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No. 89321-7

IN THE SUPREME COURT OF THE STATE OF WASHINGTON

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b/h

STATE OF WASHINGTON,

Petitioner/Cross-Respondent,

v.

MARTIN ARTHUR JONES,

Respondent/Cross-Petitioner.

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

The Honorable Vicki L. Hogan

SUPPLEMENTAL BRIEF OF MARTIN JONES

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A. ISSUES ON REVIEW

1. Whether the selection of alternate jurors by a legal assistant in a closed courtroom without the parties or Mr. Jones present violated Mr. Jones' constitutionally protected right to a public trial and the public's right to an open courtroom under the United States and Washington Constitutions?

2. Whether the selection of the alternate jurors in the absence of Mr. Jones violated his constitutionally protected right to be present?

B. STATEMENT OF THE CASE

Martin Jones' wife, Susan Jones, was arrested for Driving While Under the Influence (DUI). One of the troopers involved in the arrest was subsequently shot and injured. The trooper focused solely on Martin Jones as his assailant. Honoring his repeated requests, investigators showed the trooper a Department of Licensing (DOL) photograph of Mr. Jones, whom the trooper identified as his assailant. As a result, Mr. Jones was subsequently charged with attempted first degree murder of a police officer with a firearm.¹

¹ The matter was initially filed in Pacific County Superior Court. Mr. Jones' filed an affidavit of prejudice requiring removal of the matter to the Thurston County Superior Court. An additional affidavit of prejudice was filed and the matter was filed and ultimately tried in Pierce County Superior Court.

A total number of 16 jurors were selected to hear the evidence, with the four alternates to be selected from the entire 16 jurors prior to deliberations. At the end of closing arguments, the trial court told the jury and the parties it would put all 16 names in a wheel and select the four jurors who would be designated alternate jurors:

As I explained back in early January we seated 16 in case there was a family emergency, or some unforeseen event that would occur that would require a juror to be excused. There are still 16 of you in the box today near the end of the trial.

[The selection of alternates] will be random. The box to be spun looks a little like an old fashioned bingo, but it's wooden. Pam has all 16 of your juror numbers, and after all of the closing arguments she will tell me which four numbers have been selected at random. We don't know now. We are still hoping that there is no unexpected emergency between now and Thursday morning, but it's still a possibility.

RP 3808.

At the conclusion of testimony and just prior to closing arguments, the trial court announced to the parties the names of the four alternate jurors. It came to light at that time that the trial court's lower bench had selected the alternate jurors using the designated wheel during the break, in the absence of Mr. Jones, the attorneys, and the public:

We talked about it yesterday, we talked about it in January. At the outset of this trial we seated four alternates. I think the attorneys and I are as surprised as everyone else that there are still 16 of you in the box. *But at this time at the break of 3:00, four numbers were pulled randomly*, and at this time I am temporarily excusing these four jurors:

RP 4061 (emphasis added).

Prior to sentencing, Mr. Jones timely moved for a new trial on the basis of the violation of his right to be present during the selection of the alternate jurors. CP 1286-1300.

It was always my understanding, and again, we will have to listen to the record and so forth, but I know the Court talked about the jurors, the alternate jurors would be selected using the hopper, and names would be picked out. There was never any indication that this would be done out of the presence or without anybody being given any notice. And we did not find out about this until we came into court. We went through closing arguments, and then the jury was about to be sent out and the Court announced that the selection had already been made.

So we don't know for sure, we know that the Court said that the Judicial Assistant selected the alternate jurors during the lunch hour, but we don't know if that was something that the Court instructed the Judicial Assistant to do, and if so, whether the Court was present or just the Judicial Assistant present, or whether there were any other witnesses present, or the Court Reporter present.

RP 4110-11.

Mr. Jones also objected to the process on the basis that the selection of the alternate jurors was conducted when the courtroom was closed to the public:

Not only was the defendant not present, and we would allege that this is a very critical part of the trial, *but also in terms of the courtroom not being open to the public.*

RP 4110 (emphasis added).

The court denied Mr. Jones' motion for a new trial without comment. RP 4116. Mr. Jones was subsequently convicted as charged. CP 1155-63; RP 4091-94, 4134-35.

