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Court of Appeals

Division III

State of Washington

No. 31018-3-III
IN THE COURT OF APPEALS
FOR THE STATE OF WASHINGTON
DIVISION III

STATE OF WASHINGTON,

Plaintiff/Respondent,

vs.

JOEY A. ANDY,

Defendant/Appellant.

Appellant's Brief

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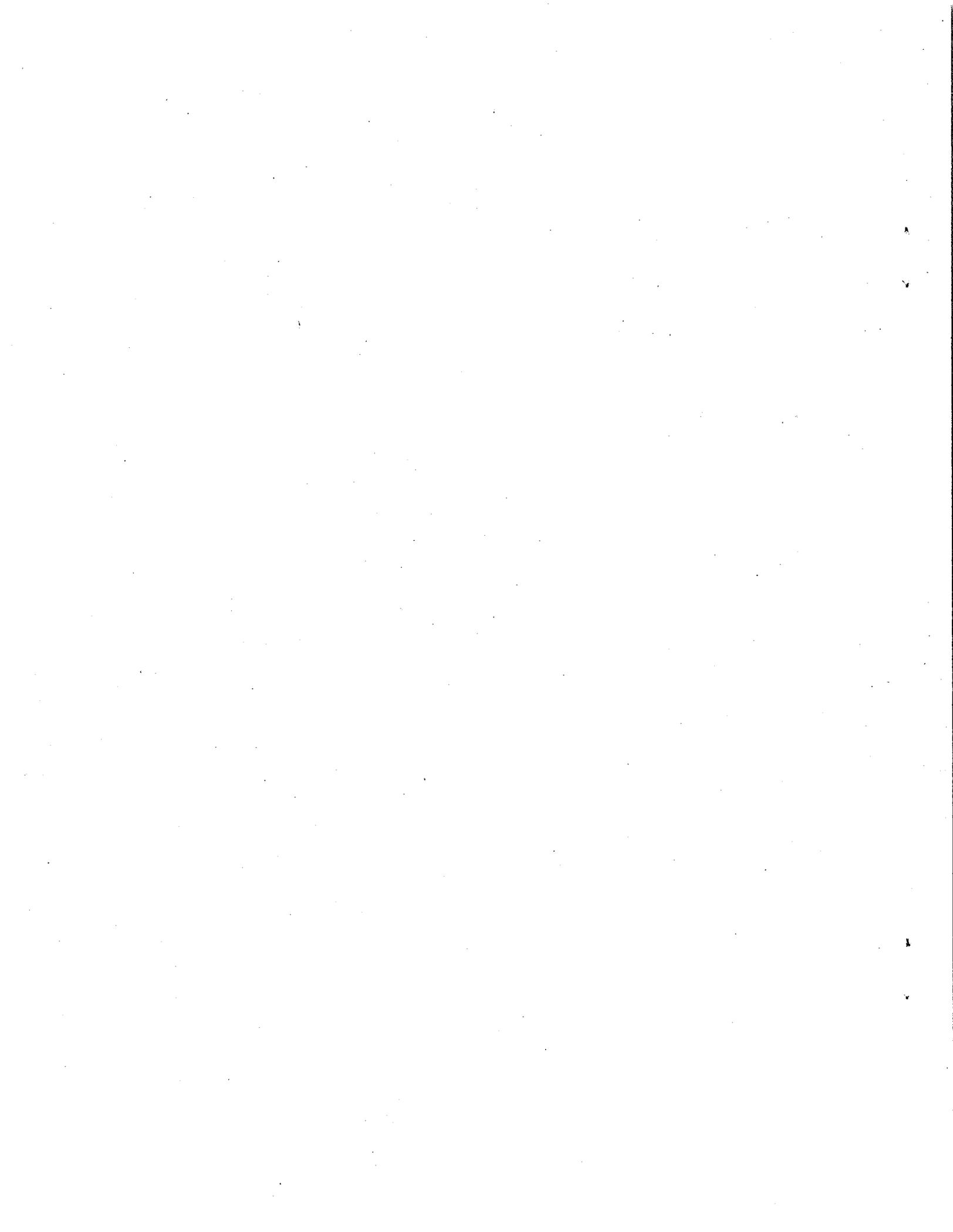


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A. ASSIGNMENTS OF ERROR

1. The trial court erred in allowing the trial to continue past 4 p.m. on five days during the trial.

2. The trial court erred in finding, “The courts and security officers followed this policy.” Finding of Fact No. 4 (last sentence), CP 84.

