

64100-0

64100-0

NO. 64100-0-1

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

STATE OF WASHINGTON,

Respondent,

v.

RONALD APPELATE,

Appellant.

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

REPLY BRIEF OF APPELLANT

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A. ARGUMENT

1. THE TRIAL COURT VIOLATED MR. APPLGATE'S
CONSTITUTIONAL RIGHT TO A PUBLIC TRIAL.

In his opening brief, Mr. Applegate argued that his exceptional sentence must be reversed and his case remanded for a new trial on the aggravating factors because the trial court violated the constitutional right to a public trial by holding a portion of voir dire in chambers without complying with the procedures set forth in State v. Bone-Club, 128 Wn.2d 254, 258-59, 906 P.2d 325 (1995). Specifically, the trial court failed to (1) identify a compelling interest in closure, (2) show a serious or imminent threat to the unnamed interest, (3) balance the unnamed interest against the public's interest in open proceedings, or (4) enter formal findings and conclusions. Br. of Appellant at 9-13.

The State argues that holding voir dire in chambers does not constitute holding proceedings outside the public courtroom, and that even if it does Mr. Applegate waived his right to a public trial by stating he did not object. The State's arguments are foreclosed by recent decisions of this Court and the Supreme Court, including Strode, Momah, and Bowen.

a. Mr. Applegate's failure to object to the private juror questioning did not effect a waiver of his right to a public trial. In its response brief, the State first argues that Mr. Applegate waived his right to a public trial by not objecting to the questioning of jurors in chambers. Br. of Resp't at 7-11. The State is wrong. It is true that the trial court satisfied the second Bone-Club factor here by giving those present an opportunity to object, but the court's failure to address the other factors requires reversal. State v. Strode, 167 Wn.2d 222, 227-29, 217 P.3d 310 (2009) (lead opinion); id. at 236 (concurring opinion); Bone-Club, 128 Wn.2d at 257-59.

Our Supreme Court has long held that a “[d]efendant’s failure to object contemporaneously [does] not effect a waiver.” Bone-Club, 128 Wn.2d at 257.

To the contrary, this court has held an opportunity to object holds no practical meaning unless the court informs potential objectors of the nature of the asserted interests. The motion to close, not Defendant’s objection, triggered the trial court’s duty to perform the weighing procedure.

Id. at 261 (internal quotation omitted). In Mr. Applegate’s case, the court did not inform potential objectors of the nature of the interest at stake, and did not perform the required weighing procedure. Accordingly, under Bone-Club, Mr. Applegate’s failure to object did

not absolve the court of its duty to address the necessary factors. Id. Rather, “the trial court, as the proponent of closure, was required to identify a compelling interest that the closure was essential to protect” as well as a serious and imminent threat to that compelling interest. In re Personal Restraint of Orange, 152 Wn.2d 795, 809, 100 P.3d 291 (2005).

The Supreme Court reaffirmed the Bone-Club principle in Strode. There, “defense counsel agreed the court should individually voir dire the 11 jurors.” Strode, 167 Wn.2d at 237 (C. Johnson, J., dissenting) (emphasis added). Nevertheless, six justices held that the defendant did not waive his constitutional right to a public trial when his attorney acquiesced to the private questioning of jurors. Id. at 229 (lead opinion), and 234 (concurring opinion).

The concurring justices in Strode explained that Momah was different because Momah’s attorney “affirmatively sought individual questioning of the jurors in private, sought to expand the number of jurors subject to such questioning, and actively engaged in discussions about how to accomplish this.” Strode, 167 Wn.2d at 234 (Fairhurst, J., concurring) (discussing State v. Momah, 167 Wn.2d 140, 217 P.3d 321 (2009)). Indeed, in Momah, the defense

attorney is the one who requested in-chambers voir dire in order to safeguard the defendant's right to a fair trial. Momah, 167 Wn.2d at 151-52. Mr. Applegate, however, did not affirmatively seek private questioning of jurors, did not seek to expand the number of jurors subject to such questioning, and did not actively engage in discussions about how to accomplish private voir dire. He merely acquiesced to the court's decision to engage in private juror questioning. Accordingly, he did not waive the right to a public trial. Strode, 167 Wn.2d at 229 and 234; Bone-Club, 128 Wn.2d at 257.

