

IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON

STATE OF WASHINGTON,)	NO. 65053-0-I
)	
Respondent,)	DIVISION ONE
)	
v.)	
)	
Gregory pierce shearer,)	UNPUBLISHED OPINION
)	
Appellant.)	FILED: May 31, 2011
)	

Lau, 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 voir dire of an individual juror in chambers without first addressing and weighing the five factors set forth in State v. Bone-Club, 128 Wn.2d 254, 906 P.2d 325 (1995). Because a failure to conduct a Bone-Club analysis before closing criminal trial proceedings requires reversal in all but the most exceptional circumstances, we reverse Gregory Shearer’s convictions for felony harassment and fourth degree assault and remand.

FACTS

The State charged Gregory Shearer with felony harassment and fourth degree assault of his girl friend, Lynn Honcoop, for events occurring during an argument at

their shared residence. During voir dire, the prosecutor asked whether anyone was a recent victim of or knew a recent victim of domestic violence. Prospective juror 7 raised her hand.

When the prosecutor asked how she felt about it, juror 7 said she did not want to talk about it. She said it was difficult to discuss in front of strangers. The trial court asked, "Would it be more comfortable if counsel and you and I were to meet in chambers so you can discuss it with us there?" Juror 7 said, "Yes." Report of Proceedings, Voir Dire (Jan. 12, 2010) (RPVD) at 38. The court asked whether

anyone in this courtroom who would have any objection if the court reporter, counsel, and myself, and the defendant went into chambers to ask some questions of Juror Number 7 in private? Is there anyone here who would object at all to having that take place in that manner?

RPVD at 39. Hearing no objections, the court reporter, judge, counsel, and Shearer went into chambers with juror 7. She then revealed her six-month-old grandson was killed by his father in her family home. She said she was still healing from the loss and that it would likely affect her decision in Shearer's case. Shearer's counsel moved to excuse for cause and the court granted the motion.

ANALYSIS

Shearer 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”¹ 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 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.² This requirement applies to the closure of jury selection. Orange, 152 Wn.2d at

¹ Additionally, article I, section 10 of the Washington State Constitution provides, “Justice in all cases shall be administered openly, and without unnecessary delay.” This provision secures the public's right to open and accessible proceedings.

² 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

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, Shearer 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 (2010), the State argues the error was not a structural one and that it caused no prejudice and thus does not require reversal. The State points out that Shearer did not object to the procedure, participated in it, and that the procedure ensured jury impartiality.

On the other hand, Shearer contends that this case is not like Momah but is instead controlled by Strode and State v. Bowen, 157 Wn. App. 821, 239 P.3d 1114 (2010). Under Strode, the failure to conduct a Bone-Club analysis before conducting voir dire in chambers requires automatic reversal and remand for a new trial. Strode, 167 Wn.2d 222. Shearer is correct.

Momah involved unusual circumstances. The media had heavily publicized Momah's case, which raised concerns about juror impartiality. Momah, 167 Wn.2d at 145. 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

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)).

questioning, or stated they could not be fair. Momah, 167 Wn.2d at 145-46. Although the trial court did not explicitly apply the Bone-Club factors before closing the courtroom, our Supreme Court affirmed Momah's conviction. Momah, 167 Wn.2d at 145, 156. The court observed that the trial court and counsel recognized and “carefully considered” Momah's competing article I, section 22 rights. Momah, 167 Wn.2d at 156. And “Momah affirmatively assented to the closure, argued for its expansion, had the opportunity to object but did not, actively participated in it, and benefited from it.” Momah, 167 Wn.2d at 151. The court concluded that Momah's conduct was indicative of 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) (“The record shows [Momah] intentionally relinquished a known right.”). The court found these circumstances distinguished Momah from the court's previous public trial cases. Momah, 167 Wn.2d at 151.

Strode, in contrast, 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. The court did not conduct any Bone-Club analysis, and “the record [was] devoid of any showing 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. 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.

The State maintains that any violation of the public trial right resulting from the brief in-chambers voir dire of a single prospective juror was de minimis and caused no prejudice. The State argues that given the nature of this particular violation, reversal is an inappropriate remedy. We reject this argument. Under Momah and Strode, in all but the most exceptional circumstances, closing voir dire without employing the Bone-Club analysis is reversible error for which prejudice is presumed. Strode, 167 Wn.2d at 231 (citing Orange, 152 Wn.2d at 814). And although federal courts have adopted a de minimis trial closure standard,³ Washington courts have “never found a public trial right violation to be . . . de minimis.” Strode, 167 Wn.2d at 230 (quoting Easterling, 157 Wn.2d at 180)).

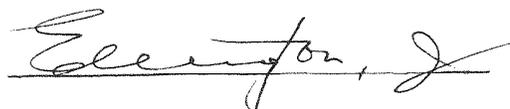
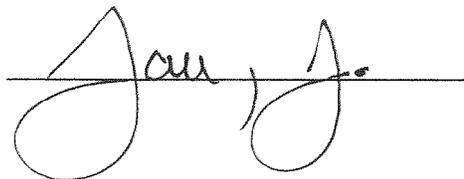
But the State argues, “Shearer's constitutional right to a public trial was not implicated here where . . . no one, including the defense, objected to the closure and the juror was excused for cause.” Resp’t’s Br. at 7. But in Bowen, Division Two followed Strode despite the fact that the defendant did not object to in chambers voir dire. There, during jury selection, the trial court asked, “Does either party have an objection to allowing jurors to take up sensitive issues, sensitive questions, in chambers if they feel that that would be beneficial to them?” Bowen, 157 Wn. App. at 826. “Both the prosecuting attorney and defense counsel stated they had no

³ See Easterling, 157 Wn.2d at 183 (Madsen, J., concurring) (citing numerous federal cases in support of a de minimis trial closure standard).

objections.” Bowen, 157 Wn. App. at 826. Nevertheless, the court held, “[W]e cannot conclude that the trial court adequately safeguarded [the defendant’s] public trial right or that [the defendant] made deliberate, tactical choices precluding him from relief. Accordingly, we hold that this closure constituted structural error. We reverse his conviction and remand for a new trial.” Bowen, 157 Wn. App. at 833.

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). Here, as in Strode, the record does not indicate that the trial court considered Shearer’s public trial right in light of competing interests. Nor does the record establish that Shearer’s conduct amounted to a knowing or tactical waiver of the right to a public trial. Accordingly, because the court improperly excluded the public from a portion of jury selection without applying the Bone-Club analysis, Strode requires that we reverse Shearer’s conviction and remand for new trial.⁴

WE CONCUR:



⁴ Given our resolution here, we decline to address Shearer’s additional contentions or his statement of additional grounds.

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