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No. 90467-7
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IN THE SUPREME COURT OF THE STATE OF WASHINGTON

In re Adoption of M.S.M.-P., a Minor
STATE OF WASHINGTON, DSHS,

Respondent,

v.

N.P.,

Petitioner

ON APPEAL FROM THE SUPERIOR COURT OF
WASHINGTON FOR KING COUNTY, JUVENILE COURT

The Honorable Michael Trickey, Judge

SUPPLEMENTAL BRIEF OF PETITIONER

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A. ISSUES IN SUPPLEMENTAL BRIEF

The trial court erroneously closed the courtroom for the entire trial that resulted in the termination of appellant's parental rights to his son. The Court of Appeals correctly concluded this was constitutional error. In re Adoption of M.S.M.-P., 181 Wn. App. 301, 311-12, 325 P.3d 392 (2014), review granted, 182 Wn.2d 1001 (2015).

1. Did the Court of Appeals wrongly conclude the error was not "manifest," and that it lacked "practical and identifiable consequences"?

2. In In re Detention of D.F.F., 172 Wn.2d 37, 256 P.3d 357 (2011), six justices concluded that reversal was required and prejudice was shown where an entire civil evidentiary hearing was closed to the public. Where Washington courts have consistently recognized that the public trial guarantee is a core safeguard in our justice system, and where no court has affirmed an order following the complete closure of an entire evidentiary proceeding, should this Court adhere to the D.F.F. majority's conclusion?

B. SUPPLEMENTAL ARGUMENT

This case involves the respondent's effort to terminate NP's parental rights to his son. The entire evidentiary proceeding was

closed to the public. The trial court conducted no analysis of the five factors required by Ishikawa¹ and numerous other controlling cases.

The opening brief and motion for discretionary review fully set forth the facts and basic argument. The Court of Appeals properly held the closure was constitutional error. This supplemental brief narrowly focuses on that court's erroneous conclusion that reversal is not required when a trial court erroneously closes an entire evidentiary proceeding that results in the termination of parental rights.

1. A MAJORITY OF THIS COURT HAS ALREADY HELD THAT COMPLETE CLOSURE OF AN EVIDENTIARY PROCEEDING REQUIRES REVERSAL.

The Washington Constitution requires that "Justice in all cases shall be administered openly, and without unnecessary delay." Const. art. 1, § 10. Public trial claims are reviewed de novo. In re Dependency of J.A.F., 168 Wn. App. 653, 661, 278 P.3d 673 (2012).

In D.F.F., the state sought D.F.F.'s temporary involuntary commitment under RCW Chapter 71.05. Relying on former MPR 1.3, the trial court closed the entire proceeding. At the end of the trial, the court entered an order committing D.F.F. for 90 days. D.F.F., 172

¹ Seattle Times Co. v. Ishikawa, 97 Wn.2d 30, 37-39, 640 P.2d 716 (1982).

Wn.2d at 38-39; In re Detention of D.F.F., 144 Wn. App. 214, 217, 183 P.3d 302 (2008).

For the first time on appeal, D.F.F. challenged the closure as a violation of Article 1, § 10. The Court of Appeals concluded the lack of objection did not waive the claim and that reversal was required. D.F.F., 172 Wn.2d at 39 (citing D.F.F., 144 Wn. App. at 226-28).

After granting the state's petition for review, this Court unanimously ruled that MPR 1.3 runs afoul of our state open courts guarantee. D.F.F., 172 Wn.2d at 41-42 (four-justice lead opinion); at 47 (two-justice concurrence); at 49 (three-justice dissent). The only disagreement was on remedy. The lead opinion concluded that this was a structural error requiring reversal. 172 Wn.2d at 43-46. The concurring justices concluded that closure of the entire trial "demonstrates sufficient prejudice to warrant relief." 172 Wn.2d at 48. The dissenting justices recognized the majority's conclusion that the remedy for all section 10 violations is a new trial, 172 Wn.2d at 57, and would instead have held that "structural error analysis has no place in the civil arena." 172 Wn.2d at 53.

In the present case, the Court of Appeals properly tallied the six-justice D.F.F. majority from the lead and concurring opinions. M.S.M.-P., 181 Wn. App. at 314. But the Court of Appeals reasoned

that D.F.F. was “no help to N.P.,” because “structural error” does not apply “in a civil case, such as a termination proceeding.” M.S.M.-P., 181 Wn. App. at 314. In an effort to forge a distinction, the court pointed out that D.F.F. involved an involuntary commitment trial. “Unlike a criminal or involuntary commitment trial, the proceeding in this case could not result in N.P.’s confinement.” M.S.M.-P., 181 Wn. App. at 314.

This distinction lacks analytical vigor. This Court has already held, multiple times, that parents have constitutionally protected interests that are “fundamental,” “far more precious ... than property rights” and a “sacred right” which is “more precious ... than the right of life itself.” In re Welfare of Myricks, 85 Wn.2d 252, 253–54, 533 P.2d 841 (1975); In re Sumey, 94 Wn.2d 757, 621 P.2d 108 (1980). In addition, termination is a permanent deprivation. The Court of Appeals was simply wrong when it inverted these liberty interests to conclude that a temporary civil commitment results in a more onerous deprivation than the permanent termination of parental rights.

