

NO. 69273-9-I

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

REC'D
JUN 24 2013
King County Prosecutor
Appellate Unit

STATE OF WASHINGTON,

Respondent,

v.

ROBERT SHAVER, JR.,

Appellant.

COURT OF APPEALS
STATE OF WASHINGTON
2013 JUN 24 PM 1:27

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

The Honorable Barbra Linde, Judge
The Honorable Catherine Shaffer, Judge

BRIEF OF APPELLANT

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A. ASSIGNMENT OF ERROR

The trial court violated appellant's constitutional right to a public trial by having the parties exercise their peremptory challenges in private.

Issue Presented

The parties exercised their peremptory challenges in private and off the record and then provided the court with a list of those challenged, which the court read aloud without designating which party made the challenge. Because the trial court did not analyze the Bone-Club¹ factors before having this important portion of jury selection held privately, did the court violate appellant's constitutional right to a public trial?

B. STATEMENT OF THE CASE

The State charged appellant Robert Shaver, Jr., with stalking, first degree burglary, unlawful imprisonment, third degree assault, and two counts of misdemeanor violation of a court order. CP 14-18. The State alleged Shaver stalked his estranged girlfriend, Chun-Mei Huang, from September 4, 2011 until September 25, 2011, at which time he unlawfully entered her apartment, assaulted her, tied her up, and held her for a period of time before eventually releasing her, after which he contacted her repeatedly in violation of a no-contact order. CP 6-13.

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

A jury trial was held March 28, 2012, through April 10, 2012. 1RP-3RP.² Shaver was convicted of all charges except the first degree burglary charge, for which a unanimous verdict could not be reached. CP 70-74; 1RP 927-29. Shaver subsequently pleaded guilty to an amended charge of second degree burglary. CP 80-93; 5RP 2-11.

The trial court imposed a 56-month sentence. CP 94-104; 1RP 939-41. Shaver appeals. 106-117.

C. ARGUMENT

THE TRIAL COURT VIOLATED THE SHAVER'S RIGHT TO A PUBLIC TRIAL BY HAVING PEREMPTORY CHALLENGES CONDUCTED PRIVATELY.

Prior to the conclusion of voir dire, the trial court informed counsel that they would exercise their peremptory challenges "on paper passing it back and forth". 1RP 176. At the conclusion of voir dire, the court explained to the venire that it would read the preliminary instruction to them while the parties figured out who the "final participants in this jury will be." 3RP 51. Upon completing recital of its preliminary instructions, the trial court identified the 12 venire members who had been struck by the parties, but did not identify which party had struck which member.

² There are ten volumes of verbatim report of proceedings referenced as follows: 1RP - six-volume, consecutively paginated set for the dates of March 28-29, 2012, April 3-5, 2012, April 9-10, 2012, and August 3, 2012; 2RP - March 29, 2012 (voir dire); 3RP - April 3, 2012 (voir dire); 4RP - July 25, 2012; and 5RP - July 26, 2012.

3RP 57-58. Thirteen jurors were then seated and sworn in to hear Shaver's case. 3RP 58-59. This procedure violated Shaver's constitutional rights to a public trial and reversal is therefore required.

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, 558 U.S. 209, 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).

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.

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”

Orange, 152 Wn.2d at 806-07, 809. A violation is presumed prejudicial and is not subject to harmless error analysis. State v. Wise, 176 Wn.2d 1, 16-19, 288 P.3d 1113 (2012); 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 (2006); In re Personal Restraint of Orange, 152 Wn.2d 795, 814, 100 P.3d 291 (2004).

The public trial right applies to “the process of juror selection,” which “is itself a matter of importance, not simply to the adversaries but to the criminal justice system.” Orange, 152 Wn.2d at 804 (quoting Press-Enter. Co. v. Superior Court, 464 U.S. 501, 505, 104 S. Ct. 819, 78 L. Ed. 2d 629 (1984)). The right to a public trial includes “circumstances in which the public's mere presence passively contributes to the fairness of the proceedings, such as deterring deviations from established procedures, reminding the officers of the court of the importance of their functions, and subjecting judges to the check of public scrutiny.” State v. Slert, 169 Wn. App. 766, 772, 282 P.3d 101 (2012)⁴ (quoting State v. Bennett, 168 Wn. App. 197, 204, 275 P.3d 1224 (2012)).