In a published unanimous decision authored by Justice Wiggins, sitting *pro tempore*, the Court of Appeals reversed Mr. Jones' conviction. 175 Wn.App. 87, 303 P.3d 1084 (2013), *review granted*, 361 P.3d 746 (2015). Applying the logic and experience test announced by this Court in *State v. Sublett*, 176 Wn.2d 58, 292 P.3d 715 (2012), the Court of Appeals found that selecting the alternate jurors in a closed courtroom, where neither the parties nor there public was present, violated Mr. Jones' right to a public trial. *Jones*, 175 Wn.App. at 96-104. The Court of Appeals also ruled that the process did not violate Mr. Jones' right to be present, and even if it did, the error was harmless. *Id.* at 104-08.

D. ARGUMENT

1. **The court's selection of the alternate jurors from the jury panel as a whole in the absence of the parties or the public violated Mr. Jones' right to a public trial and the public's right to open proceedings.**

- a. *The federal and state constitutions provide the accused the right to a public trial and also guarantee public access to court proceedings.*

Public criminal trials are a hallmark of the Anglo-American justice system. *Globe Newspaper Co. v. Superior Court*, 457 U.S. 596, 605, 102 S.Ct. 2613, 73 L.Ed.2d 248 (1982); *Richmond Newspapers, Inc. v. Virginia*, 448 U.S. 555, 564-73, 100 S.Ct. 2814, 65 L.Ed.2d 973 (1980) (plurality) (outlining history of public trials from before Roman Conquest of England through Colonial times). "A trial is a public event. What transpires in the court room is public property." *State v. Coe*, 101 Wn.2d 364, 380, 679 P.2d 353 (1984), quoting *Craig v. Harney*, 331 U.S. 367, 374, 67 S.Ct. 1249, 91 L.Ed.2d 1546 (1947). The right to a public trial is the right to have a trial open to the public. *In re Pers. Restraint of Orange*, 152 Wn.2d 795, 804-05, 100 P.3d 291 (2004).

Both the federal and state constitutions guarantee the accused the right to a public trial. U.S. Const. amend. VI ("In all criminal

prosecutions, the accused shall enjoy the right to a speedy and public trial . . . ”); Const. article I, section 22 (“In criminal prosecutions the accused shall have the right to . . . have a speedy public trial by an impartial jury . . .”).

In addition, the public also has a vital interest in access to the criminal justice system. U.S. Const. amend. I (the First Amendment’s guarantees of free speech and a free press also protect the right of the public to attend a trial); Const. art. I, § 10: (“Justice in all cases shall be administered openly, and without unnecessary delay.”). These provisions provide the public and the press a right to open and accessible court proceedings. *State v. Easterling*, 157 Wn.2d 167, 174, 137 P.3d 825 (2006). “The public has a right to be present whether or not any party has asserted the right.” *Presley v. Georgia*, 558 U.S. 209, 214, 130 S.Ct. 721, 175 L.Ed.3d 675 (2010).

Whether there has been a violation of the constitutional right to a public trial is reviewed *de novo*. *State v. Wise*, 176 Wn.2d 1, 9, 288 P.3d 1113 (2012). Where a violation of the right occurs, the remedy is reversal and remand for a new trial. *Id.* at 17-19.

To determine whether there has been a violation of the public trial right, the Court first determines whether a closure that triggers the

public trial right occurred by asking if, under considerations of experience and logic, “the core values of the public trial right are implicated.” *State v. Sublett*, 176 Wn.2d 58, 73, 292 P.3d 715 (2012) (lead opinion). If there is a closure, the Court looks to whether the trial court properly conducted a *Bone-Club* analysis before closing the courtroom. *State v. Paumier*, 176 Wn.2d 29, 35, 288 P.3d 1126 (2012). If the trial court failed to do so, then a “per se prejudicial” public trial violation has occurred “even where the defendant failed to object at trial.” *Wise*, 176 Wn.2d at 18. The remedy for a violation of the public trial right is a new trial. *Wise*, 176 Wn.2d at 19.