3. The trial court erred in finding that the security officers implemented this policy by the means stated every afternoon. Finding of Fact No. 5, CP 84-85.

4. The trial court erred in finding, “[S]ecurity officers admitted any member of the public who came to the public entrance if he or she wanted to attend the Joey Andy trial and directed him or her to the courtroom. No member of the public who desired to attend the Joey Andy trial was prevented from attending any session.” Finding of Fact No. 7, CP 85-86.

5. The trial court erred in finding, “[T]he public entrance of the courthouse always remained open if a courtroom was still in session despite the sign.” Finding of Fact No. 8, CP 86

6. The trial court erred in finding, “No member of the public was deterred by the sign described in finding of fact 8 from entering the Yakima County Courthouse and attending any session of the Joey Andy

trial. No member of the public was barred from entering the courthouse or attending any session of the Joey Andy trial by the sign. Finding of Fact No. 9, CP 86.

7. The trial court erred in concluding, "Joey Andy's right to a public trial under article I, section 22 of the Washington State Constitution and the Sixth Amendment to the United States Constitution was not violated." Conclusion of Law No. 2, CP 86.

8. The trial court erred in concluding, "The public's right to open administration of justice under Article I, section 10 of the Washington State Constitution was not violated. The public's right to an open trial under the First Amendment to the United States Constitution was not violated." Conclusion of Law No. 3, CP 87.

B. ISSUE PERTAINING TO ASSIGNMENTS OF ERROR

Did the trial court violate Mr. Andy's constitutional right to a public trial by allowing the trial to continue past 4 p.m. on five days during the trial, when a sign on the courthouse door indicated the courthouse closed at 4 p.m., thereby effectively excluding the public from portions of the trial without first doing a *Bone-Club* analysis?

C. STATEMENT OF THE CASE

Joey Andy was convicted by a jury of first degree burglary and second degree assault with deadly weapon enhancements on both convictions. CP 50-57. He appealed. CP 70-71. While the appeal was ongoing, this Court remanded the matter for the taking of additional evidence to determine whether the courthouse doors were locked at 4 p.m. on the dates of the trial in this matter and if so, whether that closure barred entry to the ongoing courtroom proceedings. Commissioner's Ruling 3/13/13; Appellant's Motion to Remand 3/5/13.

At the time of Andy's trial the Yakima County Courthouse hours were 8 a.m. to 4 p.m. 5/17/13 RP 14. Court was adjourned at the following times on the following pertinent dates of Andy's trial with the ongoing event after 4 p.m. in parenthesis: 6/11/12 at 5:41 p.m. (jury voir dire), 6/12/12 at 4:33 p.m. (testimony), 6/13/12 at 4:04 p.m. (colloquy with attorneys regarding jury instructions), 6/14/12 at 4:07 p.m. (colloquy with attorneys regarding jury instructions), and 6/15/12 at 4:45 p.m. (closing arguments, colloquy with attorneys regarding jury instructions and exhibits) CP 85, 6/11/12 Supplemental RP 117-206, 6/12/12 RP 185-214, 6/13/12 RP 353-64, 6/14/12 RP 560-64, 6/15/12 RP 697-726, 5/17/13 RP 6.

The policy in effect at the time of Andy's trial was if a trial was still ongoing past 4 p.m., the court would call courthouse security to let them know court was still in session. A security officer would then be available to admit people wishing to attend that particular court hearing. However, the courthouse was formally closed for all other purposes. RP 16-17. If court staff forgot to call security, the doors would be locked at 4 p.m. 5/17/13 RP 22. The security officer on duty testified he did not know whether he received any telephone calls from the court during Andy's trial. 5/22/13 RP 135-36.

Security officers typically do a "sweep" checking to make sure no courts are still in session before locking the doors. 5/17/13 RP 65-66. The security officer on duty testified he did not know whether he did a "sweep" during Andy's trial. 5/22/13 RP 135-36. He also testified he had no independent recollection of what occurred during Andy's trial. RP 135.

