IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON

DIVISION II

STATE OF WASHINGTON, Respondent, v. SHANNON LEE ABBEY, Appellant.	No. 37551-6-II UNPUBLISHED OPINION

Penoyar, C.J. — Shannon Lee Abbey appeals his voyeurism conviction and exceptional sentence, claiming the trial court violated his right to a public trial when it questioned a juror in the hallway outside the courtroom about the juror's failure to take his oath. Because the trial court failed to weigh the necessary factors before privately questioning the juror on a matter that involved the juror's ability to fulfill his duties as a juror, we reverse and remand for a new trial.

Facts

On July 17, 2007, the State charged Abbey with one count of voyeurism.[1] Following a CrR 3.5 hearing, jury voir dire began on January 28, 2008. During jury voir dire, the following discussion took place:

> [JUDGE]: Alright. Okay. An important part of the jury trial is the selection of a jury and the law requires that you would be sworn. So if you would all please rise at this time. (Potential jurors stand.) Would you please rise? Raise your right hands and repeat after the clerk, please.
>
> CLERK: Do each of you solemnly swear to truthfully answer all questions asked of you by the Court or Counsel relating to your qualifications and acting as jurors in this trial? If you agree, please answer I do.
> POTENTIAL JURORS: (In unison.) I do.
>
> [JUDGE]: Please be seated. Mr. Munn, Counsel, will you step out in the hallway

[1] A violation of RCW 9A.44.115(2)(a).

with me?

(Hallway conference.)

[JUDGE]: Mr. Munn, I noticed that you didn't raise your hand or you didn't promise to tell the truth?

[MUNN]: I know this is a jury but I just honestly with my beliefs it is in violation of my rights because I filled out a paper saying that it is against my religion to judge people and I will not judge another fellow human.

[JUDGE]: Well, we haven't decided if you are going to be on this jury yet. We only asked you if you would tell the truth. That's all we asked.

[MUNN]: Then why am I sent here if I fill out the paper saying not to be here. To be excused.

[JUDGE]: Because we asked you to come in and we wanted to talk to you and ask you some questions about that. Alright. Because from time to time some people respond the same way and they are able to serve as a juror. So that's why we asked you to come in.

[MUNN]: Alright. Because I feel it is a waste of my gas and a waste of my time.

[JUDGE]: Well, I understand that but it is part of your civic duty and we ask you to come in and serve on this jury. And you came in and I asked everybody to rise and tell me if they would tell the truth and you didn't — first you didn't rise and then you didn't say you would tell the truth.

[MUNN]: Well, it's because that's not what I want to do. It's against my beliefs and I don't feel that it is right that you are forcing me to do something against my beliefs.

[JUDGE]: Is it against your belief to tell the truth?

[MUNN]: No.

[JUDGE]: Well, that's all I asked from the jury. Will you tell the truth?

[MUNN]: Well, you know, I can do that.

[JUDGE]: Well, why didn't you do that?

[MUNN]: I was just really upset that you guys are forcing me. Otherwise, the

other option and this is not supposed to be in my beliefs and the amendment that says you have the freedom to choose without having to be arrested if I don't show up.

[JUDGE]: What amendment is that?

[MUNN]: I don't remember which one it is but I know that it is in the amendment of the freedom of speech and the freedom to choose.

[JUDGE]: Freedom of speech is the first amendment.

[MUNN]: Alright. The freedom of right and the freedom to choose and I chose to fill out the papers like the Court (inaudible) that you guys asked me to fill out to be excused and you guys still did not excuse me.

[JUDGE]: "You guys?"

[MUNN]: Who ever [sic] is in charge of all that that still sent me down here. I'm not sure who is in charge of all that. But I filled it out to be excused and I don't appreciate having to come down here.

[JUDGE]: Oh. Well, I understand a lot of jurors in there probably made a special effort this morning so you somehow think that somehow you are different?

[MUNN]: No. It is just that I filled out the paper accordingly like you asked me to do and be excused and like I have done in the past and filled it out the same exact way and get excused because of my beliefs not to judge others because that's what Jesus died for, you know, for our sins and so it is up to Jesus and God to judge use [sic] after this life, on this life. That's the reason why I wish to be excused in the first place and that's why I didn't believe that I needed to come down her[e]. Because I filled it out like you guys asked me to be excused.

[JUDGE]: Alright. If we ask you questions, will you promise to tell the truth?

[MUNN]: Uh-huh.

[JUDGE]: Raise your right hand. Do you promise to tell the truth?

[MUNN]: I promise to tell the truth.

[JUDGE]: What's that?

[MUNN]: I promise to tell the truth.

