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NO. 65564-7-I

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

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STATE OF WASHINGTON,

Respondent,

v.

Henry Grisby, III,

Appellant.

---

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

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APPELLANT'S OPENING BRIEF

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A. SUMMARY OF ARGUMENT

During jury selection in Henry Grisby's criminal trial, the court closed the proceedings to the public by holding individual voir dire in chambers. The court conducted no analysis prior to the closure. The temporary closure violated Mr. Grisby's and the public's constitutional right to a public and open trial. This structural error cannot be considered harmless; prejudice is presumed. Thus Mr. Grisby's conviction must be reversed.

B. ASSIGNMENT OF ERROR

The trial court violated Mr. Grisby's and the public's right to an open trial when it conducted an off-record, in-chambers conference with prospective juror 18 during voir dire.

C. ISSUE PERTAINING TO ASSIGNMENT OF ERROR

The federal and Washington constitutions guarantee a criminal defendant's right to an open and public trial. The public and press also have the right to open and accessible court proceedings. Accordingly, a courtroom may be closed to the public only when the trial court performs a weighing test as outlined in State v. Bone-Club, 128 Wn.2d 254, 258-59, 906 P.2d 325 (1995), and finds closure favored. These rights and requirements extend to the jury selection process. Violation of the right to a public trial is

presumptively prejudicial. Where the trial court conducted an in-chambers conference that was closed to the public but did not conduct a Bone-Club analysis, was Mr. Grisby's and the public's right to an open trial violated and is reversal required?

D. STATEMENT OF THE CASE

Mr. Grisby was charged with Violation of the Uniform Controlled Substances Act. CP 1-5. During voir dire, the trial court held an in-chambers conference with prospective juror number 18. 3/11/10RP 25. The court did not conduct any analysis prior to closing the proceedings. See id. The verbatim report of proceedings records the event as follows:

The court: I was going to ask juror number 18, if you and counsel and Mr. Grisgsby [sic] would come into chambers for a moment?

COURT, COUNSEL, JUROR 18 MEET IN CHAMBERS

*(Off the record discussion)*

The court: I apologize for the interruption.

Id.<sup>1</sup> When the court resumed in open session, there was no further discussion of the in-chambers conference. Id.

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<sup>1</sup> Accord Transcript of Jury Voir Dire dated March 11, 2010 (Voir Dire 3/11/10RP) at 3.

The selected jury subsequently convicted Mr. Grisby. CP

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E. ARGUMENT

MR. GRISBY'S CONVICTION MUST BE REVERSED BECAUSE THE TRIAL COURT VIOLATED HIS AND THE PUBLIC'S RIGHT TO AN OPEN TRIAL WHEN IT CONDUCTED VOIR DIRE OFF THE RECORD AND IN CHAMBERS WITHOUT ANY ANALYSIS OF THE BASIS FOR CLOSING THE PROCEEDINGS.

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

Both the federal and state constitutions guarantee the accused the right to a public trial. The Sixth Amendment provides, "In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial . . . ." U.S. Const. amend. VI; see also U.S. Const. amend. V (guaranteeing due process of law). Article I, § 22 of the Washington Constitution guarantees "[i]n criminal prosecutions, the accused shall have the right to . . . a speedy public trial." Const. art. I, § 22.

The public also has a vital interest in access to the criminal justice system. The Washington Constitution provides, "Justice in all cases shall be administered openly, and without unnecessary delay." Const. art. I, § 10; see U.S. Const. amend. I. This clear

constitutional provision entitles the public and the press to openly administered justice. Seattle Times Co. v. Ishikawa, 97 Wn.2d 30, 36, 640 P.2d 716 (1982); Federated Publ'ns, Inc. v. Kurtz, 94 Wn.2d 51, 59-60, 615 P.2d 440 (1980). Public access to the courts is further supported by Article I, § 5, which establishes the freedom of every person to speak and publish on any topic. Federated Publ'ns, 94 Wn.2d at 58. In the federal constitution, the First Amendment's guarantees of free speech and a free press also protect the right of the public to attend a trial. Globe Newspaper Co. v. Superior Court, 457 U.S. 596, 603-05, 102 S. Ct. 2613, 73 L. Ed. 2d 248 (1982); Richmond Newspapers, Inc. v. Virginia, 448 U.S. 555, 580, 100 S. Ct. 2814, 65 L. Ed. 2d 973 (1980) (plurality).