⁴ In Slert, this Court reversed Slert’s conviction, holding that an in-chambers conference at which various jurors were dismissed based on their answers to a questionnaire violated his right to a public trial. 169 Wn. App. at 778-79.

The peremptory challenge process, an integral part of jury selection,⁵ is one such proceeding: While peremptory challenges may be exercised based on subjective feelings and opinions, there are important constitutional limits on both parties' exercise of such challenges. Georgia v. McCollum, 505 U.S. 42, 49, 112 S. Ct. 2348, 120 L. Ed. 2d 33 (1992); Batson v. Kentucky, 476 U.S. 79, 106 S. Ct. 1712, 90 L. Ed. 2d 69 (1986). Based on these crucial constitutional limitations, public scrutiny of the exercise of peremptory challenges is more than a procedural nicety; it is required by the constitution. See Slert, 169 Wn. App. at 772 (explaining need for public scrutiny of proceedings).

The procedure employed at Shaver's trial violated his right to a public trial to the same extent as any in-chambers conference or other courtroom closure would have. Even though the procedure occurred in an otherwise open courtroom, any assertion that the procedure was in fact public should be rejected. The procedure was similar to a sidebar, which occurs outside of the public's scrutiny, and thus violates the appellant's right to a fair and public trial. Slert, 169 Wn. App. at 774 n. 11 (rejecting argument that no violation occurred if jurors were actually dismissed not in chambers but at a sidebar and stating "if a side-bar conference was used

⁵ People v. Harris, 10 Cal.App.4th 672, 684, 12 Cal.Rptr.2d 758 (1992).

to dismiss jurors, the discussion would have involved dismissal of jurors for case-specific reasons and, thus, was a portion of jury selection held wrongfully outside Slert's and the public's purview"); see also Harris, 10 Cal.App.4th at 684, (exercise of peremptory challenges in chambers violates defendant's right to a public trial); cf. People v. Williams, 26 Cal.App.4th Supp. 1, 7-8, 31 Cal.Rptr.2d 769 (1994) (peremptory challenges could be held at sidebar to permit party opponent to make motion based on state version of Batson, 476 U.S. 79, if challenges and party making them were then announced in open court).

The trial court violated Shaver's constitutional right to a public trial by allowing the peremptory challenge process to occur in private while it read preliminary instructions to the venire and others in the courtroom not engaged in the peremptory challenge process. And while there is no Washington case containing identical facts, the private proceeding 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. Wise, 176 Wn.2d at 16-19.

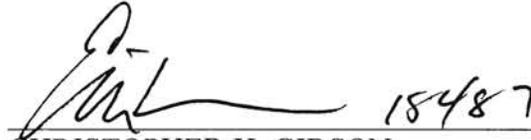
D. CONCLUSION

The trial court violated Shaver's s right to a public trial by having counsel exercise peremptory challenges in a manner removed from public scrutiny. This Court should therefore reverse Shaver's convictions.

DATED this 24th day of June 2013.

Respectfully submitted,

NIELSEN, BROMAN & KOCH, PLLC

A handwritten signature in black ink, appearing to read "C. H. Gibson", with the number "18487" written to the right of the signature.

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DIVISION ONE

STATE OF WASHINGTON)

Respondent,)

vs.)

ROBERT SHAVER,)

Appellant.)

COA NO. 69273-9-1

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 24TH DAY OF JUNE, 2013, I CAUSED A TRUE AND CORRECT COPY OF THE **BRIEF OF APPELLANT** TO BE SERVED ON THE PARTY / PARTIES DESIGNATED BELOW BY DEPOSITING SAID DOCUMENT IN THE UNITED STATES MAIL.

[X] ROBERT SHAVER
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2013 JUN 24 PM 4:27
COURT OF APPEALS DIV 1
STATE OF WASHINGTON

SIGNED IN SEATTLE WASHINGTON, THIS 24TH DAY OF JUNE, 2013.

x Patrick Mayovsky