> [JUDGE]: Alright. Go ahead and have a seat. Please remain with me, Counsel. (Mr. Munn returns to the courtroom.) Counsel, do you want to say anything?
>
> [STATE]: I think legally he has made an oath and I certainly have concerns that he might be more disruptive than—I mean if it was a joint motion to excuse him for cause I would certainly.
>
> [DEFENSE COUNSEL]: I wouldn't make that.
>
> [JUDGE]: Well, at this point though you know, I'm going to go through voir dire. Because I'm not going to set that as a standard. You know, I'm not going to ask him any questions.
>
> [STATE]: I'm certainly not.
>
> [JUDGE]: And if he raises his hand I'll say, "I am aware of your concerns, Mr. Munn." And we will discuss that after we have completed the questions. Alright?
>
> [DEFENSE COUNSEL]: If I have some more questions for him could we do it out in the hallway just because I am extremely—
>
> [JUDGE]: Well, I'm probably—all you have to do is once we are done with voir dire approach the bench and we will see we've (inaudible) or for cause.
>
> [STATE]: And given the mixed case law right now I would prefer not to do any jury questioning out in the hallway.
>
> [JUDGE]: Oh, that's right. So that could be—
>
> [STATE]: Given that this was the oath I don't have the same concern but we would have to—
>
> [JUDGE]: Yes.
>
> [STATE]: I know some judges have been not telling—
>
> [JUDGE]: We are not going to do anymore. Nope. Nope. We are not going to do any more. We will send them all out and bring them back in here. You are absolutely right and it was—I need another cup of coffee. Alright.
>
> (Hallway conference concludes.)

Clerk's Papers (CP) at 113-17. Based on evidence that Abbey was looking into a bathroom

window as a woman was getting out of the shower, a jury found Abbey guilty of voyeurism. The sentencing court imposed an exceptional 60-month sentence because of Abbey's prior unscored misdemeanor criminal history.[2] He appeals.

analysis

Abbey makes a single challenge on appeal, claiming that the trial court violated his right to a public trial when it questioned juror Munn in the hallway rather than in open court.[3]

The Sixth Amendment to the United States Constitution provides, "In all criminal prosecutions, the accused shall enjoy the right to a . . . public trial." Similarly, article I, section 22 of the Washington Constitution guarantees, "In criminal prosecutions the accused shall have the right . . . to have a . . . public trial." The Washington Constitution also provides in article I, section 10 that "[j]ustice in all cases shall be administered openly." The public trial right is not absolute; it is strictly guarded to ensure 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) (C. Johnson, J. dissenting) (citing *State v. Easterling*, 157 Wn.2d 167, 174-75, 137 P.3d 825 (2006) (Chambers, J. concurring). "Whether a defendant's constitutional right to a public trial has been violated is a question of law, subject to a de novo review on direct appeal." *Strode*, 167 Wn.2d at 225.

[2] Abbey has three misdemeanor convictions of attempted voyeurism.

[3] We asked the parties twice to provide supplemental briefing. First, we asked for briefing on how article I, section 11 of the Washington Constitution and RCW 2.36.080(3) pertain to this case. Second, we asked for briefing on whether the trial court's failure to include Abbey in the in-hall questioning of Juror Munn violated Abbey's due process rights under the Sixth and Fourteenth Amendments and, if so, was it harmless error. Upon further consideration, we confine our discussion to that raised in the original briefs.

Our Supreme Court has articulated guidelines every trial court must follow before closing a courtroom to the public. *State v. Bone-Club*, 128 Wn.2d 254, 258-59, 906 P.2d 325 (1995). Those criteria are:

> 1. The proponent of closure or sealing 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 (quoting *Allied Daily Newspapers of Wash. v. Eikenberry*, 121 Wn.2d 205, 210-11, 848 P.2d 1258 (1993)). *See also Presley v. Georgia*, __ U.S. __, 130 S. Ct. 721, 724, 175 L. Ed. 2d 675 (2010); *State v. Brightman*, 155 Wn.2d 506, 514, 122 P.3d 150 (2005); *State v. Bowen*, 157 Wn. App. 821, 239 P.3d 1114 (2010). If the proceeding is subject to the right to a public trial, the trial court's failure to conduct a *Bone-Club* inquiry before excluding the public violates the defendant's public trial rights. *Brightman*, 155 Wn.2d at 515-16.

The public trial right applies to jury voir dire. *Presley v. Georgia*, 130 S. Ct. at 724-25; *In re Pers. Restraint of Orange*, 152 Wn.2d 795, 806, 100 P.3d 291 (2004); *State v. Erickson*, 146 Wn. App. 200, 206, 189 P.3d 245 (2008) (Quinn-Brintnall, J. dissenting); *State v. Duckett*, 141 Wn. App. 797, 803, 173 P.3d 948 (2007) (Brown, J. dissenting); *State v. Frawley*, 140 Wn. App. 713, 719-20, 167 P.3d 593 (2007) (Brown, J. dissenting). A defendant does not, however, have a right to a public hearing on purely ministerial or legal issues when it does not involve

consideration of evidence or any issue related to trial. *State v. Rivera*, 108 Wn. App. 645, 653, 321 P.3d 292 (2001) (neither public nor defendant had a right to be present when trial court addressed juror's complaint about another juror's hygiene). *But see State v. Wise*, 148 Wn. App. 425, 433-35, 200 P.3d 266 (2009) (Van Deren, J. dissenting), *review granted*, 170 Wn.2d 1009, 236 P.3d 207 (2010) (*Bone-Club* analysis unnecessary for temporary relocation of voir dire to chambers, defendant waived public trial right, and defendant lacked standing to assert public's right).

