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

STATE OF WASHINGTON,	)	No. 64509-9-I
Respondent,	)	
v.	)	
ADAM BRICK,	)	UNPUBLISHED OPINION
Appellant.	)	
_____	)	FILED: September 19, 2011

SPEARMAN, J. — Adam Brick appeals his convictions following a jury trial for three counts of rape of a child in the first degree. Brick fails to establish that he was denied a fair trial because the trial court allowed the child victim to hold a stuffed toy while she testified. Moreover, the unanimity jury instruction was not improper. However, although we conclude that Brick's constitutional right to a public trial was not violated by the court's order sealing questionnaires used for jury selection, because the trial court sealed the questionnaires without first conducting the required Bone–Club[1] analysis, we remand for reconsideration of the sealing order.

FACTS

In the fall of 2004, when M.W. was six years old, her biological father, Adam Brick, moved into the two-bedroom apartment M.W. shared with her mother. M.W.'s

[1] State v. Bone–Club, 128 Wn.2d 254, 906 P.2d 325 (1995).

mother worked full time, and Brick became M.W.'s caretaker before and after school. Brick and M.W. slept in the same bed.

Brick physically punished M.W. by slapping and shaking her. He inflicted other harsh and unusual punishments on M.W., including putting her in a cold shower or in a cold bath and holding her head underwater; making her do squats and kicking her legs from under her; and forcing her to stay outside on the balcony in the cold with little or no clothing. M.W. was afraid to tell other family members about the punishments because Brick threatened to harm her if she did.

In April 2007, when M.W. was eight years old, she told her grandmother about the extent of the harsh punishments she was subjected to. M.W.'s mother forced Brick to move out as a result of these disclosures. M.W. began seeing a counselor.

Within a few weeks, M.W. revealed to the counselor that Brick was also sexually abusing her. M.W. subsequently described numerous instances of sexual abuse to the counselor, her grandmother, her mother, and a child interview specialist. M.W. said that Brick had touched her numerous times with his hands, penetrated her vaginally four or five times, and had made her rub and suck his penis. She said his penis would sometimes "slobber" and "squirting stuff" went on her legs, tummy, or face and that Brick would change the sheets afterward. Brick would tell M.W. it was her "fault" while he was doing these things to her.

The State charged Brick with three counts of first-degree rape of a child.

A physical examination revealed an abnormality of M.W.'s hymen. The

treatment provider could not determine the cause, but said it was consistent with the penetration described by M.W.

M.W. expressed fear and anxiety about testifying in court in front of Brick. She told the counselor she was scared of Brick and would not talk about the things that happened if he were there because he would do awful things to her. In early 2009, worried about the prospect of testifying in court, M.W. told her mother the abuse had not occurred. Immediately following this statement, M.W. cried and admitted the abuse had happened, but said she was afraid to see Brick in court.

At trial, M.W. described the abusive punishments inflicted by Brick. She also said Brick used to get on top of her in bed and move around. She said Brick touched his private parts to hers and described a time when she bled from the vaginal area and it "hurt really bad." M.W. denied that Brick's penis penetrated her or that anything came out.[2] She explained that she did not tell anyone about the abuse at first because she was afraid of Brick.

The defense conceded that some physical abuse had occurred. Brick argued that M.W. fabricated the sexual abuse because she believed Brick would not be able to move back in with her if she made those allegations and the abuse would stop.

The jury convicted Brick as charged and the trial court imposed a standard range sentence. Brick appeals.

[2] Although M.W. denied penetration and ejaculation in her testimony at trial, she had reported that both had occurred on numerous previous occasions to the child interview specialist, her therapist, the sexual assault center treatment provider, and to her grandmother. Evidence of M.W.'s prior statements was admitted at trial through the testimony of these witnesses.

Stuffed Toy

When M.W. took the witness stand, she held a stuffed reindeer in her lap. A few minutes into her direct testimony, Brick objected and requested a sidebar. M.W.'s testimony resumed. The testimony contains no reference to the stuffed animal M.W. held. Defense counsel later made a record that he had objected to M.W. holding the stuffed animal while she testified.[3] The court noted that it had overruled the objection, concluding that Brick was not prejudiced.

Brick contends that the trial court improperly exercised its discretion and denied him a fair trial when it overruled his objection. He also claims that the prosecutor committed misconduct in allowing the incident to occur.

