

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

STATE OF WASHINGTON,)	No. 63749-5-I
)	
Respondent,)	
)	
v.)	UNPUBLISHED OPINION
)	
LARRY GRUBB,)	
)	
Appellant.)	FILED: May 31, 2011

Schindler, J. — Article I, section 22 of the Washington State Constitution guarantees a criminal defendant the right to a public trial. In this case, the trial court conducted individual voir dire in chambers without first addressing and weighing the five factors required by State v. Bone-Club, 128 Wn.2d 254, 906 P.2d 325 (1995). Because the failure to conduct a sufficient Bone-Club analysis before closing criminal trial proceedings requires reversal in all but the most exceptional circumstances, we reverse Larry Grubb’s convictions for rape of a child in the first degree and remand for a new trial.

FACTS

The State charged Larry Grubb with nine counts of child rape in the first degree for conduct involving his step-granddaughter E.R. The incidents were alleged to have

occurred between July 29, 2005 and December 31, 2007. Before trial, the State moved to dismiss one of the counts, which it alleged occurred in another county. The trial court granted the motion and over Grubb's objection, also granted the State's motion to allow evidence of that incident pursuant to ER 404(b) and RCW 10.58.090.

At the outset of Grubb's trial, the court provided the jury venire with a written questionnaire to facilitate jury selection. The questionnaire invited the jurors to indicate a preference for discussing certain questions privately. Before the potential jurors were called into the courtroom, the prosecutor asked the court how it wished to proceed if any of the jurors wished to speak privately. The court indicated it intended to follow "the Momah case and the other cases I think as best we can."¹ The court stated that it would ask if anyone in the courtroom had an objection, and if nobody objected, they would go into chambers with the court reporter. Defense counsel commented that the defendant would have the right to be present and the court agreed.

Based on the responses to the questionnaires, the court invited four prospective jurors into chambers individually. There were no objections. The court, the defendant, counsel, and the court reporter were present. Defense counsel participated in questioning the jurors on the record, and challenged one for cause. The court denied the challenge.

Jury selection continued in open court. Once it was complete, the court made a

¹ Based on the date of the trial, it is clear that the court was referring to this court's opinion in the Momah case, not the later Supreme Court opinion discussed below.

record regarding the voir dire that had occurred in chambers. The court first indicated that it did not believe it had actually engaged in a closure of the court by conducting part of the voir dire in chambers. The court also stated that if there had been a closure, it was justified under Bone-Club to protect the defendant's rights. Following a week-long trial, Grubb was convicted by the jury of seven of the charged counts. He appeals.

ANALYSIS

Grubb contends that the trial court violated his right to a public trial when it conducted voir dire of individual jurors in chambers. Whether a trial court procedure violates a criminal defendant's right to a public trial is a question of law that we review de novo. State v. Easterling, 157 Wn.2d 167, 173-74, 137 P.3d 825 (2006).

The state and federal constitutions guarantee the right to a public trial. Article I, section 22 of the Washington Constitution provides: "In criminal prosecutions the accused shall have the right . . . to have a speedy public trial." The Sixth Amendment to the United States Constitution states: "In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial."² These provisions assure a fair trial, foster public understanding and trust in the judicial system, and give judges the check of public scrutiny. State v. Duckett, 141 Wn. App. 797, 803, 173 P.3d 948 (2007) (citing State v. Brightman, 155 Wn.2d 506, 514, 122 P.3d 150 (2005); Dreiling v. Jain, 151 Wn.2d 900, 903-04, 93 P.3d 861 (2004)). While the right to a public trial is not

² Additionally, article I, section 10 of the Washington State Constitution provides that "[j]ustice in all cases shall be administered openly, and without unnecessary delay." This provision secures the public's right to open and accessible proceedings.

absolute, Washington courts strictly guard it to assure that proceedings occur outside the public courtroom in only the most unusual circumstances. State v. Strode, 167 Wn.2d 222, 226, 217 P.3d 310 (2009); Easterling, 157 Wn.2d at 174-75; In re Pers. Restraint of Orange, 152 Wn.2d 795, 804-05, 100 P.3d 291 (2004).

To protect the defendant's right to a public trial, our Supreme Court held in Bone-Club that a court must analyze and weigh five factors before closing part of a criminal trial.³ This requirement applies to the closure of jury selection. Orange, 152 Wn.2d at 807-14. Here, the record reflects that the court conducted questioning in chambers to protect the privacy of prospective jurors without first undertaking the required Bone-Club analysis.

The State contends that, notwithstanding this error, Grubb is not entitled to appellate relief. As in State v. Momah, 167 Wn.2d 140, 217 P.3d 321 (2009), cert. denied, 131 S. Ct. 160, 178 L. Ed. 2d 40 (2010), the State avers the error was not structural and that it caused no prejudice. Thus, the State continues, it does not

³ Under Bone-Club,

1. The proponent of closure . . . 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.

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 (alteration in original) (quoting Allied Daily Newspapers of Wash. v. Eikenberry, 121 Wn.2d 205, 210-11, 848 P.2d 1258 (1993)).

require reversal.⁴ The State points out that Grubb participated in the process. The State further contends that Grubb also benefited from the procedure because it ensured the impartiality of the jury.