The Court of Appeals also overlooked this Court’s consistent recognition that public scrutiny of evidentiary proceedings is the core value of our public trial guarantees. This Court often discusses the “practical and identifiable” consequences of administering justice in

secret. Open proceedings are required “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. Sublett, 176 Wn.2d 58, 72, 292 P.3d 715 (2012) (quoting State v. Brightman, 155 Wn.2d 506, 514, 122 P.3d 150 (2005)).

A public trial is a core safeguard in our system of justice. Be it through members of the media, victims, the family or friends of a party, or passersby, the public can keep watch over the administration of justice when the courtroom is open. The open and public judicial process helps assure fair trials. It deters perjury and other misconduct by participants in a trial. It tempers biases and undue partiality. The public nature of trials is a check on the judicial system, which the public entrusts to adjudicate and render decisions of the highest import. It provides for accountability and transparency, assuring that whatever transpires in court will not be secret or unscrutinized. And openness allows the public to see, firsthand, justice done in its communities.

State v. Wise, 176 Wn.2d 1, 5–6, 288 P.3d 1113 (2012). “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. Jones, 175 Wn. App. 87, 303 P.3d 1084 (2013) (quoting Richmond Newspapers, Inc. v. Virginia, 448 U.S. 555, 572, 100 S.Ct. 2814, 65 L.Ed.2d 973 (1980)).

There are situations where this Court has held that these core values are not implicated. But this case does not involve non-

evidentiary hearings such as pretrial motions or instruction conferences, or even sidebars during the course of evidentiary proceedings. Cf. State v. Koss, 181 Wn.2d 493, 500, 334 P.3d 1042 (2014) (public trial right does not extend to in-chambers preliminary instruction conference); State v. Smith, 181 Wn.2d 508, 519, 334 P.3d 1049, 1055 (2014) (on-the-record sidebar in hallway is not subject to public trial guarantee); In re Detention of Reyes, 176 Wn. App. 821, 315 P.3d 532 (2013) (closure of non-evidentiary pretrial motion in RCW Chapter 71.09 case was not manifest constitutional error), review granted, 182 Wn. 2d 1001 (2015). Unlike these situations, the present case involves exclusion of the public for an entire evidentiary proceeding, with no discussion of Ishikawa and no constitutionally valid justification for the closure. Neither the Court of Appeals nor the respondents have cited authority affirming a court's order following such a closure, in any kind of case, nor has petitioner's counsel found any.

This is not to say that constitutional rights cannot be waived. In Herron, for example, the court informed Herron of his right to public voir dire, and Herron expressly waived that right. State v. Herron, 177 Wn. App. 96, 104, 318 P.3d 281 (2013), review granted, 182 Wn.2d

1001 (2015).² But the waiver of constitutional rights is never presumed. A party asserting the waiver of a constitutional right bears the burden to show a knowing, intelligent, and voluntary waiver. See e.g., State v. Frawley, 181 Wn.2d 452, 463, 334 P.3d 1022, 1028 (2014) (“we require an independent knowing, voluntary, and intelligent waiver of the public trial right”); Herron, 177 Wn. App. at 104. This requires “an intentional relinquishment or abandonment of a known right or privilege.” Herron, at 104 (quoting Johnson v. Zerbst, 304 U.S. 458, 464, 58 S.Ct. 1019, 82 L.Ed. 1461 (1938)).

Although this argument technically has been raised for the first time on appeal, the respondent has never shown a valid waiver of this constitutional right. NP was not present when the closure was requested and when defense counsel did not object.³ When NP later

² As Division Three stated, “Mr. Herron waived his § 22 right to a public trial under these standards. He knew that he had the right to have voir dire conducted in the courtroom in the presence of any member of the public who might have been in attendance. Suggestions were made that would have allowed him to conduct private voir dire in public. Believing that he would learn more by having the inquiries made in private, he expressly opted for questioning the jurors in chambers. He intentionally relinquished one known right in order to further his equally important right to obtain an impartial jury.” Herron, 177 Wn. App. at 104.

³ See Br. of Appellant, at 3 & 7 (noting NP’s absence at the time the closure was discussed).

appeared via telephone, he was not advised of the right to a public trial on the record. Given the court's and counsels' profound misunderstanding that RCW 26.33.060 mandated closure, there is no reason to conclude he was ever advised of this right. RP 6, 39-47.

Where there is no valid waiver, it is fair to follow D.F.F.'s remedy. In short, a majority of this Court has already held that the remedy for this error is reversal and remand for a new trial. Because D.F.F. is not incorrect and harmful – and certainly not when applied to these facts – the same remedy should follow here. In re Restraint of Yates, 177 Wn.2d 1, 25, 296 P.3d 872 (2013) (party urging the overruling of a prior decision bears burden to show it is harmful and wrongly decided).

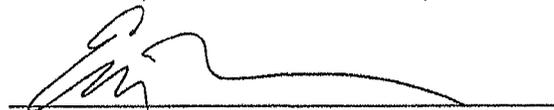
D. CONCLUSION

This Court should conclude the trial court's closure was error requiring reversal.

DATED this 18th day of March, 2015.

Respectfully Submitted,

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Dear Supreme Court Clerk:

Attached for filing is the supplemental brief of petitioner. A copy has been served on respondent's counsel via cc to this email.

Thank you for your consideration and assistance.

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