

NO. 67357-2-1

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

STATE OF WASHINGTON,

Respondent,

v.

RAMOS ORTIZ-LOPEZ,

Appellant.

FILED
COURT OF APPEALS DIV 1
STATE OF WASHINGTON
2012 JUN 22 PM 4:27

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

The Honorable John M. Meyer, Judge

SUPPLEMENTAL BRIEF OF APPELLANT

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A. SUPPLEMENTAL ASSIGNMENTS OF ERROR

1. The trial court violated appellant's constitutional right to a public trial by taking peremptory challenges during a private, unreported sidebar.

2. The trial court violated the appellant's constitutional right to be present at all critical stages of trial.

Issues Pertaining to Supplemental Assignments of Error

1. During jury selection, the parties made peremptory challenges at a private, unreported sidebar. Because the trial court did not analyze the Bone-Club¹ factors before conducting this important portion of jury selection in private, did the court violate appellant's constitutional right to a public trial?

2. Did the appellant's absence from the sidebar violate his constitutional right to be present at all critical stages of trial?

B. SUPPLEMENTAL STATEMENT OF THE CASE²

Jury selection in this case occurred on April 25, 2011. CP 133-37 (trial minutes). General voir dire occurred in the late morning and early

¹ State v. Bone-Club, 128 Wn.2d 254, 906 P.2d 629 (1995).

² After the appellant's opening brief was filed, the State ordered a supplemental transcript of a portion of jury selection occurring on April 25, 2011. On June 19, this Court granted the appellant's motion to file supplemental briefing based on that transcript. This is that brief.

afternoon that day. CP 134-35. At one point, the court, the parties, and the reporter moved to another public courtroom so that four jurors could be questioned regarding sensitive matters away from the other venire members. CP 136-37; Supp. RP at 2-15.

After questioning was complete and other matters were discussed, the parties and court reconvened in the original courtroom. Supp. RP at 16.

The transcript describes the next portion of jury selection as follows:

THE COURT: Okay.

[Defense counsel]: We're ready.

THE COURT: You ready?

[The State]: No response.

THE COURT: Come up to sidebar, around here.

(SIDEBAR CONFERENCE)

THE COURT: Alright. The lawyers have selected the jury. When I call your number or your name Kelli is going to seat you.

Supp. RP at 16. The court then called the jurors who had been selected to the box and excused the remaining venire members. Supp. RP 16-17. The

trial minutes reveal that immediately before seating the selected jurors, the prosecutor and defense counsel exercised peremptory challenges. CP 137.

C. SUPPLEMENTAL ARGUMENTS

1. THE TRIAL COURT VIOLATED THE APPELLANT'S RIGHT TO A PUBLIC TRIAL BY CONDUCTING PEREMPTORY CHALLENGES AT SIDEBAR.

The Sixth Amendment to the United States Constitution and article I, section 22 of the Washington Constitution guarantee the accused a public trial by an impartial jury.³ Presley v. Georgia, __ U.S. __, 130 S. Ct. 721, 724, 175 L. Ed. 2d 675 (2010); State v. Bone-Club, 128 Wn.2d 254, 261-62, 906 P.2d 629 (1995). Additionally, article I, section 10 of the Washington Constitution provides that “[j]ustice in all cases shall be administered openly, and without unnecessary delay.” This latter provision gives the public and the press a right to open and accessible court proceedings. Seattle Times Co. v. Ishikawa, 97 Wn.2d 30, 36, 640 P.2d 716 (1982). A violation is presumed prejudicial and is not subject to harmless error analysis. State v. Strode, 167 Wn.2d 222, 231, 217 P.3d 310 (2009); State v. Easterling, 157 Wn.2d 167, 181, 137 P.3d 825

³ The Sixth Amendment provides in pertinent part that “[i]n all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury” Article I, section 22 provides that “[i]n criminal prosecutions the accused shall have the right . . . to have a speedy public trial by an impartial jury”

(2006); In re Personal Restraint of Orange, 152 Wn.2d 795, 814, 100 P.3d 291 (2004).

The public trial requirement is for the benefit of the accused; it allows the public to ensure the accused is tried fairly and to keep the court and the parties keenly aware of their responsibilities and the importance of their roles. Bone-Club, 128 Wn.2d at 259. As the United States Supreme Court has observed:

The open trial . . . plays as important a role in the administration of justice today as it did for centuries before our separation from England. . . . Openness . . . enhances both the basic fairness of the criminal trial and the appearance of fairness so essential to public confidence in the system.