In addition to Strode, this Court's recent decision in Bowen controls this case. State v. Bowen, No. 39096-5-II (filed 7/20/2010). There, as here, the trial court asked, "Does either party have an objection to allowing jurors to take up sensitive issues, sensitive questions, in chambers if they feel that that would be beneficial to them?" Bowen, slip op. at 2. And, as here, both the defense attorney and the prosecutor stated they had no objections. Id. Also as here, the trial court asked the public if it had any objections, and no one objected. Id. at 3.

The trial court questioned some members of the venire in chambers, the defendant was convicted, and this Court reversed for the violation of the right to a public trial. Although the trial

defense attorney had stated he did not object to the in-chambers questioning, this Court held: “We agree that the trial court did not conduct the required analysis prior to closing the courtroom and further find that Bowen did not waive his article I, section 22 right to a public trial.” Bowen, slip op. at 4.

“To protect the public trial right and determine whether circumstances warrant a closure, Washington courts must apply the Bone-club guidelines and make specific findings on the record justifying a closure.” Id. at 5-6 (citing Momah, 167 Wn.2d at 148-49).

We conclude that the circumstances in this case are more similar to those in Strode than those in Momah. Here, the trial court, not defense counsel, proposed individual in-chambers voir dire of jury pool members. ... Furthermore, the record does not indicate circumstances requiring individual questioning of jurors in chambers, as opposed to another public location. ... Accordingly, we hold that this closure constituted structural error.

Bowen, slip op. at 8-9.

Like Bowen, the circumstances in Mr. Applegate’s case are more similar to those in Strode than those in Momah. As in Bowen, the trial court, not defense counsel, proposed individual in-chambers voir dire. As in Bowen, the record does not indicate circumstances requiring individual questioning of jurors in

chambers, as opposed to another public location. As in Bowen, the closure constituted structural error.

b. The judge held proceedings outside the public courtroom when he questioned a potential juror in chambers. The State then attempts to argue that in-chambers questioning of potential jurors does not constitute a closure of the public courtroom. Br. of Resp't at 12-14. This argument is without merit. By definition, a judge's chambers is not a "public courtroom." Proceedings may not be held "outside the public courtroom" except in "the most unusual circumstances." Strode, 167 Wn.2d at 226; State v. Easterling, 157 Wn.2d 167, 174-75, 137 P.3d 825 (2006)..

The State's reliance on the Court of Appeals' opinion in Momah is unavailing. Br. of Resp't at 12 (citing State v. Momah, 141 Wn. App. 705, 171 P.3d 1064 (2007)). The Court of Appeals held there was no closure at all when the trial judge held portions of voir dire in chambers, and thus did not reach the question of whether a closure would have been proper. Id. at 711-16. But the Supreme Court rejected that analysis, stating, "we find the trial court ... closed the courtroom...." Momah, 167 Wn.2d at 145.

In sum, because the court held a portion of voir dire outside the public courtroom without conducting a proper Bone-Club

analysis, the exceptional sentence must be reversed, and the case remanded for a new trial.

2. THE CONVICTIONS ON TWO AGGRAVATING FACTORS WHICH ARE THE SAME IN FACT AND LAW VIOLATE DOUBLE JEOPARDY, REQUIRING VACATION OF THE “ONGOING PATTERN” CONVICTION.

Mr. Applegate was convicted of six counts each of two different aggravated felonies: second-degree rape of a child aggravated by an ongoing pattern of sexual abuse, and second-degree rape of a child aggravated by domestic violence. CP 4, 16-17, 32-34. But as explained in Mr. Applegate’s opening brief, the “ongoing pattern” aggravating factor is a subset, or lesser-included offense, of the “domestic violence” aggravating factor. Accordingly, entering convictions for both aggravators violates the prohibition on double jeopardy. The “ongoing pattern” conviction should be vacated for each count. Br. of Appellant at 13-20.

The State asserts that a double-jeopardy violation may not be raised for the first time on appeal. Br. of Resp’t at 14-15. The State is wrong. An appellant may raise a manifest constitutional error on appeal even if the issue was not addressed at trial. RAP 2.5(a). Thus, “[a] double jeopardy claim may be raised for the first

time on appeal.” State v. Jackman, 156 Wn.2d 736, 746, 132 P.3d 136 (2006).