Brick argues that by failing to notify him that the victim intended to bring the stuffed animal to court and failing to take the item away before M.W. testified, the prosecutor engaged in misconduct. But nothing in the record suggests that the prosecutor knew M.W. intended to bring the stuffed animal or observed her with it before she took the stand. Although Brick asserts that the "prop was clearly designed to invoke sympathy" for M.W., this argument is premised on the assumption that the prosecutor was, at a minimum, aware that M.W. would bring the stuffed animal to trial. Because no facts in the record establish that this is the case, Brick's claim of prosecutorial misconduct is entirely speculative.

Brick analogizes to RCW 9A.44.150, which permits, under limited certain circumstances, a child witness to testify in a criminal proceeding via one-way closed

[3] The record does not indicate the precise basis of counsel's objection.

circuit television. In order to allow a child under the age of ten to testify in this manner, the court must hold a hearing and find that requiring the child to testify in the presence of the defendant will cause emotional or mental distress that will prevent the child from reasonably communicating at trial. RCW 9A.44.150(1)(c). Likewise, Brick contends that once he lodged his objection, the trial court was required to hold a hearing to ensure that the witness was not able to testify without the stuffed animal.

But the issue of whether to allow a child to testify outside the presence of the accused is not comparable to the issue of whether to allow a child victim to hold a security object while testifying. No authority requires the court to hold a hearing or to make a finding of necessity. In State v. Hakimi, 124 Wn. App. 15, 98 P.3d 809 (2004), a similar issue arose before trial when two nine-year-old child victims brought dolls to hold during child hearsay hearings. At that point, defense counsel argued that the witnesses should not be allowed to hold the dolls when they testified before the jury. But the trial court allowed it on the grounds that child witnesses present special considerations and require "some security in an otherwise insecure setting" and because the court found that the defendant would not be unduly prejudiced.[4] Hakimi, 124 Wn. App. at 20. The trial court in Hakimi did not make a finding that the particular witnesses in that case would be unable to testify without the object. Instead, the court articulated that the unique needs of child witnesses must be weighed against the potential prejudice to the defendant. The trial court's ruling here is consistent with

[4] As the court noted in Hakimi, although the court in an earlier case, State v. Harper, 35 Wn. App. 855, 862, 670 P.2d 296 (1983), expressed some concern about a child sexual assault victim testifying while holding a teddy bear, it is not clear how old the victim in Harper was and that court expressly declined to reach the alleged error.

Hakimi. Brick cannot demonstrate that the trial court abused its discretion.[5]

Unanimity instruction

Brick also argues that the jury instructions failed to adequately convey the requirement of unanimity. We disagree.

A jury must unanimously agree on the act that supports a conviction. State v. Petrich, 101 Wn.2d 566, 569, 683 P.2d 173 (1984). When the State alleges multiple acts, any of which are sufficient to prove a charged crime, the State must either elect the act upon which it will rely for conviction or the court must instruct the jury that it must unanimously agree that one particular act was proved beyond a reasonable doubt. Petrich, 101 Wn.2d at 572. Here, the State made no election and the court was required to give a unanimity instruction. Such an instruction is adequate where it addresses the requirement of jury unanimity "such that the ordinary juror would interpret it to mean that the jury must be unanimous on the act underlying the conviction." State v. Moultrie, 143 Wn. App. 387, 394, 177 P.3d 776 (2008). We review a challenged jury instruction de novo and consider the instructions as a whole. State v. Bennett, 161 Wn.2d 303, 307, 165 P.3d 1241 (2007).

The trial court gave the following unanimity instruction:

[5] Brick also relies on the decision of the Hawaii intermediate appellate court in State v. Palabay, 9 Haw. App. 414, 844 P.2d 1 (1992), to argue that allowing a witness to hold a stuffed animal while testifying results in a due process violation, absent a court finding of compelling necessity. It does not appear that other courts have adopted a compelling need standard. Instead, courts that have addressed the issue have emphasized the need to strike a balance between the right of the accused to a fair trial and the need to mitigate the intimidating environment for some child witnesses. Courts have generally upheld the trial court's discretionary ruling allowing the witness to testify with an object to provide comfort. See e.g., State v. Powell, 318 S.W. 3d 297 (2010); State v. Marquez, 124 N.M. 409, 951 P.2d 1070 (N.M. App. 1997); State v. Cliff, 116 Idaho 921, 782 P.2d 44 (Idaho App. 1989).

