

NO. 65053-0-I

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

STATE OF WASHINGTON,

Respondent,

v.

GREGORY SHEARER,

Appellant.

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

The Honorable Charles R. Snyder, Judge

REPLY BRIEF OF APPELLANT

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A. ARGUMENT IN REPLY¹

QUESTIONING ONE PROSPECTIVE JUROR IN CHAMBERS
VIOLATED SHEARER'S RIGHT TO A PUBLIC TRIAL.

Shearer contends the trial court violated his right to a public trial by asking prospective juror 7 voir dire questions in chambers after the juror said it was difficult to discuss a domestic violence incident in front of strangers. Supplemental Brief (SB). In response, the state contends: (1) that Shearer should be required to show the private questioning was a manifest error of constitutional error, Brief of Respondent (BOR) at 10-11; (2) that the closure was "so minimal that it did not implicate Shearer's right to a public trial," BOR at 12-18; and (3) that granting a new trial is not the appropriate remedy because the private questioning "did not render Shearer's trial fundamentally unfair," BOR at 18-23.

1. Shearer is not required to show the closure was a manifest error of constitutional magnitude.

With respect to (1), the state concedes "this Court has held otherwise and therefore Shearer is not obligated" to make the showing required by RAP 2.5(a)(3). BOR at 11. This is true. Without belaboring

¹ Shearer rests on the Brief of Appellant at 12-26 with respect to the arguments that the trial court erroneously admitted the complainant's written statements under ER 801(d)(1)(i) and that trial counsel deprived him of his constitutional right to effective representation for failing to object.

the point, the Supreme Court recently held "the public trial right is considered an issue of such constitutional magnitude that it may be raised for the first time on appeal." State v. Strode, 167 Wn.2d 222, 229, 217 P.3d 310 (2009).

In Shearer's case, the trial court asked, "Is this [*sic*] anyone in this courtroom who would have any objection if we leave the courtroom for a moment? If the court reporter, counsel, and myself, and the defendant went into chambers to ask some questions of Juror Number 7 in private?" RPVD 39.

This appears to be the court's attempt to satisfy at least factor (2) of the 5-factor test articulated in State v. Bone-Club, 128 Wn.2d 254, 258-59, 906 P.2d 325 (1995) ("Anyone present when the closure motion is made must be given an opportunity to object to the closure."). But the very wording of the court's question presumes counsel and the defendant would be part of the in-chambers questioning. The court plainly directed the query to spectators and not participants. As a result, the court not only initiated the private procedure, but also effectively excluded counsel and Shearer from those person present in the courtroom who could object.

For these reasons, Shearer's failure to object did not require him to demonstrate the closure was a manifest error of constitutional magnitude.

This Court should reject such a notion and accept the state's concession there is no authority to support it.

2. The brief closure to question one prospective juror implicated Shearer's right to a public trial.

The state maintains the closure in Shearer's case was too minimal to implicate public trial rights. In Washington, no court has found the full closure of a portion of voir dire de minimis. See Strode, 167 Wn.2d at 230 (observing that Supreme Court "has never found a public trial right violation to be [trivial or] de minimis."), quoting State v. Easterling, 157 Wn.2d 167, 180, 137 P.3d 825 (2006).

The federal cases the state cites in support are distinguishable. In United States v. Ivester, 316 F.3d 955 (9th Cir. 2003), the trial court questioned one juror mid-trial, and then the entire panel, in a closed courtroom to determine whether they felt safe. The appellate court found the closure did not violate Ivester's right to a public trial because the question of juror safety was an administrative problem that had no bearing on Ivester's guilt or innocence, did not infect any witness's testimony or counsel's arguments, did not attack the government, and was very brief in duration. Id. at 960.

The reason for closure in Shearer's case was not merely an administrative matter. Instead, the questioning of Juror 7 went to the heart

of voir dire – whether she was fit to serve fairly as a witness. Her answers could have affected guilt or innocence as well as each party's case. For these reasons, Ivester does not help the state.

In Peterson v. Williams, 85 F.3d 39 (2d Cir. 1996), the trial court ordered the courtroom closed only for the testimony of an undercover police officer, which was not contested. But because of inadvertent administrative error, the courtroom remained closed during the defendant's brief testimony, which immediately followed. Id., 85 F.3d at 41. The courtroom was reopened before closing arguments, during which defense counsel summarized his client's testimony. Id., 85 F.3d at 43. In a very limited holding, the appellate court held, "[I]n the context of this case, where the closure was 1) extremely short, 2) followed by a helpful summation, and 3) entirely inadvertent, the defendant's Sixth Amendment rights were not breached." Id. 85 F.3d at 44.

In Shearer's case, those members of the public who were excluded from the in-chambers questioning did not hear a "helpful summation" of the matters discussed. Nor, of course, was the closure "entirely inadvertent." Strode, 167 Wn.2d at 230 (noting that while federal cases have held that "[t]rivial closures have been defined to be those that are brief and inadvertent," closure of part of voir dire there was not inadvertent); State v. Brightman, 155 Wn.2d 506, 517, 122 P.3d 150

(2005) (distinguishing cases by noting "the trial court's ruling in this case clearly amounts to an affirmative act.").

