 74951-0

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Court of Appeals
Division I
State of Washington

NO. 74951-0-I

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

STATE OF WASHINGTON,

Respondent,

v.

EFRAIN ALVARADO,

Appellant.

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

The Honorable Brian L. Stiles, Judge

BRIEF OF APPELLANT

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A. ASSIGNMENTS OF ERROR

1. The trial court violated appellant's right to a public trial.

2. If the State seeks appellate costs, those should be denied.

Issues Pertaining to Assignments of Error

1. In two unrecorded sidebars, the trial court considered objections made by defense counsel to the State's closing argument. The sidebar arguments and rulings were not later summarized on the record, and there is not any indication as to their content in the court file. Did these courtroom closures violate appellant's constitutional right to a public trial?

2. Appellant is indigent. Should this Court deny appellant costs if they are requested?

B. STATEMENT OF THE CASE

1. Procedural History

On October 22, 2015, the Skagit County prosecutor charged appellant Efrain Alvarado with one count of first degree unlawful possession of a firearm. CP 44. A jury found him guilty. CP 54. He was sentenced to 25 months of confinement. CP 34-43.

2. Substantive Facts.

On morning of October 6, 2015, Ashley West was waking up when she heard a loud explosion that sounded like broken glass. RP 71. She ran outside and saw that an upstairs window had been broken outward. RP 72. She ran into the house and up the stairs to where her roommate, Irene Alvarado (Irene), had a room. West observed a large hole in Irene's door, which lined up with holes in the bedroom door across the hall, which in turn lined up with the broken window. RP 73, 79.

Standing outside Irene's locked door, West peered in through the large hole. RP 74. She saw Irene in bed across the room. RP 76. She also saw Irene's brother, Efrain Alvarado, sitting against a wall that was directly in the path of the holes and he was within arm's reach of a shotgun. RP 75, 78, 79. West asked what happened, but Alvarado said nothing and just looked forward with a blank look on his face. RP 76.

West went to the police station and reported the incident. RP 80. Alvarado had a previous conviction that disqualified him from possessing a gun. RP 139. Police executed a search warrant later that day. RP 101-02. They did not find the shotgun or any evidence

that Alvarado had dominion or control over the bedroom. RP 103, 115.

C. ARGUMENT

1. ALVARADO'S RIGHT TO A PUBLIC TRIAL WAS VIOLATED WHEN THE TRIAL COURT TWICE CONSIDERED DEFENSE COUNSEL'S OBJECTIONS TO THE PROSECTUOR'S CONDUCT DURING REBUTTAL ARGUMENT IN UNRECORDED SIDEBARS.

(i) Relevant Facts

During the State's rebuttal argument, the prosecutor was addressing the possession element when defense counsel objected and asked to approach the bench. RP 222. The trial court agreed a sidebar was necessary and conducted the conference off the record. RP 222-23. Afterward, nothing was said and the State continued with its argument. RP 223.

Shortly afterward, defense counsel again objected. RP 224. The prosecutor said he was done with his argument, but the trial counsel stated it wanted a sidebar anyway. RP 224. Again, nothing was summarized on the record afterward. RP 224.

Apparently in response to the objections, the trial court cautioned the jury that, if there was any argument that was beyond

the evidence or beyond the instructions, it was to disregard that and decide the evidence for itself. RP 224-25.

The trial court never memorialized the content of the sidebars on the record, and there is nothing in the court file indicating the content of the sidebars. CP __ (sub no. 30 – trial minutes).

(ii) Legal Argument

The Sixth Amendment and article I, section 22 of the Washington Constitution guarantee the accused a public trial by an impartial jury. Presley v. Georgia, 558 U.S. 209, 213, 130 S. Ct. 721, 175 L. Ed. 2d 675 (2010); State v. Bone-Club, 128 Wn.2d 254, 261-62, 906 P.2d 629 (1995). Article I, section 10 of the Washington Constitution also provides that "[j]ustice in all cases shall be administered openly." This gives the press and public a right to open and accessible court proceedings. Seattle Times Co. v. Ishikawa, 97 Wn.2d 30, 36, 640 P.2d 716 (1982).

The right to a public trial is a core safeguard in our justice system. State v. Wise, 176 Wn.2d 1, 5, 288 P.3d 1113 (2012). The open and public judicial process helps ensure fair trials, deters misconduct, and tempers biases and undue partiality. Id. at 6. It is a check on the judicial system, provides for accountability and

transparency, and assures that whatever transpires in court will not be secret or unscrutinized. Id.

A violation of the public trial right is structural error, presumed prejudicial, and not subject to harmless error analysis. Id. at 13-15. Whether the public trial right has been violated is a question of law reviewed de novo, and may be raised for the first time on appeal. Id. at 9.

Courts employ a three-step test for determining whether the public trial right is violated, asking whether: (1) the proceeding at issue implicated the public trial right under the "experience and logic" test; (2) the proceeding was closed; and (3) the closure was justified (i.e., did the court conduct a Bone-Club analysis on the record prior to closing the proceeding?). State v. Gomez, 183 Wn.2d 29, 33, 347 P.3d 876 (2015). Applying that three-part inquiry here, the record establishes that Alvarado's right to a public trial was violated.