We resolve this case on the issue of Abbey's right to a public trial, not the public's right to the same. We analyze Abbey's public trial rights under *Momah*[4] and *Strode*,[5] two decisions the Washington State Supreme Court issued the same day.[6]

In *Momah*, the defendant:

> 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. Moreover, the trial judge in this case not only sought input from the defendant, but he closed the courtroom after consultation with the defense and the prosecution. Finally, and perhaps most importantly, the trial judge closed the courtroom to safeguard Momah's constitutional right to a fair trial by an impartial jury, not to protect any other interests.

167 Wn.2d 140, 151-52, 217 P.3d 321 (2009) (Alexander, J. dissenting). The court affirmed

[4] *State v. Momah*, 167 Wn.2d 140, 217 P.3d 321 (2009) (Alexander, J. dissenting).

[5] *Strode*, 167 Wn.2d 222.

[6] Two recent decisions from this court have concluded that *Momah* and *Strode* have been eclipsed by a more recent United Supreme Court case, *Presley*, 130 S. Ct. 721. *See State v. Leyerle*, 158 Wn. App. 474, 242 P.3d 921 (2010) (Hunt, J. dissenting) and *State v. Paumier*, 155 Wn. App. 673, 230 P.3d 212 (Quinn-Brintnall, J. dissenting), *review granted*, 169 Wn.2d 1017, 236 P.3d 206 (2010). Because our result here is the same under *Momah* and *Strode* as under these more recent cases and because here, unlike in *Presley*, the defendant did not object to the closure, we analyze this case under *Momah* and *Strode*.

Momah's convictions. 167 Wn.2d at 156.

In *Strode*, the defendant merely stated that he did not object to chambers interviews of jurors. 167 Wn.2d at 229. Our Supreme Court overturned Strode's conviction and remanded to the trial court for a new trial. *Strode*, 167 Wn.2d at 231. Abbey, like Strode, merely acquiesced in the private interviews. In *Strode*, six justices agreed that this mere acquiescence did not waive Strode's public trial right. 167 Wn.2d at 229, 235. The result here is the same. We reverse Abbey's conviction and remand for further proceedings. *See Bowen*, 157 Wn. App. at 821 (found violation of defendant's public trial right under *Momah* and *Strode*).

Here, what began as a ministerial matter, i.e., finding out why the juror refused to stand and take the oath, soon evolved into a discussion highly relevant to whether the State or defendant felt that the juror should serve, such that the State even suggested removing the juror for cause. What transpired was an investigation into the juror's ability to serve, a matter neither ministerial nor trivial, and how his religious beliefs interfered with his ability to pass judgment or render a verdict. Certainly, this type of information, which directly relates to the integrity of the process, absent a *Bone-Club* analysis, needed to be publicly explored.[7]

[7] The trial court abandoned this method of questioning after this point in the trial following the State's objection to using it for private questions. Instead, the trial court had the venire leave the courtroom while the attorneys questioned individual jurors publicly. The trial court could easily have employed this same method with juror Munn.

We reverse and remand for a new trial.

A majority of the panel having determined that this opinion will not be printed in the Washington Appellate Reports, but will be filed for public record pursuant to RCW 2.06.040, it is so ordered.

Penoyar, C.J.

I concur:

Worswick, J.

Quinn-Brintnall, J. (concurring in the result) — Because Shannon Lee Abbey did not object to the trial court's decision to question the prospective juror in the hallway outside the courtroom and his counsel participated in the investigation into why the prospective juror had refused to take an oath to tell the truth,[8] I would hold that he has not preserved this error for our review. *See, e.g.*, *Presley v. Georgia*, ___ U.S. ___, 130 S. Ct 721, 722, 175 L. Ed. 2d 675 (2010) (defendant objected to trial court's decision to exclude the public, including Presley's uncle, during voir dire); *State v. Wise*, 148 Wn. App. 425, 200 P. 3d 266 (2009), *review granted*, 170 Wn.2d 1009 (1020) (*Bone-Club*[9] analysis unnecessary for temporary relocation of voir dire to chambers, defendant waived public trial right, and defendant lacked standing to assert public's right). But because the record clearly establishes that, unlike Wise, Abbey was excluded from being present in the hallway during the judge's questioning of the recalcitrant juror, I concur with the result of the majority opinion that Abbey is entitled to a new trial.

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QUINN-BRINTNALL, J.

[8] Although the record suggests that the trial court believed John Munn was asserting a First Amendment free exercise of religion right, in my opinion his statements made in the hallway suggest that he was referring to constitutional and statutory prohibitions on questioning prospective jurors and witnesses regarding religious belief. *See* Wash. Const. art. I, § 11; RCW 2.36.080(3).

[9] *State v. Bone-Club*, 128 Wn.2d 254, 906 P.2d 325 (1995).