The security officer on duty after 4 p.m. does not stand by the entrance doors. Instead, he or she stands near the metal detector. A person approaching the entrance doors from the street would only see the closed sign, not the security officer. The person could only see the security officer if he or she peered through the door at a certain angle. 5/17/13 RP 64.

The sign on or near the entrance door has been updated three times since the shortened hours were implemented around 10/3/11. 5/22/13 RP 148. The security department head testified that the sign in place during Andy's trial said, "The courthouse closes at 4:00 p.m. Office hours, auditor 9:00 to 3:30, HR, which was human resources, 9:00 to 4:00, district court clerks 8:00 to 4:00, superior court clerks 8:30 to 4:00, all others 8:00 to 4:00. The bottom line on the [sign] says court closes at 5:00 p.m." 5/22/13 RP 152; Ex. B. The current sign, installed 3/4/13, added the phrase, "Courtrooms are open while in session." 5/22/13 RP 150, 165.

D. ARGUMENT

The trial court violated Mr. Andy's constitutional right to a public trial by allowing the trial to continue past 4 p.m. on five days during the trial, when a sign on the courthouse door indicated the courthouse closed at 4 p.m., thereby effectively excluding the public from portions of the trial without first doing a *Bone-Club* analysis.

A person accused of crime is entitled to a public trial. U.S. Const. amend. VI; Wash. Const. art I, § 22; *State v. Bone-Club*, 128 Wn.2d 254, 257, 906 P.2d 325 (1995). This includes the entire jury selection process. *In re Personal Restraint of Orange*, 152 Wn.2d 795, 804, 100 P.3d 291 (2004). The public and press also have a First Amendment right to public

trials. U.S. Const. Amend. I; *Waller v. Georgia*, 467 U.S. 39, 46, 104 S. Ct. 2210, 81 L.Ed. 2d 31 (1984); Wash. Const. art 1, § 10; *State v. Easterling*, 157 Wn.2d 167, 179, 137 P.3d 825 (2006).

The court may not close the courtroom “except under the most unusual circumstances.” *Bone-Club*, 128 Wn.2d at 259. Even where only a part of the jury voir dire is improperly closed, it can violate a defendant’s constitutional public trial right. *Orange*, 152 Wn.2d at 812. Violations of this right may be raised for the first time on appeal. *Bone-Club*, 128 Wn.2d at 257; *State v. Brightman*, 155 Wn.2d 506, 517, 122 P.3d 150 (2005).

A public trial right is considered an issue of such constitutional magnitude that it may be raised for the first time on appeal and a “defendant’s failure to lodge a contemporaneous objection at trial [does] not effect a waiver.” *State v. Strobe*, 167 Wn.2d 222, 229, 217 P.3d 310 (2009) (citations omitted). Moreover, a defendant cannot waive the public’s right to open proceedings. *Strobe*, 167 Wn.2d at 230. “As we observed in *Bone-Club*, the public also has a right to object to the closure of a courtroom, and the trial court has the independent obligation to perform a *Bone-Club* analysis. The record reveals that the public was not

afforded the opportunity to object to the closure, nor was the public's right to an open courtroom given proper consideration.” *Id.* (citations omitted).

To overcome the presumption of openness, the trial court must find on the record that closure is the only way to preserve a specific, more important, interest and that the closure is narrowly tailored to serve that interest. The findings must be specific enough to enable this court to determine whether closure was proper. *Orange*, 152 Wn.2d at 806; *Waller*, 467 U.S. at 45. The court must perform five steps:

1. The proponent of closure must make some showing of a compelling interest. If that interest is an accused's right to a fair trial, the proponent must show a likelihood of jeopardy.
2. Anyone present must be given an opportunity to object to the closure.
3. The protective method must be the least restrictive means available to protect the threatened interest.
4. The court must weigh the competing interests of the proponent of closure and the public.
5. The order must be no broader in its application or duration than necessary to serve its purpose.

Bone-Club, 128 Wn.2d at 258-89; *Federated Publications, Inc. v. Kurtz*, 94 Wn.2d 51, 62, 615 P.2d 440 (1980). Failure to follow these steps violates the public trial clause of Wash. Const. art I, § 22. *Orange*, 152 Wn.2d at 812.