Although the defendant's right to a public trial and the public's right to open access to the court system are different, they serve "complementary and interdependent functions in assuring the fairness of our judicial system." State v. Bone-Club, 128 Wn.2d 254, 259, 906 P.2d 325 (1995).

The requirement of a public trial is for the benefit of the accused; that the public may see he is fairly dealt with and not unjustly condemned, and that the presence of interested spectators may keep his triers keenly alive to a sense of their responsibility and to the importance of their functions.

Id. (quoting In re Oliver, 333 U.S. 257, 270 n.25, 68 S. Ct. 499, 92 L. Ed. 682 (1948)); accord State v. Brightman, 155 Wn.2d 506, 514, 122 P.3d 150 (2005) (public trial right designed 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”).

Open public access to the judicial system provides a check on the judicial process that is necessary for a healthy democracy. Globe Newspaper, 457 U.S. at 606; Richmond Newspapers, 448 U.S. at 572-73. Criminal trials may provide an outlet for community concern or outrage regarding criminal activity. Press-Enterprise v. Superior Court, 464 U.S. 501, 508-09, 104 S. Ct. 819, 78 L. Ed. 2d 629 (1984). When trials are open to the public, citizens may be confident that established, fair procedures are being followed and that deviations from those standards will be made known. Id. at 508. “Openness thus enhances both the basic fairness of the criminal trial and the appearance of fairness so essential to public confidence in the system.” Id. The role of public access to the court system in maintaining public confidence was also noted by the Washington Supreme Court:

We adhere to the constitutional principle that it is the right of the people to access open courts where they may freely observe the administration of civil and criminal justice. Openness of courts is essential to the courts' ability to maintain public confidence in the fairness and honesty of the judicial branch of government as being the ultimate protector of liberty, property, and constitutional integrity.

Allied Daily Newspapers v. Eikenberry, 121 Wn.2d 205, 211, 848 P.2d 1258 (1993).

The right to a public trial includes the right to have public access to pretrial proceedings, including jury selection. E.g., In re Personal Restraint of Orange, 152 Wn.2d 795, 804, 100 P.3d 291 (2004) (quoting Press-Enterprise, 464 U.S. at 505); Presley v. Georgia, 558 U.S. \_\_\_, 130 S. Ct. 721, 724-25, \_\_\_ L. Ed. 2d \_\_\_ (2010) (“Trial courts are obligated to take every reasonable measure to accommodate public attendance at criminal trials[,]” including the voir dire of prospective jurors). “[A] closed jury selection process harms the defendant by preventing his or her family from contributing their knowledge or insight to jury selection and by preventing the venire from seeing the interested individuals.” Brightman, 155 Wn.2d at 515 (citing Orange, 152 Wn.2d at 812); accord Const. art. I, § 35 (victims of crimes have the

right to “attend trial and all other court proceedings the defendant has the right to attend”).

“Whether a defendant’s constitutional right to a public trial has been violated is a question of law, subject to a de novo review on direct appeal.” State v. Strode, 167 Wn.2d 222, 225, 217 P.3d 310 (2009) (citing Brightman, 155 Wn.2d at 514).

2. Washington courts must apply a five-part test when considering full or temporary exclusion of the public from a trial.

To protect the accused’s constitutional right to a public trial, a trial court may not conduct secret or closed proceedings “without, first, applying and weighing five requirements as set forth in Bone-Club and, second, entering specific findings justifying the closure order.” State v. Easterling, 157 Wn.2d 167, 175, 137 P.3d 825 (2006).<sup>2</sup> The presumption of openness may be overcome only by a

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<sup>2</sup> The five Bone-Club factors are:

1. The proponent of closure or sealing must make some showing of a compelling interest, and where that need is based on a right other than an accused’s right to a fair trial, the proponent must show a “serious and imminent threat” to that right.

2. Anyone present when the closure motion is made must be given an opportunity to object to the closure.

3. The proposed method for curtailing open access must be the least restrictive means available for protecting the threatened interests.

4. The court must weigh the competing interests of the proponent of closure and the public.

finding that closure is necessary to “preserve higher values” and the closure must be narrowly tailored to serve that interest. Waller v. Georgia, 467 U.S. 39, 45, 104 S. Ct. 2210, 81 L. Ed. 2d 31 (1984) (quoting Press-Enterprise, 464 U.S. at 510).