b. *The courtroom was closed during the selection of the alternate jurors.*

In order for a total closure of the courtroom to be found, there does not have to be an order of the court excluding the public. *State v. Njonge*, 181 Wn.2d 546, 556, 334 P.3d 1068 (2014). Rather, it must be clear from the record that the public was excluded from the proceedings. *Id.*

In the motion for a new trial based upon the trial court’s selection of the alternate jurors during a break in private, Mr. Jones also objected to the process on the basis that it was conducted when the courtroom was closed:

Not only was the defendant not present, and we would allege that this is a very critical part of the trial, *but also in terms of the courtroom not being open to the public.*

RP 4110 (emphasis added). The State never objected to this assertion at trial, did not claim the courtroom was open, or otherwise dispute this statement. The net result is that the record establishes the courtroom was closed during the selection of the alternate jurors. Further, the State cannot now claim the courtroom was never closed when it conceded at trial that it was.

c. Application of the logic and experience test compels the conclusion that the public right to an open trial applies to the selection of the alternate jurors.

Where there is no directly controlling decisions determining whether the public trial right is implicated by a particular proceeding, the Court uses the experience and logic test. *Njonge*, 181 Wn.2d at 553-54; *Sublett*, 176 Wn.2d at 73. The experience prong of the test “asks ‘whether the place and process have historically been open to the press and general public.’” *Sublett*, 176 Wn.2d at 73, quoting *Press-Enterprise Co. v. Superior Court*, 478 U.S. 1, 8, 106 S.Ct. 2735, 92 L.Ed.2d 1 (1986). In other words, the court engages in a historical inquiry to determine whether the type of procedure is one that has traditionally been open to the public. “The logic prong asks ‘whether

public access plays a significant positive role in the functioning of the particular process in question.” *Sublett*, 176 Wn.2d at 73. Relevant to this inquiry is the overarching policy objectives of having an open trial such as fairness ensured by permitting public scrutiny of proceedings. *See Richmond Newspapers, Inc.*, 448 U.S. at 572 (“People in an open society do not demand infallibility from their institutions, but it is difficult for them to accept what they are prohibited from observing.”); *State v. Brightman*, 155 Wn.2d 506, 514, 122 P.3d 150 (2005) (“The public trial right serves 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.”). If both prongs of the test are implicated, the public trial right attaches, and the “*Bone-Club* factors must be considered before the proceeding may be closed to the public.” *Sublett*, 176 Wn.2d at 73.

- i. *Selecting jurors, including alternate jurors, is typically part of voir dire and traditionally done in open court.*

Justice Wiggins in the Court of Appeals’ opinion in *Jones* set forth the practice in Washington regarding the selection of alternate jurors. *Jones*, 175 Wn.App. at 97-101. The conclusion the Court of Appeals reached was that:

[t]aken together, both the historic and current practices in Washington reveal that the procedure for selecting alternate jurors, like the selection of regular jurors, generally occurs as part of voir dire in open court. As our Supreme Court has recognized, voir dire has traditionally been and must continue to be open to the public.

Id. at 101, citing *State v. Momah*, 167 Wn.2d 140, 148, 217 P.3d 321 (2009); *Orange*, 152 Wn.2d at 804. From this review of precedent, the Court concluded “that the Washington experience of alternate jurors selection is one connected to the voir dire process for jury selection. Therefore, alternate juror selection, under our experience, has been and continues to be publicly open.” *Jones*, 175 Wn.App. at 101.

ii. *Under the logic prong, the selection of alternate jurors implicates the core of the right to a public trial.*

“The logic prong asks ‘whether public access plays a significant positive role in the functioning of the particular process in question.’”

Sublett, 176 Wn.2d at 73, quoting *Press-Enterprise Co.*, 478 U.S. at 8.

Turning to the logic prong of the experience and logic test, our inquiry focuses on the purposes of the public trial right and the constitutional assurance of open courts. Washington courts have recognized these purposes as ensuring a fair trial, reminding court officers of the importance of their duties, encouraging witnesses to come forward, and discouraging perjury. *Sublett*, 176 Wn.2d at 72, 292 P.3d 715; *Brightman*, 155 Wn.2d at 514, 122 P.3d 150. Two of the purposes of the public trial right are implicated in this case: basic fairness to the

defendant and reminding the trial court of the importance of its functions.