The State then argues that double-jeopardy protections do not apply to aggravating factors. Br. of Resp’t at 14, 16. The State ignores the United States Supreme Court’s opinion in Sattazahn, in which seven justices held that double jeopardy protections do apply to exceptional sentences. Sattazahn v. Pennsylvania, 537 U.S. 101, 111 (3-justice plurality) & 118 (4-justice dissent), 123 S.Ct. 732, 154 L.ed.2d 588 (2003). The plurality explained:

Our decision in Apprendi v. New Jersey, 530 U.S. 466, 147 L.ed.2d 435, 120 S.Ct. 2348 (2000), clarified what constitutes an “element” of an offense for purposes of the Sixth Amendment’s jury-trial guarantee. Put simply, if the existence of any fact (other than a prior conviction) increases the maximum punishment that may be imposed on a defendant, that fact – no matter how the State labels it – constitutes an element, and must be found by a jury beyond a reasonable doubt. Id. at 482-84, 490.

...

[A]ggravating circumstances ... operate as the functional equivalent of an element of a greater offense.

...

We can think of no principled reason to distinguish, in this context, between what constitutes an offense for purposes of the Sixth Amendment’s jury-trial guarantee and what constitutes an “offence” for purposes of the Fifth Amendment’s Double Jeopardy Clause.

Sattazahn, 537 U.S. at 111. The four dissenters agreed that double jeopardy protections apply to aggravating factors, and indeed, would have reversed the petitioner's death sentence for a double-jeopardy violation. Id. at 126 (Ginsburg, J., dissenting); id. at n.6 ("This Court has determined" that "sentencing proceedings involving proof of one or more aggravating factors are to be treated as trials of separate offenses, not mere sentencing proceedings").

The State then argues that the "ongoing patter" aggravator is not a lesser-included offense of the "domestic violence" aggravator because it requires a finding that the victim was under the age of 18. Br. of Resp't at 14, 17-18. The State ignores the rule that the elements must be evaluated "as charged and proved, not merely as the level of an abstract articulation of the elements." State v. Freeman, 153 Wn.2d 765, 777, 108 P.3d 753 (2005). In this case, the underlying crime (second-degree rape of a child) includes an even stricter age element, which necessarily applies both to the crime of second-degree rape of a child aggravated by an ongoing pattern of sexual abuse, and second-degree rape of a child aggravated by domestic violence. CP 38-40; RCW 9A.44.076. Thus, the former offense did not require proof of a fact which the

latter did not. The two are the same offenses for double-jeopardy purposes. See Orange, 152 Wn.2d at 817.

The State's theory was that the "domestic violence" aggravator applied because Mr. Applegate engaged in an ongoing pattern of sexual abuse against his stepdaughter and niece, and that the "ongoing pattern" aggravator applied because Mr. Applegate engaged in an ongoing pattern of sexual abuse against his stepdaughter and niece. The two convictions are the same in law and fact, and violate the prohibition on double jeopardy. The "ongoing pattern" aggravator must be vacated for all six counts. State v. Womac, 160 Wn.2d 643, 656, 160 P.3d 40 (2007).

3. THE TRIAL COURT VIOLATED MR. APPLGATE'S RIGHT TO DUE PROCESS BY OMITTING THE TO-CONVICT INSTRUCTION FOR THE "ONGOING PATTERN" AGGRAVATOR.

As explained in Mr. Applegate's opening brief, the trial court failed to provide a "to convict" jury instruction for the "ongoing pattern" aggravator, requiring reversal of that aggravating factor for all six counts. Br. of Appellant at 20-23 (citing, inter alia, State v. Smith, 131 Wn.2d 258, 263, 930 P.2d 917 (1997)).

The State wrongly asserts that this error is not one of constitutional magnitude that Mr. Applegate may raise for the first

time on appeal. Br. of Resp't at 18-20. The Supreme Court has held otherwise. In Mills, the Court held that the failure to provide the jury with a to-convict instruction listing every element of the crime charged is an error of constitutional magnitude that may be raised for the first time on appeal. State v. Mills, 154 Wn.2d 1, 6, 109 P.3d 415 (2005). This is because omission of the to-convict instruction or an element therefrom "obviously affect[s] a defendant's constitutional rights by violating an explicit constitutional provision or denying the defendant a fair trial through a complete verdict." State v. O'Hara, 167 Wn.2d 91, 103, 217 P.3d 756 (2009).