Press-Enter. Co. v. Superior Court, 464 U.S. 501, 508, 104 S. Ct. 819, 78 L. Ed. 2d 629 (1984).

While the right to a public trial is not absolute, a trial court may restrict the right only “under the most unusual circumstances.” Bone-Club, 128 Wn.2d at 259. Before a trial judge can close any part of a trial, it must first apply on the record the five factors set forth in Bone-Club. Orange, 152 Wn.2d at 806-07, 809.

The accused's right to a public trial under both the federal and state constitutions applies to voir dire. Presley, 130 S. Ct. at 724; State v. Momah, 167 Wn.2d 140, 148, 217 P.3d 321 (2009). Washington courts

have repeatedly held that jury selection conducted in chambers violates the right to public trial. See, e.g., Strode, 167 Wn.2d at 226-29 (Alexander, C.J., lead opinion); 167 Wn.2d at 231-36 (Fairhurst, J., concurring); State v. Paumier, 155 Wn. App. 673, 679, 685, 230 P.3d 212, review granted, 169 Wn.2d 1017 (2010); State v. Heath, 150 Wn. App. 121, 125-29, 206 P.3d 712 (2009); State v. Frawley, 140 Wn. App. 713, 718-21, 167 P.3d 593 (2007). Because the peremptory challenge process is an integral part of voir dire, the constitutional public trial right also extends to that portion of criminal proceedings. People v. Harris, 10 Cal.App.4th 672, 684, 12 Cal.Rptr.2d 758 (1992) (holding peremptory challenges conducted as sidebar violate public trial right, even where such proceedings are reported).

The trial court violated appellant's constitutional right to a public trial by taking peremptory challenges during a private, unreported sidebar. Id. And while there is no Washington case containing identical facts, the private, unreported sidebar was no less a violation of the right to a public trial than the closed voir dire sessions that Washington courts have repeatedly held to violate the public trial right. Because the error is structural, prejudice is presumed, and thus reversal is required. Strode, 167 Wn.2d at 231.

2. THE TRIAL COURT VIOLATED THE APPELLANT'S RIGHT TO BE PRESENT AT ALL CRITICAL STAGES BY CONDUCTING PEREMPTORY CHALLENGES AT SIDEBAR.

“A criminal defendant has a fundamental right to be present at all critical stages of a trial.” State v. Irby, 170 Wn.2d 874, 880, 246 P.3d 796 (2011). This includes the right to be present during voir dire and empanelling of the jury. Diaz v. United States, 223 U.S. 442, 455, 32 S. Ct. 250, 56 L. Ed. 500 (1912). The right to be present derives from the Confrontation Clause of the Sixth Amendment and the Due Process Clauses of the Fifth and Fourteenth Amendments. Id.⁴

Jury selection is “the primary means by which a court may enforce a defendant's right to be tried by a jury free from ethnic, racial, or political prejudice, or predisposition about the defendant's culpability.” Irby, 170 Wn.2d at 884 (quoting Gomez v. United States, 490 U.S. 858, 873, 109 S. Ct. 2237, 104 L. Ed. 2d 923 (1989)). “[A] defendant's presence at jury selection ‘bears, or may fairly be assumed to bear, a relation, reasonably substantial, to his opportunity to defend’ because ‘it will be in his power, if present, to give advice or suggestion or even to supersede his lawyers altogether.’” Irby, 170 Wn.2d at 883 (quoting

⁴ In situations in which the accused is not actually confronting witnesses or evidence against him, this right is protected by the Due Process Clause. Irby, 170 Wn.2d at 880-81 (quoting United States v. Gagnon, 470 U.S. 522, 526, 105 S. Ct. 1482, 84 L. Ed. 2d 486 (1985)).

Snyder v. Massachusetts, 291 U.S. 97, 105-06, 54 S. Ct. 330, 78 L. Ed. 674 (1934), overruled on other grounds by Malloy v. Hogan, 378 U.S. 1, 84 S. Ct. 1489, 12 L. Ed. 2d 653 (1964))). This right attaches from the time empanelment of the jury begins. Irby, 170 Wn.2d at 883.

Irby requires reversal in this case. In Irby, the State and Irby agreed to the trial court's suggestion that neither party attend the first day of jury selection and that they appear and begin questioning jurors on the following day. Id. at 877.