Jones, 175 Wn.App. at 101-02.

Recently, this Court emphasized the critical nature of an open courtroom:

The public trial right facilitates fair and impartial trials through public scrutiny. The public's presence in the courtroom reminds those involved about the importance of their roles and holds them accountable for misconduct. Effective public oversight of the fairness of a particular trial begins with assurance of the fairness of the particular jury.

State v. Love, 183 Wn.2d 598, 606-07, 354 P.3d 841 (2015) (internal citations omitted).

Here, the clerk's selection of the alternate jurors was conducted out of the view of the public or the parties.

Although we do not suggest that the alternate juror drawing in this case was anything but random-and Jones does not appear to argue otherwise-there is simply no way to tell how the drawing was performed. The issue is not that the drawing in this case was a result of manipulation or chicanery on the part of the court staff member who performed the task, but that the drawing could have been. Where such a drawing occurs during a court recess off the record, the defendant and the public lack the assurance of a truly random drawing that they would have if the drawing were performed in open court on the record. This lack of assurance raises serious questions regarding the overall fairness of the trial, and indicates that court personnel should be reminded of the importance of their duties.

Jones, 175 Wn.App. at 102.²

The only assurance that this process was done fairly was if the public was present when it was conducted, which did not happen here. Thus logic dictates that selecting alternate jurors in public furthers the “core values the public trial right serves.” *Id.* at 102.

d. *The court did not engage in a Bone-Club analysis prior to the courtroom closure, thus Mr. Jones is entitled to reversal and remand for a new trial.*

Where the application of the logic and experience test demonstrates that the drawing for the alternate jurors was required to be conducted in open court, the trial court was required to consider the *Bone-Club* factors before permitting this practice. Since the trial court failed to consider the factors, Mr. Jones’ right to a public trial was violated and requires reversal. *See Wise*, 176 Wn.2d at 19 (“where ‘the jury would necessarily be differently composed and it is impossible to

² The importance of transparency in the act of selecting jurors by wheel as used here can be found in *State v. Rouner*, 333 Mo. 64 S.W.2d 916 (1933). In *Rouner*, a statute set forth that the pool from which the petit jury was selected was done by the clerk of the court placing 400 names of members of the township on slips of paper, placed in a box, then chosen in the presence of the court and the public in a random drawing. 64 S.W.2d at 917-18. In Mr. Rouner’s case, this practice was done by two county judges, who chose the names to be placed in the box, then one of the judges made the selection of the jurors. *Id.* Thus, the selection was done in violation of the statute because it was not done by the clerk nor publicly nor in open court, but in private. *Id.* The Missouri Supreme Court found this to be error and reversed the defendant’s conviction. *Id.* at 921. The Court noted that these statutes were enacted because “it is obvious that the General Assembly by this amendment of 1911 sought to correct evils and to stop loose practices which grew and flourished behind closed doors.” *Rouner*, 64 S.W.2d at 918.

speculate as to the impact of that on [the] trial,' the appropriate remedy is a new trial.'"). *Jones*, 175 Wn.App. at 104, quoting *Wise*, 176 Wn.2d at 19.

e. *The Court's intervening jurisprudence does not alter this analysis.*

In the intervening years since the Court of Appeals' decision reversing Mr. Jones' conviction, this Court has issued a number of decisions involving the right to a public trial and jury selection. None of these decisions change the analysis in which the Court of Appeals engaged or the ultimate result reached by that Court.

In *State v. Russell*, 183 Wn.2d 720, 357 P.3d 38 (2015), the Court ruled that the court and the parties, including the defendant, reviewing juror questionnaires for hardship considerations did not violate the right to a public trial because working sessions such as this were never historically open to the general public. Accord *State v. Slett*, 181 Wn.2d 598, 334 P.3d 1088 (2014).

Similarly, in *State v. Koss*, 181 Wn.2d 493, 334 P.3d 1042 (2014), the Court found that there was no violation of the right to a public trial where the court and the parties, including the defendant, conducted a preliminary discussion about jury instructions based

largely on similar reasoning in *Russell*, that these conferences have historically not been open to the public.

