IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON

STATE OF WASHINGTON,	)	**No. 25578-6-III**
	)	**(consolidated with**
Respondent,	)	**No. 25579-4-III)**
	)	
v.	)	
	)	
MATTHEW E. WHITE,	)	
	)	
Appellant,	)	
_____	)	**Division Three**
STATE OF WASHINGTON,	)	
	)	
Respondent,	)	
	)	
v.	)	
	)	
KELLY G. MARTIN,	)	
	)	
Appellant.	)	**UNPUBLISHED OPINION**

Korsmo, J. — The trial court conducted a very brief in-chambers voir dire of one juror on a sensitive issue without first giving the public the opportunity to object. Our Supreme Court has previously declined to apply a *de minimis* exception to the open

courtroom controversy. Accordingly, we are constrained to reverse the convictions on these consolidated cases and remand for a new trial.

FACTS

Matthew White and Kelly Martin were charged with a series of offenses after they sold scrap aluminum that had been stolen.[1] The cases were tried jointly to a jury. During voir dire, Juror 12 raised his hand and advised the court that he needed to privately answer the question of whether a close friend or family member had ever been accused of a crime. At a convenient time, the court and the attorneys saw Juror 12 in chambers apart from the rest of the panel. Both defendants waived their right to be present.

Juror 12 explained that his daughter had been involved in drug use and embezzlement earlier in life, but had turned herself around. He stated that her former problems would not affect his ability to be fair. Mr. Martin's counsel asked a series of questions about the juror's daughter. There was no challenge for cause. Juror 12 ultimately served on the panel.

The entire process took just three minutes for the court to move to chambers, ask questions, and return to the courtroom.

The jury convicted each defendant on charges of burglary, possession of stolen

[1] In view of our disposition of these appeals, the substantive trial evidence will only be briefly noted during our discussion of the sufficiency of the evidence.

property, second degree theft, and third degree theft. The two men were acquitted of charges of a second burglary count and of possessing burglary tools. Each man received a standard range sentence and then appealed to this court.

After argument to a panel of this court in 2008, the cases were stayed pending the outcome of *State v. Momah*, 167 Wn.2d 140, 217 P.3d 321 (2009), and *State v. Strode*, 167 Wn.2d 222, 217 P.3d 310 (2009). After the mandates issued in those cases, this court requested supplemental briefing. The cases were then again argued to a panel of this court.

ANALYSIS

The appellants raise a series of arguments concerning events at their trial, and both also challenge the sufficiency of the evidence to support the burglary conviction. Because a new trial is required and we do not believe the other issues are likely to reoccur, we only address the public trial and evidentiary sufficiency arguments.

Public Trial

Article I, § 10 of the Washington constitution states: "Justice in all cases shall be administered openly, and without unnecessary delay." A series of cases has applied that provision to the jury selection process of a criminal trial. *In re Pers. Restraint of Orange*, 152 Wn.2d 795, 100 P.3d 291 (2004); *Momah*; *Strode*. It is error to exclude the public

from a courtroom where jury selection is taking place. *Orange*. A court also violates the public trial provision when it "closes" a courtroom by moving jury selection to chambers or another location where the public is not present. *Strode*.

It is possible to close a portion of a trial, including jury selection, to the public if the court openly engages in a five-part balancing test developed in *Seattle Times Co. v. Ishikawa*, 97 Wn.2d 30, 640 P.2d 716 (1982), and *Federated Publications, Inc. v. Kurtz*, 94 Wn.2d 51, 615 P.2d 440 (1980). *State v. Bone-Club*, 128 Wn.2d 254, 258-259, 906 P.2d 325 (1995); *Momah*, 167 Wn.2d at 149. The five factors are: (1) The proponent of closure must make a showing of compelling need; (2) any person present when the motion is made must be given an opportunity to object; (3) the means of 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 public and of the closure; (5) the order must be no broader in application or duration than necessary. *Bone-Club*, 128 Wn.2d at 258-259.