(iii) Sidebar Conferences Addressing Potential Prosecutorial Misconduct During Closing Argument Implicate the Public Trial Right.

The proceeding at issue in this case is a sidebar conference held in response to defense counsel's objection to the State's conduct during closing argument. There were two such proceedings

here. As explained below, under the experience and logic test, this type of proceeding implicates public trial rights.

Under the experience and logic test, the first prong asks whether the place and process of the proceeding have historically been open to the press and public. State v. Sublett, 176 Wn.2d 58, 73, 292 P.3d 715 (2012). The second prong asks whether public access plays a significant role in the functioning of the particular process in question. Id. The guiding principle under both prongs is "whether openness will enhance both the basic fairness of the criminal trial and the appearance of fairness so essential to public confidence in the system." State v. Smith, 181 Wn.2d 508, 514-15, 519, 334 P.3d 1049 (2014) (citations and internal quotes omitted). Where that occurs, the public trial right attaches.

In Smith, the Supreme Court held that sidebars on evidentiary matters do not implicate the public trial right under the experience and logic test. 181 Wn.2d at 511. The court explained, however, that "[p]roper sidebars . . . deal with mundane issues implicating little public interest." Id. at 516. It cautioned, "that merely characterizing something as a 'sidebar' does not make it so." Id. at 516 n.10. Therefore:

> To avoid implicating the public trial right, sidebars must be limited in content to their traditional subject areas, should be done only to avoid disrupting the flow of trial, and must either be on the record or be promptly memorialized in the record.

Id.

The proceeding at issue in this case was not limited to mundane evidentiary matters, was not memorialized, and exceeded the limited scope of a traditional sidebar. Hence, Smith's holding is inapplicable.

Importantly, however, when considering the type of sidebar proceeding at issue in Smith, the Supreme Court distinguished the type of proceeding at issue in State v. Easterling, 157 Wn.2d 167, 172, 137 P.3d 825 (2006). There, the courtroom was closed during a codefendant's combined motion to sever and dismiss. Id. The Easterling proceeding included a discussion about whether the State acted in bad faith. Easterling, 157 Wn.2d at 172 & n.7. The Supreme Court concluded the closure violated Easterling's public trial right because courts have a strong interest in protecting the transparency and fairness of criminal trials. Id. at 178.

In Smith, the Supreme Court concluded the proceeding in Easterling was not akin to a mundane sidebar dealing with evidentiary issues that often come up during trial. Smith, 181 Wn.2d

at 517-18. Instead, it recognized that the Easterling proceeding, which addressed issues pertaining to bad faith on the part of the State, demanded openness as a key factor for insuring fairness in the trial process and for achieving the appearance of fairness that is so essential for public confidence in the justice system. Id.

The Smith Court concluded evidentiary sidebars "do not invoke any of the concerns the public trial right is meant to address regarding perjury, transparency, or the appearance of fairness." Id. The court further explained that evidentiary rulings are exclusively within the province of the trial judge, so nothing is added to the functioning of trial by making such rulings in open court. Id. at 519.

The sidebars in Alvarado's case are more analogous to the proceeding at issue in Easterling than the evidentiary sidebars in Smith. Sidebar proceedings addressing potential prosecutorial misconduct during closing arguments do not merely implicate mundane procedural issues of little public interest. Instead, such proceedings are more similar to the proceeding at issue in Easterling, which addressed questions as to the State's potential bad faith in prosecuting its case.

Misconduct during the State's closing argument that is not properly handled at trial is very serious, and it may ultimately deny the

defendant the fair trial guaranteed him by the constitution. State v. Monday, 171 Wn.2d 667, 676-77, 257 P.3d 551 (2011); State v. Reed, 102 Wn.2d 140, 145, 684 P.2d 699 (1984); State v. Case, 49 Wn.2d 66, 70–71, 298 P.2d 500 (1956); State v. Evans, 163 Wn. App. 635, 642, 260 P.3d 934 (2011). Prosecutorial misconduct during closing arguments may preclude a fair consideration of the case by the jury, or otherwise interfere with the fair and even-handed administration of justice. Id. Hence, proceedings addressing potential misconduct are precisely the type of proceedings that must be subject to public scrutiny in order to assure fair trials and deter misconduct. Wise, 176 Wn.2d at 5.

Indeed, matters pertaining to whether the prosecutor is engaging in misconduct rouse appearance-of-fairness concerns and public questions as to the State's prosecutorial role against its citizens. In order to enhance both the basic fairness of a criminal trial and the appearance of fairness so essential to public confidence in the system, trial courts need to consider challenges to potential prosecutorial misconduct in the open and within the view of public scrutiny. That did not happen here.

In sum, defense counsel objected twice to the State's argument regarding a core element of its case against Alvarado. This

raised substantial issues of public interest: whether the prosecutor was engaging in misconduct and, more significantly, whether Alvarado was being denied a fair trial. Wise, 176 Wn.2d at 6; Easterling, 157 Wn.2d at 178. As such, this type of proceeding exceeds the limited scope of Smith's evidentiary sidebars. Experience and logic demonstrate objections and rulings pertaining to potential prosecutorial misconduct should be heard in open court.