The State then makes the same error it made in its double-jeopardy analysis, claiming Mr. Applegate had no due process right to a proper to-convict instruction because he was charged with a "sentencing aggravating factor." Br. of Resp't at 19-23. Again, the State misunderstands Apprendi and its progeny. Under those cases, an aggravating factor is indistinguishable from an element of a higher crime. See Blakely v. Washington, 542 U.S. 296, 307, 124 S.Ct. 2531, 159 L.Ed.2d 403 (2004) (second-degree kidnapping with sentence enhancement for deliberate cruelty was essentially the same as first-degree kidnapping); Ring v. Arizona, 536 U.S.

584, 605, 122 S.Ct. 2428, 153 L.Ed.2d 18 (2002) (aggravating factor increasing punishment for crime “is an element of the aggravated crime”); Apprendi, 530 U.S. at 478 (“Any possible distinction between an ‘element’ of a felony offense and a ‘sentencing factor’ was unknown to the practice of criminal indictment, trial by jury, and judgment by court as it existed during the years surrounding our Nation’s founding”). Indeed, Apprendi was a due process case, not a Sixth Amendment case. See id. at 469. The State’s reliance on the pre-Apprendi case of Kincaid is therefore unavailing. Br. of Resp’t at 21 (citing State v. Kincaid, 103 Wn.2d 304, 692 P.2d 823 (1985)).

The State argues that this Court “agreed” with Kincaid in Gordon, but in fact, this Court merely recognized Kincaid’s holding. State v. Gordon, 153 Wn. App. 516, 534 n.9, 223 P.3d 519 (2009). The adequacy of the to-convict instruction was not raised in Gordon, but this Court’s pronouncements on instructions generally are helpful. This Court concluded:

After Apprendi and Ring, the alleged error here can be fairly characterized as failing to properly instruct on an element of the aggravated crime. We hold that aggravating factors are elements of the crime for purposes of instructing the jury on exceptional sentencing.

Id. at 534. Given that “aggravating factors are elements of the crime for purposes of instructing the jury on exceptional sentencing,” id., and “a to-convict instruction must contain all of the elements of the crime,” Smith, 131 Wn.2d at 263, aggravating factors must be in the to-convict instruction. Gordon, 153 Wn. App. at 534; Smith, 131 Wn.2d at 263.

Finally, the State argues there was no due process violation because the instruction comported with the WPIC. Br. of Resp’t at 23. But WPICS are not statements of the law, and are often incorrect. State v. Kylo, 166 Wn.2d 856, 866, 215 P.3d 177 (2009) (defendant received ineffective assistance of counsel where his attorney proposed an instruction matching the WPIC, because “there were several cases that should have indicated to counsel that the pattern instruction was flawed”); see also State v. Freeburg, 105 Wn. App. 492, 507, 20 P.3d 984 (2001) (urging trial courts to deviate from improper self-defense WPIC). The fact that the trial court followed the WPIC is therefore of no moment.

In sum, because the “ongoing pattern” aggravating factor was not in a to-convict instruction, Mr. Applegate’s right to due process was violated. This Court should reverse the “ongoing pattern” aggravator for all six counts.

4. THE APPLICATION OF THE DOMESTIC VIOLENCE
ENHANCEMENT TO MR. APPLGATE VIOLATED
THE EX POST FACTO CLAUSE.

As explained in Mr. Applegate's opening brief, the application of the domestic violence enhancement to Mr. Applegate violated the ex post facto clause because Mr. Applegate committed his crimes in 1989 and the legislature did not add this aggravating factor until 1996. Br. of Appellant at 23-26.

The State again complains that Mr. Applegate failed to raise this issue below, but an ex post facto violation is a manifest error of constitutional magnitude that may be raised for the first time on appeal. RAP 2.5(a).

The State then contends that there is no ex post facto violation because in 1989 an exceptional sentence could be imposed for anything, even if that thing was not listed as an aggravating factor. Br. of Resp't at 26-28. It claims, "[s]ince the list of aggravating circumstances was not an exclusive list, and merely illustrative, reliance on reasons which were codified later is not barred by ex post facto doctrine." Br. of Resp't at 28. This reasoning directly contradicts the primary purpose of the ex post facto clause, which is "to assure that legislative Acts give fair warning of their effect and permit individuals to rely on their

meaning until explicitly changed.” Weaver v. Graham, 450 U.S. 24, 28, 101 S.Ct. 960, 67 L.Ed.2d 17 (1981).

The illustrative list in place at the time Mr. Applegate committed his crimes did not give fair notice that sentences could be enhanced based on domestic violence. This is especially so because, as noted in Mr. Applegate’s opening brief, the Legislature at that time declared that domestic crimes should be treated the same as other crimes. Br. of Appellant at 25-26 (citing RCW 10.99.010 (1989)).