Finally, the state cites Snyder v. Coiner, 510 F.2d 224 (4th Cir. 1975). In that case, a bailiff refused to allow additional persons to enter or leave the courtroom during a part of closing arguments to prevent disturbances. Id. at 230. The court found the closure trivial, noting "[t]here were no restrictions placed on the defendant, his counsel, family or witnesses or even spectators then in the courtroom." Id. See also Carson v. Fischer, 421 F.3d 83, 93 (2d Cir. 2005) ("presence of four of Carson's family members . . . law enforcement personnel, counsel, and members of the jury during Sanchez's testimony clearly safeguarded the first, second, and fourth reasons for the public trial right. This is not a case like Oliver or Waller, where the court conducted a hearing in the absence of jurors and the public.").

Shearer's case is easily distinguishable. The in-chambers voir dire was closed to all spectators, whether they were in the courtroom or not. And the closure, again, was not inadvertent. Snyder thus does not support a claim the closure in Shearer's case was trivial. See State v. Erickson, 146 Wn. App. 200, 209, 189 P.3d 245 (2008) ("the private questioning of jurors, even if done to protect jurors' privacy or to elicit more truthful or forthright answers during voir dire regarding their ability to serve, is more

than trivial in terms of its effect on the proceedings."), petition for review stayed.

The state next asks this Court to adopt the reasoning of dissenting Judge Hunt in State v. Leyerle, 158 Wn. App. 474, 242 P.3d 921 (2010), upon which Shearer relied in his brief. SB at 13. Aside from ignoring well-established Supreme Court precedent, the dissent is not correct.

First, Judge Hunt was careful to limit application of her analysis to the specific facts: (1) that the challenged voir dire procedure occurred in a public hallway outside a courtroom rather than chambers or the jury room, which are "typically considered private;" (2) that there were no members of the public in the courtroom when the court relocated the questioning; (3) that the trial court videotaped the hallway proceeding, transcribed its four pages, and made it available for public review; and (4) that defense counsel assented to the procedure and Leyerle waived his presence on the record. Leyerle, 158 Wn. App. at 487-90 & n.25.

Shearer's case is distinguishable. First, the private voir dire occurred in chambers, which is not typically considered open to the public. Second, it appears the judge was speaking with spectators when he asked whether there was anyone in the courtroom who would object to in-chambers questioning of Juror 7 by counsel in the presence of the court and court reporter. RPVD 39. Third, the court reporter transcribed the in-

chambers voir dire, but no member of the public observed it as it happened. Finally, neither defense counsel nor Shearer himself assented to the private procedure. Therefore, the dissent in Leyerle, even if it had precedential value, does not apply to Shearer's case.

Judge Hunt also found that even if the trial court closed the voir dire by taking the juror into the hallway, the remedy should not be a new trial because it would amount to a "windfall" for Shearer. Leyerle, 158 Wn. App. at 490-92. The "windfall" rationale comes from Waller v. Georgia, 467 U.S. 39, 42, 49-50, 104 S. Ct. 2210, 81 L. Ed. 3d 31 (1984), where the question was whether retrial was the proper remedy for an unlawful closure of a pretrial suppression hearing. The Court held a new trial would be a windfall:

[T]he remedy should be appropriate to the violation. If, after a new suppression hearing, essentially the same evidence is suppressed, a new trial presumably would be a windfall for the defendant, and not in the public interest.

Waller, 467 U.S. at 50. Consistent with this "appropriate remedy" standard, the Court ordered only a new suppression hearing, with the instruction to the trial court to decide "what portions, if any, may be closed." Id.

Our Supreme Court considered and rejected this remedy in State v. Bone-Club, 128 Wn.2d at 261-62. It held, "Even if the new suppression

hearing again results in the admission of [the defendant's statements to the officer], Defendant should have the opportunity to use any such variances in testimony [in the officer's testimony in an open rather than closed hearing] for impeachment purposes in a new trial." Bone-Club, 128 Wn.2d at 262. Judge Hunt failed to discuss this holding during her discussion of Waller.

In any event, the closed proceeding in Waller was not voir dire. In Washington, absent extraordinary circumstances, the remedy for closed voir dire is a new trial. Strode, 167 Wn.2d at 231, citing In re Personal Restraint of Orange, 152 Wn.2d 795, 814, 100 P.3d 291 (2004). There were no extraordinary circumstances here, as discussed in Shearer's Supplemental Brief at 11-12. The dissent in Leyerle thus offers the state no refuge.

3. Reversal of Shearer's conviction is warranted under Momah.

The state maintains that even if the court's hallway questioning of Juror 7 was error, it was not structural error and thus does not warrant reversal. BOR at 18-23. For support, the state cites the following portion of State v. Momah, 167 Wash.2d 140, 155-56, 217 P.3d 321 (2009):

[C]ourts grant automatic reversal and remand for a new trial only when 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.

BOR at 18.

Shearer discussed this aspect of the case in detail. SB at 7-13.