Momah presented unusual circumstances. That case was characterized by wide publicity, which led to the defense's concern that prospective jurors with knowledge of the case would contaminate the entire venire if questioned in open court. Momah, 167 Wn.2d at 145-46. As a result, the court and counsel conducted individual voir dire of those potential jurors who indicated that they had prior knowledge of the case, asked for private questioning, or stated that they could not be fair. Momah, 167 Wn.2d at 146. Although the trial court did not explicitly analyze the Bone-Club factors before closing the courtroom, our Supreme Court affirmed Momah's conviction. Momah, 167 Wn.2d at 145, 156. In doing so, the court observed that the trial court and trial counsel recognized and "carefully considered" Momah's competing article I, section 22 rights. Momah, 167 Wn.2d at 156. In addition, the court concluded that Momah's conduct indicated deliberate, tactical choices to protect his right to an impartial jury. Momah, 167 Wn.2d at 155; see also Strode, 167 Wn.2d at 234 (Fairhurst, J., concurring) ("Prior to voir dire, [Momah] was expressly advised that all proceedings are presumptively public. Nonetheless, the defense affirmatively sought individual questioning of the jurors in private, sought to expand the number of jurors subject to such questioning, and actively engaged in discussions about how to accomplish this."). The court found that these circumstances distinguished Momah's case from the court's previous public

⁴ The State has not argued on appeal that no trial closure occurred.

trial cases. Momah, 167 Wn.2d at 151.

Although the process employed here may have theoretically furthered Grubb's interest in an impartial jury, the record reveals that the primary purpose of closure was to avoid embarrassing the jurors. And while Grubb acquiesced in the process established by the court, there is no indication that he or his counsel initiated the process or argued for its expansion, as was the case in Momah.

The State points to the record the trial court made after the jury was empanelled and argues that the court sufficiently, if belatedly, set forth a proper justification for its earlier decision to conduct individual voir dire in chambers. But the State cites no authority that an untimely consideration of the Bone-Club factors sufficiently protects the right to a public trial. Moreover, the court's belated remarks in this case did not reflect the necessary "detailed review" required to protect the public trial right in any event. Bone-Club, 128 Wn.2d at 260-61; see also State v. White, 152 Wn. App. 173, 181, 215 P.3d 251 (2009) ("The trial court must consider alternatives and balance the competing interests on the record."). The court here did not address why less restrictive measures could not have been sufficient. In addition, the court appeared to rely on a conclusion that the public had no interest in the trial proceeding openly because no one objected.⁵ Our Supreme Court has said, however, that merely

⁵ On the topic of the nature of the public's interest in the proceedings, the court stated, I think both parties' interests were protected as well as the public interests at that time, and I really don't see any competing interest in the public since no one was, other than folks involved in the case, and there was no one who expressed objection, and the order was limited only for those few questions that the jurors were uncomfortable about, and took no longer than necessary to inquire about those, and that is the Court's findings and determination, and that's under the merit of . . . Bone-Club.

affording an opportunity to object “holds no ‘practical meaning’ unless the court informs potential objectors of the nature of the asserted interests.” Bone-Club, 128 Wn. 2d at 261 (quoting Seattle Times Co. v. Ishikawa, 97 Wn.2d 30, 39, 640 P.2d 716 (1982)).

The record does not reflect that the trial court appropriately informed potential objectors about the competing interests in this case.

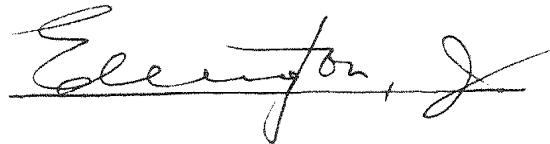
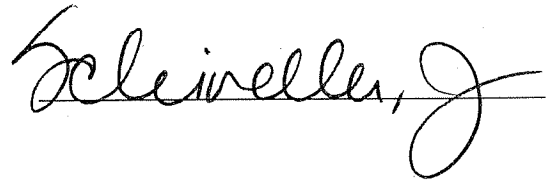
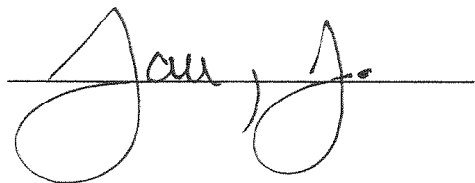
Absent indicia that the court adequately considered Grubb’s public trial right before reaching its decision, we are constrained to conclude that this case is controlled by Strode, not Momah.

In contrast to Momah, Strode presented an “unexceptional” set of facts. Strode, 167 Wn.2d at 223. The trial court and counsel, out of concern for juror privacy, individually questioned in chambers potential jurors who had been victims of a sexual offense or accused of committing a sexual offense. Strode, 167 Wn.2d at 224. As here, the record did not show “that the trial court engaged in the detailed review that is required in order to protect the public trial right.” Strode, 167 Wn.2d at 228. Nor did Strode engage in behavior that indicated a deliberate, tactical choice or a waiver of his public trial right as was the case in Momah. Strode, 167 Wn.2d at 231-32 (Fairhurst, J., concurring). The court therefore reversed Strode’s conviction and remanded for a new trial. Strode, 167 Wn.2d at 231.

Pursuant to Strode, in all but the most exceptional circumstances, closing voir dire without employing the Bone-Club analysis constitutes error for which prejudice is presumed and remand for a new trial is required. Strode, 167 Wn.2d at 231 (citing

Orange, 152 Wn.2d at 814). This case does not present exceptional circumstances. As in Strode, the record does not indicate that the trial court sufficiently considered Grubb's public trial right in light of competing interests. Nor does the record establish that Grubb's conduct amounted to a knowing waiver of the right to a public trial. Accordingly, because the court improperly excluded the public from a portion of jury selection without first applying the Bone-Club analysis, Strode requires that we reverse Grubb's conviction and remand for a new trial.⁶

WE CONCUR:



⁶ On appeal, Grubb additionally assigns error to the trial court's denial of a motion for a bill of particulars, to the court's alleged failure to conduct a sufficient analysis on the record to justify admission of evidence of the uncharged out-of-county acts, to the State's belated disclosure of an expert witness and to cumulative error. The remedy he seeks for each of these alleged errors is the grant of a new trial. Accordingly, in light of our disposition, we need not reach these claims.