The State then argues that because the “comparable” aggravating circumstance of “ongoing pattern of sexual abuse” was specifically listed in the statute in 1988, Mr. Applegate should have been on notice that his conduct could result in an exceptional sentence. Br. of Resp’t at 29. This argument constitutes an implicit concession on the double-jeopardy issue discussed above. But because the domestic violence aggravator is a superset of the ongoing pattern aggravator, it does not solve the ex post facto problem.

In sum, the enhancement of Mr. Applegate’s sentence based on the domestic violence aggravator violated the ex post facto clause because the new law “aggravate[d] a crime, or [made] it

greater than it was, when committed.” Collins v. Youngblood, 497 U.S. 37, 42, 110 S.Ct. 2715, 111 L.Ed.2d 30 (1990) (quoting Calder v. Bull, 3 Dall. 386, 390, 1 L.Ed. 648 (1798)). The domestic violence aggravator should be vacated on all six counts.

5. THE APPLICATION OF THE DOMESTIC VIOLENCE ENHANCEMENT TO MR. APPELATE VIOLATED THE PRESUMPTION AGAINST RETROACTIVE APPLICATION OF A STATUTORY AMENDMENT.

As explained in Mr. Applegate’s opening brief, the legislature did not intend for the domestic violence aggravator to be applied retroactively. Br. of Appellant at 26-28. Indeed, the Sentencing Reform Act (“SRA”) dictates that “[a]ny sentence imposed under this chapter shall be determined in accordance with the law in effect when the current offense was committed.” RCW 9.94A.345. For this reason, too, the domestic violence aggravator should be stricken on all six counts.

The State appears to argue that there is no retroactivity issue because the amendment was procedural, not substantive. Br. of Resp’t at 33. The State is wrong. The term “procedural” means “changes in the procedures by which a criminal case is adjudicated, as opposed to changes in the substantive law of crimes.” Collins, 497 U.S. at 45. For example, a law that changes

the number of jurors in a criminal trial is a procedural change that does not implicate retroactivity concerns. Id. at 50-52. Similarly, the amendment to the SRA mandating that juries, not judges, find facts justifying exceptional sentences, was a procedural change that did not violate the ex post facto clause when applied to defendants who committed their crimes before the amendment took effect. State v. Pillatos, 159 Wn.2d 459, 476, 150 P.3d 1130 (2007).

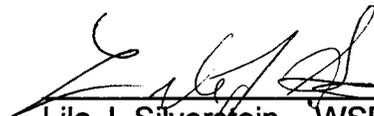
The amendment at issue here was substantive, not procedural. It created aggravated crimes that did not exist previously, and increased the punishment for crimes committed against family or household members. Laws of 1996 Ch. 248, § 2; RCW 9.94A.390 (1996). The retroactive application of this aggravator to Mr. Applegate was therefore improper.

E. CONCLUSION

For the reasons set forth above and in his opening brief, Mr. Applegate respectfully requests that this Court vacate his exceptional sentence and remand for a new trial for violation of the right to a public trial. In the alternative, Mr. Applegate asks this Court to vacate the convictions on the “ongoing pattern” aggravator for a violation of the double jeopardy clause and the omission of the to-convict instruction. Mr. Applegate further asks this Court to vacate the convictions on the “domestic violence” aggravator for violations of the ex post facto clause and the presumption against retroactive application of a statutory amendment.

DATED this 6th day of August, 2010.

Respectfully submitted,


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Attorneys for Appellant

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

STATE OF WASHINGTON,)	
)	
RESPONDENT,)	
)	
v.)	NO. 64100-0-I
)	
RONALD APPELATE,)	
)	
APPELLANT.)	

DECLARATION OF DOCUMENT FILING AND SERVICE

I, MARIA ARRANZA RILEY, STATE THAT ON THE 9TH DAY OF AUGUST, 2010, I CAUSED THE ORIGINAL **REPLY BRIEF OF APPELLANT** TO BE FILED IN THE **COURT OF APPEALS - DIVISION ONE** AND A TRUE COPY OF THE SAME TO BE SERVED ON THE FOLLOWING IN THE MANNER INDICATED BELOW:

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COYOTE RIDGE CORRECTIONS CENTER
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CONNELL, WA 99326 | <input checked="" type="checkbox"/>
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