The trial court herein effectively closed the courtroom on its own motion by conducting portions of the trial after 4 p.m. when the courthouse was formally closed. The fact that the courtroom itself was open or that the courthouse was unlocked with a security officer available to allow entry makes no difference because the sign on the entrance door effectively barred the public from entering the courtroom. The public cannot be expected to know it may enter the courthouse on its own volition contrary to the public posting that the courthouse is closed.

The first line on the sign says the courthouse closes at 4 p.m. The sign then lists five sets of office hours all closing at 4 p.m. or earlier. The bottom line on the sign says court closes at 5:00 p.m., an apparent contradiction to the other lines. How many members of the public will read beyond the first line, or assuming they do, how many will comprehend the meaning of the last line? Considering the unambiguous message of the first line that the courthouse closes at 4 p.m., common sense dictates that most people would logically assume admittance is barred after 4 p.m. and leave.

Furthermore, even assuming the security guard followed the implemented policies¹ and was available to admit court attendees, the public would not be aware of his presence. The security officer on duty after 4 p.m. does not stand by the entrance doors. Instead, he stands near the metal detector. A person approaching the entrance doors from the street would only see the closed sign, not the security officer unless that person peered through the door at a certain angle. 5/17/13 RP 64.

Due process guarantees the right to an open and public trial. If the public is not “aware” of the open and public proceedings, this right loses all meaning. *Press-Enter. Co. v. Superior Court*, 464 U.S. 501, 509, 104 S. Ct. 819, 78 L. Ed. 2d 629 (1984). Even if a courthouse is technically unlocked, secret proceedings unfairly diminish or eliminate this public trial right. *Id.* The law requires “reasonable measure to accommodate public attendance” at court proceedings. *State v. Leyerle*, 158 Wn. App. 474, 478, 242 P.3d 921 (2010); *Presley v. Georgia*, 558 U.S. 209, 130 S.Ct. 721, 175 L.Ed.2d 675 (2010). Moreover, court proceedings must not only be open, but they must be “accessible.” *Leyerle*, 158 Wn. App. at 479-80; *Easterling*, 157 Wn.2d at 174.

¹ There is no evidence that this occurred, contrary to the trial court’s written findings set forth in the Assignments of Error. The security officer on duty testified he did not know whether he received any telephone calls from the court to keep the doors open and did not

Yakima County's policy of closing the courthouse at 4:00 p.m. while unlocking the courthouse doors during times of trial, with no additional direction to the public that proceedings remain open, is not a reasonable measure to accommodate public attendance. Seeing the sign outside the courthouse that the building is closed, the public is unlikely to be "aware" of ongoing public proceedings afterhours. Although the courthouse is technically unlocked, it is not sufficiently "accessible." Unlocking the courthouse door, without more, cannot constitute "reasonable measures" to "accommodate public attendance." The proceedings in this case may as well have been behind locked doors. It is difficult to imagine many members of the general public who would be brave enough to assert the public trial right and enter the courthouse when all posted hours announce that the courthouse is in fact closed.

The measures taken in this case by the Yakima County Superior Court did not make the courthouse sufficiently "accessible," did not make the public "aware" of the ongoing public trial, and were not "reasonable" to "accommodate public attendance." Significant portions of Mr. Andy's trial were effectively closed and his conviction should be reversed in favor of a new and public trial.

know whether he did a "sweep" during Andy's trial. He also testified he had no independent recollection of what occurred during Andy's trial. 5/22/13 RP 135-36.

Finally, the denial of the constitutional right to a public trial is not subject to harmless error analysis. *Bone-Club*, 128 Wn.2d at 261-62; *Neder v. United States*, 527 U.S. 1, 8, 119 S. Ct. 1827, 144 L. Ed. 2d 35 (1999). Since denial of the public trial right is deemed to be a structural error, prejudice is presumed. *Bone-Club*, 128 Wn.2d at 261-62; *Orange*, 152 Wn.2d at 812. The only appropriate remedy is to remand for a new trial. *Brightman*, 155 Wn.2d at 518.

E. CONCLUSION

For the reasons stated, the convictions should be reversed, and the case remanded for a new trial.

Respectfully submitted October 30, 2013,

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PROOF OF SERVICE (RAP 18.5(b))

I, David N. Gasch, do hereby certify under penalty of perjury that on October 30, 2013, I mailed to the following by U.S. Postal Service first class mail, postage prepaid, or e-mailed by prior agreement (as indicated), a true and correct copy of the brief of appellant:

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