 225-26, 743 P.2d 816 (1987). 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). 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).

As argued above, the Court of Appeals was correct in holding that the exclusion of Lormor's daughter did not affect his

right to a public trial, and therefore an objection would have been useless. Further, even if there had been reason to object, and counsel made the objection, the result would be that the trial court would have conducted the Bone-Club analysis. Almost certainly the child would have been excluded anyway. Therefore, Lormor cannot show that the outcome of the case would have been different had his attorney made the objection, and his claim of ineffective assistance of counsel fails.

V. CONCLUSION.

Neither the Washington nor federal constitution requires the conclusion that excluding one person from the courtroom constitutes a courtroom closure that triggers the need for the Bone-Club analysis. Even if error occurred in this case, it was so trivial that it had no impact whatsoever on the fairness of the trial, and therefore Lormor is not entitled to reversal and a new trial. Finally, he has not established that the outcome of his trial would have been different if his attorney had made an objection to the exclusion of his daughter from

the courtroom, and therefore he has not established ineffective assistance of counsel.

Respectfully submitted this 2d day of September, 2010.



Carol La Verne, WSBA# 19229
Attorney for Respondent

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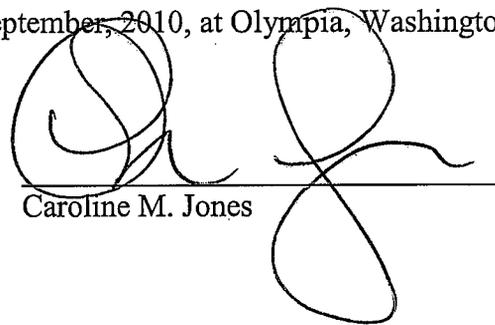
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THOMAS EDWARD DOYLE
ATTORNEY AT LAW
PO BOX 510
HANSVILLE WA 98340-0510

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

Dated this 3 day of September, 2010, at Olympia, Washington.



Caroline M. Jones