Moreover, the trial court must enter specific findings identifying the interest so that a reviewing court may determine if the closure was proper. Id. When the record “lacks any hint that the trial court considered [the defendant’s] public trial right as required by Bone-Club, [the appellate court] cannot determine whether the closure was warranted.” Brightman, 155 Wn.2d at 515-16, 122 P.3d 150 (citing Bone-Club, 128 Wn.2d at 261).

The constitutional right to a public trial is not waived by defendant’s failure to object. Strode, 167 Wn.2d at 226; Brightman, 155 Wn.2d at 514-15; Bone-Club, 128 Wn.2d at 257.<sup>3</sup>

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5. The order must be no broader in its application or duration than necessary to serve its purpose.

E.g., Strode, 167 Wn.2d at 223, 227-28; Bone-Club, 128 Wn.2d at 258-59.

<sup>3</sup> In State v. Momah, 167 Wn.2d 140, 217 P.3d 321 (2009), the Washington Supreme Court upheld the defendant’s conviction though a thorough Bone-Club analysis was not performed on the record prior to closure. In that case, the defendant “affirmatively assented to the closure, argued for its expansion,” and “actively participated in it.” Id. at 151. In addition, the trial court consulted with both the defense and prosecution about the defendant’s public trial right, and identified the compelling interests justifying the closure. Id. at 145. Because of these extensive factual distinctions, Momah is not controlling here.

3. The trial court did not apply the five-part *Bone-Club* test before questioning a juror in chambers.

The Supreme Court has ruled unequivocally that jury selection is not exempt from public trial requirements. E.g., *Orange*, 152 Wn.2d at 804; accord *Presley*, 130 S. Ct. at 724-25. The court may not conduct voir dire in private without first discussing the need to do so on the record and weighing the necessary *Bone-Club* factors. *Easterling*, 157 Wn.2d at 175; *Orange*, 152 Wn.2d at 804.

For example, in *Strode*, the defendant was charged with first degree rape of a child, first degree attempted rape of a child, and first degree child molestation. 167 Wn.2d at 223. Those jurors who responded affirmatively to a confidential questionnaire asking “whether 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.” *Id.* at 224. In addition to the prospective juror, the judge, prosecuting attorney, defense counsel and defendant were the only others present during the in-chambers voir dire. *Id.* A *Bone-Club* analysis was not

conducted prior to these closed, in-chambers interviews of prospective jurors. Id. The Supreme Court held that the trial court's decision to allow "questioning of prospective jurors in chambers was a courtroom closure and a denial of the right to a public trial." Id. at 227. Though the record indicated generally the trial judge's basis for the closure, there was no indication that the judge engaged in the "detailed review that is required in order to protect the public trial right." Id. at 228.

Here, like in Strode, "the absence of any record showing that the trial court gave any consideration to the Bone-Club closure test prevents [this Court] from determining whether conducting part of the trial in chambers was warranted." 167 Wn.2d at 229; accord Bone-Club, 128 Wn.2d at 261 (holding constitutional rights violated where record did not show basis for courtroom closure). Indeed, this case is more egregious than Strode because the record does not indicate even generally the trial judge's basis for the closure. Compare 3/11/10RP 25 with 167 Wn.2d at 228. However, the pertinent question is not the merit of the trial court's closure but the procedure used by the trial court before closure. Strode, 167 Wn.2d at 230 n.5.

The trial judge made no effort to comply with the constitutional prerequisites to conducting private proceedings before questioning prospective juror 18 in chambers and off the record. The record here contains no indication that the trial judge “engaged in the required Bone-Club analysis or made the required formal findings of fact and conclusions of law relevant to the Bone-Club criteria.” Strode, 167 Wn.2d at 228. Thus the trial court violated the constitutional requirement of open court proceedings.

4. The court similarly violated the public’s right of access.

The requirements for protecting the public’s right to open courtrooms “mirrors” the requirements used in criminal cases. Easterling, 157 Wn.2d at 175. The court may not close the courtroom without “first, applying and weighing five requirements as set forth in Bone-Club and, second, entering specific findings justifying the closure order.” Id. (citing Bone-Club, 128 Wn.2d at 258-59, and Ishikawa, 97 Wn.2d at 37).