> The State alleges that the defendant committed acts of Rape of a Child on multiple occasions. To convict the defendant on any count of Rape of a Child, one particular act of Rape of a Child must be proved beyond a reasonable doubt and you must unanimously agree as to which act has been proved. You need not unanimously agree that the defendant committed all the acts of Rape of a Child.[6]

To convict Brick on Count I, the jury was further instructed, in relevant part:

> To convict the defendant of the crime of Rape of a Child in the First Degree, as charged in Count I, each of the following elements of the crime must be proved beyond a reasonable doubt:
>
> (1) That on or about the period of time intervening between June 13, 2002 through April 26, 2007, but an act separate and distinct from Counts II and III, the defendant had sexual intercourse with [M.W.]…

The "to convict" instructions for Counts II and III likewise required the jury to find acts of sexual intercourse occurred that were "separate and distinct" from the acts supporting the other two counts. [7]

Brick argues that the last sentence of the unanimity instruction, providing that the jury "need not unanimously agree that the defendant committed all the acts of Rape of a Child" undermined the first two sentences and misinformed the jury that it could convict him without being unanimous. He further contends that the instructions as a

[6] This instruction mirrors Washington Pattern Jury Instruction (WPIC) 4.25. See 11 Washington Practice: Washington Pattern Jury Instructions: 4.25 Criminal (3d ed. 2008).

[7] The jury was additionally instructed:

> A separate crime is charged in each count. You must decide each count separately. Your verdict on one count should not control your verdict on any other count.

whole were inadequate because the "to convict" instructions failed to inform the jury that it had to be unanimous as to each separate and distinct act it relied upon.

However, in Moultrie, this court examined a unanimity instruction that was identical in all material respects to the instruction given here and concluded that it "adequately addressed the requirement of jury unanimity such that the ordinary juror would interpret it to mean that the jury must be unanimous on the act underlying the conviction." Moultrie, 143 Wn. App. at 394. Likewise, in State v. Fisher, 165 Wn.2d 727, 755-56, 202 P.3d 937 (2009), the supreme court addressed a similar unanimity instruction, and concluded that it properly "required the jury to unanimously agree on the specific act or acts that had been proved beyond a reasonable doubt."[8] The instructions in both Moultrie and Fisher included the language Brick challenges here informing the jury that it "need not unanimously agree" that the defendant committed all acts. Moultrie, 143 Wn. App. at 392; Fisher, 165 Wn.2d at 739. This language does not undermine the unanimity requirement, but merely informs that jury that it need not unanimously agree that the defendant committed all acts of rape of a child that were supported by the evidence.

Moreover, the trial court instructed the jury to "consider the instructions as a whole." We presume the jury followed the instructions given. State v. Russell, 125 Wn.2d 24, 84, 882 P.2d 747 (1994). In following these instructions, the ordinary juror

[8] The instruction provided in Fisher, was based on former WPIC 4.25 and contained the phrase "beyond a reasonable doubt" twice in the second sentence. This court in Moultrie rejected the argument that the omission of the additional phrase permitted the jury to convict without unanimity, concluding it is unnecessary to repeat the phrase "beyond a reasonable doubt" in the last clause of the sentence after the word "proved." Moultrie, 143 Wn. App. at 393.

would read the "to convict" Instructions in conjunction with the unanimity instruction. There is no reason to conclude the jury would have been confused about its duty to be unanimous with respect to the act of rape relied upon to support each count. Accordingly, we conclude that the instructions adequately conveyed the requirement for jury unanimity.

Open and Public Trial

Prior to trial, the parties stipulated that members of the jury venire would complete a confidential questionnaire that contained questions about the panel members' personal experience with sex crimes.[9] We assume that following completion of the questionnaires, jury selection then proceeded in open court, and Brick does not allege otherwise. Nothing in the record shows that either party moved to seal the questionnaires. Nevertheless, on the day the trial concluded with closing arguments, the court signed an order to seal the questionnaires, finding that the "privacy interests of the prospective jurors in their answers regarding sexual history and victim status outweighs the public's right of access."