As agreed, on the first day of jury selection, the judge swore in the venire members and gave them a jury questionnaire. After the potential jurors completed questionnaires, the judge sent an email to the prosecutor and defense counsel suggesting that 10 venire members be removed from the panel for various reasons. The judge asked for input, indicating that if any jurors were going to be released, he would like to do it that day. Id.

Irby's counsel agreed to release all ten potential jurors. The prosecutor objected to the release of three. The court then released the remaining seven. Irby, however, was in custody at the time of the exchange and there was no indication that he was consulted about the dismissal of any potential jurors. Id. at 878-79.

Jury selection continued on the following day in Irby's presence. Id. at 878. At the conclusion of trial, the jury convicted Irby as charged.

Id. at 879. Irby appealed to this Court, arguing that the trial court's dismissal of the seven potential jurors via email exchange violated his right to be present at all critical stages. This Court agreed, and was affirmed by the Supreme Court. Id. at 887.

This case is like Irby in all important respects. The court took peremptory challenges at sidebar⁵ and there is no indication that Ortiz was present or permitted to participate. See Lewis v. United States, 146 U.S. 370, 372, 13 S. Ct. 136, 36 L. Ed. 1011 (1892) (“[W]here the [defendant’s] personal presence is necessary in point of law, the record must show the fact.”); see also People v. Williams, 858 N.Y.S.2d 147, 52 A.D.3d 94, 96-97 (2008) (exclusion of defendant from sidebar conference where jurors excused by agreement violates right to be present; court refuses to speculate that defendant could overhear conversations). The fundamental purpose of a defendant's right to be present during jury selection, including the exercise of peremptory challenges, is to allow him to give advice or suggestions to counsel or even to supersede counsel's decisions. Here, as in Irby, because Ortiz was not present for this portion of jury selection, he was unable to exercise that right. See Commonwealth v. Owens, 414 Mass. 595, 602, 609 N.E.2d 1208 (1993)

⁵ Supp. RP 16; CP 137.

(defendant “has a right to be present when jurors are being examined in order to aid his counsel in the selection of jurors and in the exercise of his peremptory challenges”) (citing Lewis, 146 U.S. at 372).

Nonetheless, violation of the right to be present is subject to harmless error analysis. Irby, 170 Wn.2d at 885. The State bears the burden of proving beyond a reasonable doubt that the error is harmless. Id. at 886.

The Irby Court found Irby’s absence from the portion of jury selection at issue was not harmless:

[T]he State has not and cannot show that three of the jurors who were excused in Irby's absence ... had no chance to sit on Irby's jury. Those jurors fell within the range of jurors who ultimately comprised the jury, and their alleged inability to serve was never tested by questioning in Irby's presence Had [those jurors] been subjected to questioning in Irby's presence . . . the questioning might have revealed that one or more of these potential jurors were not prevented by reasons of hardship from participating on Irby's jury Therefore, the State cannot show beyond a reasonable doubt that the removal of several potential jurors in Irby's absence [was harmless].

Id. at 886-87.

Thus, the Irby Court considered whether the same jurors would have inevitably sat on the jury regardless of Irby’s participation and concluded the answer was no. Accordingly, the State could not show the error was harmless. Id. As in Irby, the State cannot show that the venire

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DIVISION ONE

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| STATE OF WASHINGTON |) | |
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| Respondent, |) | |
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| v. |) | COA NO. 67357-2-1 |
| |) | |
| RAMOS ORTIZ-LOPEZ, |) | |
| |) | |
| Appellant. |) | |

DECLARATION OF SERVICE

I, PATRICK MAYOVSKY, DECLARE UNDER PENALTY OF PERJURY UNDER THE LAWS OF THE STATE OF WASHINGTON THAT THE FOLLOWING IS TRUE AND CORRECT:

THAT ON THE 20TH DAY OF JUNE 2012, I CAUSED A TRUE AND CORRECT COPY OF THE **SUPPLEMENTAL BRIEF OF APPELLANT** TO BE SERVED ON THE PARTY / PARTIES DESIGNATED BELOW BY DEPOSITING SAID DOCUMENT IN THE UNITED STATES MAIL.

- [X] ERIK PEDERSEN
SKAGIT COUNTY PROSECUTOR'S OFFICE
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SIGNED IN SEATTLE WASHINGTON, THIS 20TH DAY OF JUNE 2012.

x Patrick Mayovsky

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