What the state fails to recognize or ignores by advancing this argument is that Momah is factually distinguishable, as the Supreme Court recognized in the following passage immediately following the quoted passage above:

We hold the closure in this case was not a structural error. The closure occurred to protect Momah's rights and did not actually prejudice him. The record reveals that due to the publicity of Momah's case, the defense and the trial court had legitimate concerns about biased jurors or those with prior knowledge of Momah's case. The record also demonstrates that the trial court recognized the competing article I, section 22 interests in this case. The court, in consultation with the defense and the prosecution, carefully considered the defendant's rights and closed a portion of voir dire to safeguard the accused's right to an impartial jury. Further, the closure was narrowly tailored to accommodate only those jurors who had indicated that they may have a problem being fair or impartial. *Momah affirmatively accepted the closure, argued for the expansion of it, actively participated in it, and sought benefit from it.* Thus, the underlying facts and impact of the closure in Momah are significantly different from those presented by our previous cases.

Momah, 167 Wn.2d at 156.

The trial court in Shearer's case did not "carefully consider the defendant's rights." Instead, the court questioned Juror 7 because it was "difficult to talk in front of a bunch of strangers." RPVD 38. The prospective juror gave no indication, as was the driving concern in

Momah, that she had prejudged Shearer's case because of knowledge she had gained about the case. The court therefore did not indicate it considered Shearer's right to a fair trial, but rather only Juror 7's privacy interest. While this interest is compelling, it alone does not justify failing to consider the other Bone-Club factors. See Strobe, 167 Wn.2d at 229 ("even if the trial court concluded that there was a compelling interest favoring closure, it must still perform the remaining four Bone-Club steps to thoroughly weigh the competing interests.").

There was also no undue publicity leading up to Shearer's trial. There was thus no "legitimate concern" about biased jurors or those with prior knowledge" about the case.

Nor did the trial court "consult" with the defense and prosecution before moving into the hallway. Rather, the court asked whether "anyone in this courtroom would have any objection" if the court reporter, counsel, the defendant, and the court "went into chambers" to ask Juror 7 some questions in private. RPVD 39.

This question presupposed defense counsel would participate in the procedure. The judge plainly directly the question to spectators. This was not an invitation to defense counsel to object. And it certainly was not consultation. Therefore, Shearer's counsel did not "affirmatively accept" the closure.

Counsel also did not ask Juror 7 any questions before moving to strike for cause; this was, therefore, not the kind of "active participation" the Momah Court contemplated.

Finally, counsel did not seek expansion of the private procedure. Cf., State v. Strode, 167 Wn.2d at 234 (Fairhurst, J, concurring):

[M]omah himself established the need for private individual questioning to avoid contamination of the jury pool. There is no suggestion that Momah was denied the right to object. The individual questioning of jurors behind closed doors, whether in a courtroom or another room, was the only adequate way to sufficiently protect the defendant's right to an impartial jury, and the record shows practical matters came into play, such as the size of the jury pool and room availability.

Shearer's case is different than Momah. Instead, it is controlled by Strode. In Strode, at least 11 prospective jurors who indicated they, or anyone close to them, had either been the victim of sexual abuse or accused of committing a sexual offense, were called one at a time into the judge's chambers for questioning on the issue of whether their past experiences would preclude them from rendering a fair and impartial verdict in the case. Strode, 167 Wn.2d at 224. This, the Court held, was "a courtroom closure and a denial of the right to a public trial." Id., 167 Wn.2d at 227.

The Court also held, "Strode's failure to object to the closure or his counsel's participation in closed questioning of prospective jurors did not

. . . constitute a waiver of his right to a public trial." Id., 167 Wn.2d at 229.

Finally, the Court plainly held, [D]enial of the public trial right is deemed to be a structural error and prejudice is necessarily presumed." Id., 167 Wn.2d at 231.

The same result is warranted in Shearer's case.

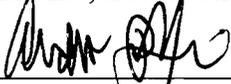
B. CONCLUSION

For the reasons cited herein and in his Brief of Appellant, Shearer requests this Court to reverse his convictions and remand for a new trial.

DATED this 31 day of March, 2011.

Respectfully submitted,

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**IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON
DIVISION ONE**

STATE OF WASHINGTON,)	
)	
Respondent,)	
)	
v.)	COA NO. 65053-0-1
)	
GREGORY SHEARER,)	
)	
Appellant.)	

DECLARATION OF SERVICE

I, PATRICK MAYOVSKY, DECLARE UNDER PENALTY OF PERJURY UNDER THE LAWS OF THE STATE OF WASHINGTON THAT THE FOLLOWING IS TRUE AND CORRECT:

THAT ON THE 31ST DAY OF MARCH, 2011, I CAUSED A TRUE AND CORRECT COPY OF THE **REPLY BRIEF OF APPELLANT** TO BE SERVED ON THE PARTY / PARTIES DESIGNATED BELOW BY DEPOSITING SAID DOCUMENT IN THE UNITED STATES MAIL.

[X] SHANNON CONNOR
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SIGNED IN SEATTLE WASHINGTON, THIS 31ST DAY OF MARCH, 2011.

x *Patrick Mayovsky*