Finally, in *Love, supra*, the Court ruled that conducting peremptory challenges on paper did not violate the right to a public trial where the courtroom was open during the entire process.

Here, in contrast the above cited cases where the courtroom remained open during the process, the clerk's act of selecting the alternate jurors was done in a courtroom completely closed from the public and the parties. Further, the selection of alternate jurors was not a process historically closed to the public but has been conducted in an open court room so the public and the parties can be assured the process was done fairly.

2. Selection of the alternate jurors in the closed courtroom violated Mr. Jones's constitutionally protected right to be present.

- a. *A defendant has the right to be present during jury selection.*

A criminal defendant has a constitutional right to be present in the courtroom at all critical stages of the trial. U.S. Const. amends VI, XIV; *Rushen v. Spain*, 464 U.S. 114, 117, 104 S.Ct. 453, 78 L.Ed.2d 267 (1983). Under this standard, a defendant has a right to be present at a proceeding "whenever his presence has a relation, reasonably

substantial, to the fullness of his opportunity to defend against the charge.” *Snyder v. Massachusetts*, 291 U.S. 97, 105-06, 54 S.Ct. 330, 78 L.Ed. 674 (1934), *overruled in part on other grounds sub nom. Malloy v. Hogan*, 378 U.S. 1, 84 S.Ct. 1489, 12 L.Ed.2d 653 (1964).

The Washington State Constitution also provides a criminal defendant with “the right to appear and defend in person.” Art. I, § 22. In addition, Washington’s criminal rules state that “[t]he defendant shall be present ... at every stage of the trial ... except ... for good cause shown.” CrR 3.4 (a); *State v. Chapple*, 145 Wn.2d 310, 318, 36 P.3d 1025 (2001). Thus, in Washington, “[i]t is a constitutional right of the accused in a criminal prosecution to appear and defend in person and by counsel ... *at every stage of the trial when his substantial rights may be affected.*” *State v. Irby*, 170 Wn.2d 874, 885, 246 P.3d 796 (2011), *quoting State v. Shutzler*, 82 Wn. 365, 367, 144 P. 284 (1914) (emphasis in original).

In Washington, the importance of safeguarding the right to be present at trial has been recognized since territorial days. *State v. Walker*, 13 Wn.App. 545, 556, 536 P.2d 657 (1975); *Shapoonmash v. United States*, 1 Wash.Terr. 188 (1862).

Whether a defendant's right to be present was violated is reviewed *de novo*. *Id.* at 880.

b. *The selection of the alternate jurors was part of jury selection, thus a critical stage of the proceedings.*

Jury selection process is a critical stage of the proceedings at which the defendant has a right to be present. *Love*, 183 Wn.2d 608; *Irby*, 170 Wn.2d at 884-85.

This right is particularly important when a person's "life or liberty may depend upon the aid which, by his personal presence, he may give to counsel and to the court and triers, in the selection of jurors." *Lewis v. United States*, 146 U.S. 370, 373, 13 S.Ct. 136, 36 L.Ed. 1011 (1892).

c. *The violation of Mr. Jones' right to be present was not a harmless error.*

A violation of the right to be present under the United States and Washington Constitutions can be a harmless error. *Irby*, 170 Wn.2d at 885-86. In proving the error was harmless, the State bears the burden of proving harmlessness beyond a reasonable doubt. *Id.*

The State cannot meet its burden here. The process of selecting the alternate jurors in a closed courtroom lacked the transparency necessary for the public and Mr. Jones to be assured that the process

was done in a fair manner. The selection of the alternate jurors in private and in the absence of Mr. Jones was not a harmless error and must result in the reversal of Mr. Jones' conviction.

E. CONCLUSION

For the reasons stated, Mr. Jones asks this Court to find that his constitutionally protected rights to a public trial and to be present were violated requiring reversal of his conviction and remand for a new trial.

DATED this 19th day of January 2016.

Respectfully submitted,

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IN THE SUPREME COURT OF THE STATE OF WASHINGTON

STATE OF WASHINGTON,)
)
 Respondent,)
) NO. 89321-7
 v.)
)
 MARTIN JONES,)
)
 Petitioner.)

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Supplemental Brief of Petitioner

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