(iv) The Trial Court Impermissibly Closed the Courtroom without Conducting the *Bone-Club* Analysis.

A trial court may restrict the public trial right only "under the most unusual circumstances." Bone-Club, 128 Wn.2d at 259. Before closing any part of trial, therefore, the trial court must apply the five Bone-Club factors on the record.[1] Id. at 258-59.

A courtroom closure occurs where a portion of the trial is held in a place that is inaccessible to spectators. State v. Love, 183 Wn.2d 598, 606, 354 P.3d 841 (2015). Although the Supreme Court recently held there was no courtroom closure when for-cause

[1] These factors are: (1) the proponent of closure must show a compelling interest for closure and, when closure is not based on the accused's right to a fair trial, a serious and imminent threat to that compelling interest; (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; and (5) the order must be no broader in its application or duration than necessary to serve its purpose. Bone-Club, 128 Wn.2d at 258-59.

challenges were made at sidebar and peremptory challenges were made by silently exchanging a written list of jurors (Id. at 606-07), the circumstances here are distinguishable.

In Love, the Washington Supreme Court explained that the process was open to the public because:

> [O]bservers could watch the trial judge and counsel ask questions of potential jurors, listen to the answers to those questions, see counsel exercise challenges at the bench and on paper, and ultimately evaluate the empaneled jury. The transcript of the discussion about for cause challenges and the struck juror sheet showing the peremptory challenges are both publically available. The public was present for and could scrutinize the selection of Love's jury from start to finish, affording him the safeguards of the public trial right missing in cases where we found closures of jury section.

Id. at 607. The court further reasoned, "written peremptory challenges are consistent with the public trial right so long as they are filed in the public record." Id.

Unlike the jury selection in Love, however, in Alvarado's case, the public was entirely excluded from the sidebar proceedings. In Love, the public could view the struck jurors leave the courtroom and could see the final empaneled jury. Here, no such visual information was afforded the public. In Love, the parties' challenges were also filed in the public record, so the public

could find out exactly which party struck each juror. There is nothing on file here that would allow the public to glean the content of those sidebar rulings.

Here, unlike in Love, the public had no idea what was being discussed at the sidebars. The only clue that might have vaguely tipped off the public was the trial court's instruction to the jury after closing arguments. However, this instruction included no summarization of what occurred during the sidebar or of the court's rulings, so the public is unable to consider for itself whether the Court's instruction was an adequate remedy or whether it sufficiently protected Alvarado's right to a fair trial.

The secret sidebar discussions did not allow for accountability and transparency—twin goals of the public trial right. The public only knows that secret conferences occurred after defense counsel's objection to the prosecutor's closing arguments. There was no contemporaneous recording of the sidebar discussion or any rulings. There was no summarization on the record. There are no court documents filed from which the public may glean the content of these sidebars. Hence, the sidebars were proceedings that were closed to the public and there should have bone a Bone-Club analysis.

The trial court failed to conduct the five-part Bone-Club test before holding the sidebar proceedings. Failure to perform the Bone-Club analysis before closing the courtroom is structural error, no matter how brief the closure. State v. Shearer, 181 Wn.2d 564, 572-73, 334 P.3d 1078 (2014). Consequently, this Court should reverse and remand for a new trial. Wise, 176 Wn.2d at 19.

II. THIS COURT SHOULD EXERCISE ITS DISCRETION AND DENY ANY REQUEST FOR COSTS.

Alvarado was represented below by appointed counsel. CP __ (sub no. 12). The trial court found him indigent for purposes of this appeal. CP __ (sub no. 51). Under RAP 15.2(f), "The appellate court will give a party the benefits of an order of indigency throughout the review unless the trial court finds the party's financial condition has improved to the extent that the party is no longer indigent."

Under RCW 10.73.160(1), appellate courts "*may* require an adult offender convicted of an offense to pay appellate costs." (Emphasis added). The commissioner or clerk "will" award costs to the State if the State is the substantially prevailing party on review, "*unless the appellate court directs otherwise in its decision terminating review.*" RAP 14.2 (emphasis added). Thus, this Court

has discretion to direct that costs not be awarded to the state. State v. Sinclair, 192 Wn. App. 380, 393, 367 P.3d 612, 618 (2016). Our Supreme Court has rejected the notion that discretion should be exercised only in "compelling circumstances." State v. Nolan, 141 Wn.2d 620, 628, 8 P.3d 300 (2000).

In Sinclair, this Court concluded, "it is appropriate for this court to consider the issue of appellate costs in a criminal case during the course of appellate review when the issue is raised in an appellant's brief. Sinclair, 192 Wn. App. at 389-90. Moreover, ability to pay is an important factor that may be considered. Id.

Based on Alvarado's indigence, this Court should exercise its discretion and deny any requests for costs in the event the State is the substantially prevailing party.

D. CONCLUSION

For the reasons stated above, this Court should reverse and remand for a new trial.

DATED this 4th day of August, 2016.

Respectfully submitted,

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