Brick contends that the court's order sealing the questionnaires without conducting a Bone-Club analysis on the record violated both his and the public's right to an open and public trial. He further claims that this error is structural and requires reversal of his convictions. The State argues (1) juror questionnaires do not fall within the scope of the right to a public trial; (2) Brick's argument fails because he agreed to use the confidential questionnaires and he cannot show that he objected to sealing the

[9] The questionnaires informed the jury that the documents would not be "available to the public."

documents; and (3) even if the failure to conduct a Bone-Club analysis prior to sealing the questionnaires was error, the error was not structural and reversal is not required.

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." Additionally, article I, section 10 of the Washington State Constitution secures the public's right to open and accessible proceedings and provides that "[j]ustice in all cases shall be administered openly, and without unnecessary delay." 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). While the right to a public trial is not absolute, Washington courts strictly guard it to assure that closed proceedings occur only the most unusual circumstances. State v. Strode, 167 Wn.2d 222, 226, 217 P.3d 310 (2009); State v. Easterling, 157 Wn.2d 167, 174-75, 137 P.3d 825 (2006); In re Pers. Restraint of Orange, 152 Wn.2d 795, 804–05, 100 P.3d 291 (2004). Whether a trial court procedure violates the right to a public trial is a question of law that we review de novo. Easterling, 157 Wn.2d at 173–74.

Before restricting public access to criminal proceedings, our supreme court held in State v. Bone–Club that a court must analyze and weigh five factors.[10] The Bone-

[10] Under Bone–Club,

> 1. The proponent of closure ... must make some showing [of a compelling

Club analysis recognizes that the public's article I, section 10 open access right and the defendant's article I, section 22 public trial right "serve complementary and interdependent functions in assuring the fairness of our judicial system." Bone–Club, 128 Wn.2d at 259.

The Bone-Club analysis applies in the context of sealing of court documents. State v. Waldon, 148 Wn. App. 952, 967, 202 P.3d 325 (2009). We have already rejected the contention that juror questionnaires are not court documents falling within the scope of the right to an open and public trial. See State v. Coleman, 151 Wn. App. 614, 623, 214 P.3d 158 (2009) (juror questionnaires constitute court records and thus standards for closing criminal proceedings apply).

In Coleman, we held that sealing juror questionnaires without conducting a Bone–Club analysis violated the public's right to open courts under article I, section 10 of the state constitution, but not Coleman's public trial right under article I, section 22. Coleman, 151 Wn. App. at 623–24. The questionnaires were used only in jury selection, which was conducted in open court, and they were not sealed until after the jury was seated and sworn. Because there was "nothing to indicate that the

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> 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.
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> 2. Anyone present when the closure motion is made must be given an opportunity to object to the closure.
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> 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 v. Eikenberry, 121 Wn.2d 205, 210–11, 848 P.2d 1258 (1993)).

questionnaires were not available for public inspection during the jury selection process," we concluded that the sealing order "had no effect on Coleman's public trial right," did not constitute structural error, and did not warrant reversal. Coleman, 151 Wn. App. at 624. We remanded for reconsideration of the sealing order under Bone–Club and Waldon. Coleman, 151 Wn. App. at 624; see also State v. Tarhan, 159 Wn. App. 819, 834, 246 P.3d 580, review granted, No. 85737-7 (Wash. Sept. 8, 2011), ("After Coleman, there can be no serious dispute" that a trial court commits error if it fails to conduct a Bone–Club analysis on the record before sealing court documents).

The relevant facts here are indistinguishable from those in Coleman. There is no indication that jury selection did not proceed in open court. Nor does the record suggest that the questionnaires were used for any purpose other than jury selection, were not a part of the public proceedings during the jury selection process, or were not available for public inspection prior to the sealing order. Because Brick makes no

showing of prejudice, he he was not denied his right to a public trial and his agreement to use the questionnaires is immaterial.[11] Thus, as in Coleman, the remedy here is remand for reconsideration of the juror questionnaire sealing order based on the Bone-Club factors.

We remand for reconsideration of the sealing order, but otherwise affirm.

Spearman, J.

WE CONCUR:

Dwyer, C.J.

Schindler, J.

[11] As in this case, the defendant in Tarhan also stipulated to the use of confidential questionnaires. We did not, however, rely on that fact in our determination that Tarhan was not denied his right to a public trial, but sealing the documents without considering the Bone-Club factors violated the public's right to open courts.