A member of the public is not required to assert the public’s right of access to preserve this issue for appeal. See Easterling, 157 Wn.2d at 176 n.8, 179. The public’s right to open proceedings is entrusted to the court’s protection. Strode, 167 Wn.2d at 230.

Courts are independently obligated to “ensure the public’s right to open trials is protected.” Id. at 230 n.4; see Presley, 130 S. Ct. at 724-25 (“The public has a right to be present whether or not any party has asserted the right,” and therefore, “trial courts are required to consider alternatives to closure even when they are not offered by the parties.”).

In Easterling, the Supreme Court reversed a criminal conviction due to the trial court’s closure of the courtroom during a pretrial hearing that solely involved the co-defendant, whose case had previously been severed from the defendant. 157 Wn.2d at 178, 180 n.11. There the trial court erred by not articulating the necessary grounds for closing the courtroom, even absent any objection to the courtroom closure. Id. Despite the lack of objection to the courtroom closure, the court’s failure to articulate a sufficiently compelling reason for closing the hearing to the public violated both the public’s and the defendant’s rights to an open and public trial. Id. at 179.

This decision to close a part of a criminal trial to the public runs afoul of the article I, section 10 guarantee of providing open access to criminal proceedings. It also runs contrary to this court’s consistent position of strictly protecting the public’s and the press’s right to view the administration of justice.

Id. (citing Eikenberry, 121 Wn.2d 205; Ishikawa, 97 Wn.2d 30.)

Easterling held the public has a right to access court proceedings unless there is a compelling need for closure. Generic, and even reasonable, concerns for juror privacy do not trump the constitutional right of public proceedings. State v. Frawley, 140 Wn. App. 713, 719-20, 167 P.3d 593 (2007). Like in Easterling, the trial court's closure of the courtroom during voir dire in Mr. Grisby's case violated the public's right to an open trial.

5. Reversal is required.

"Prejudice is presumed where a violation of the public trial right occurs." Bone-Club, 128 Wn.2d at 261-62 (citing State v. Marsh, 126 Wash. 142, 146-47, 217 P. 705 (1923)); accord, e.g., Waller, 467 U.S. at 49 & n. 9. Closure of the courtroom during voir dire "is a structural error that cannot be considered harmless." Strode, 167 Wn.2d at 223; accord Easterling, 157 Wn.2d at 181 ("The denial of the constitutional right to a public trial is one of the limited classes of fundamental rights not subject to harmless error analysis."). Consequently, the remedy for a violation of the right to

public access is to reverse the conviction. Easterling, 157 Wn.2d at 179-80.

In Easterling, the court rejected the possibility that a courtroom closure may be de minimis, even for a limited closure applicable to a limited hearing for a separately charged co-defendant. 157 Wn.2d at 180 (“a majority of this court has never found a public trial right violation to be de minimus”); accord Strobe, 167 Wn.2d at 223, 230 (closed jury voir dire not de minimis). Where a portion of the proceedings are fully closed to the public, the closure is not trivial or de minimis and requires reversal. Easterling, 157 Wn.2d at 174, 180 n.12.

The trial court’s error in conducting private voir dire requires reversal of Mr. Grisby’s conviction.

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F. CONCLUSION

Because the trial court conducted individual voir dire in closed proceedings, Mr. Grisby and the public's constitutional right to a public trial was violated. Accordingly, Mr. Grisby's conviction must be reversed.

DATED this 23rd day of December, 2010.

Respectfully submitted,

A handwritten signature in black ink, appearing to read 'Marla L. Zink', is written over a horizontal line.

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

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STATE OF WASHINGTON,	)	
	)	
Respondent,	)	
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v.	)	NO. 65564-7-I
	)	
HENRY GRISBY III,	)	
	)	
Appellant.	)	

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**DECLARATION OF DOCUMENT FILING AND SERVICE**

I, MARIA ARRANZA RILEY, STATE THAT ON THE 23<sup>RD</sup> DAY OF DECEMBER, 2010, I CAUSED THE ORIGINAL **OPENING 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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**SIGNED** IN SEATTLE, WASHINGTON THIS 23<sup>RD</sup> DAY OF DECEMBER, 2010.

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