A court errs when it closes jury selection without first applying this five-factor test. *Strode*, 167 Wn.2d at 228; *State v. Brightman*, 155 Wn.2d 506, 515-516, 122 P.3d 150 (2005). Whether the error requires a new trial appears to depend upon the defendant's involvement in the closure and the necessity of the closure for the defense to

gain information to ensure a fair trial. *Compare Momah* (no prejudicial error where closure necessary to protect defendant's right to a fair trial) with *Strode* (prejudice presumed when closure procedure set up without active defense involvement in order to protect juror's privacy).

Here, there was no consideration of the *Bone-Club* test factors before closing the courtroom by interviewing Juror 12 in chambers. Thus, the trial court erred. *Brightman*. There was no involvement by defense counsel in suggesting an in-chambers interview. While counsel for Mr. Martin took an active role in questioning Juror 12, *Strode* appears to hold that active participation alone is not enough to move a case into the nonprejudicial error category. *See Strode*, 167 Wn.2d at 235-236 (Fairhurst, J., concurring).[2] Instead, there must be recognition of the public nature of the right to jury trial and a conscious decision by the defense to conduct a closed inquiry. *Id.*

Thus, *Strode* compels us to conclude that it was error to close the courtroom by hearing Juror 12 in chambers. The prosecutor argues that the error should be considered *de minimis*. We agree that the mere three minute closure in this case, the bulk of which consisted of questions by Mr. Martin's counsel who was seeking to ensure that Juror 12's experience would not prejudice the defense, was in fact *de minimis*. However, we do not

[2] *Strode* is a plurality opinion of four justices. Two justices concurred in the result in an opinion by Justice Fairhurst. Three justices dissented.

agree that labeling the public trial violation in that manner prevents relief.

Members of the Washington Supreme Court have reasoned that a courtroom closure may be so *de minimis* as to not amount to prejudicial error. *E.g., State v. Easterling*, 157 Wn.2d 167, 182-185, 137 P.3d 825 (2006) (Madsen, J., concurring). Nonetheless, that court has noted that a majority of the court has never applied the *de minimis* concept in this setting, typically because the facts at issue did not present a minimal courtroom closure. *Id.* at 180-181 (majority); *Strode*, 167 Wn.2d at 230 (plurality). While this court may technically be able to deny relief on a *de minimis* violation theory because a majority of the Washington Supreme Court has yet to reject the idea, that court's repeated consideration of the issue suggests the matter is best left to a determination by that body. Thus, we decline the prosecutor's invitation to deny relief.

While the violation was *de minimis*, the trial court erred in briefly closing the courtroom to consider Juror 12's information. The Washington Supreme Court must determine if there is a *de minimis* exception to a public trial violation.

Sufficiency of the Evidence

Both Mr. Martin and Mr. White argue that the evidence was insufficient to support the burglary verdicts. We believe that the evidence permitted the jury to reach the decision it did.

The sufficiency of the evidence to support a verdict is reviewed according to long-settled principles. The reviewing court does not weigh evidence or sift through competing testimony. Instead, the question presented is whether there is sufficient evidence to support the determination that each element of the crime was proven beyond a reasonable doubt. *Jackson v. Virginia*, 443 U.S. 307, 319, 61 L. Ed. 2d 560, 99 S. Ct. 2781 (1979); *State v. Green*, 94 Wn.2d 216, 221-222, 616 P.2d 628 (1980). The reviewing court will consider the evidence in a light most favorable to the prosecution. *Id.*

A person commits the crime of burglary if he enters or remains unlawfully in the building of another with the intent to commit a crime therein. RCW 9A.52.030(1). The defendants both argue that there was no evidence that they were the persons who entered the fenced premises behind Aztec Fabrication sometime over a weekend and took the metal templates and scrap aluminum that were reported stolen from the premises. At trial, the two men contended that they found the materials by a dumpster near where Mr. White lived. They admitted selling some of the items to a recycling facility. The crime was discovered on the same day that the stolen items were sold.

The *Green/Jackson* standard requires a reviewing court to view the evidence in a light most favorable to the prosecution. That also is consistent with the role of an

appellate court which must defer to factual determinations made by the trier-of-fact. *Quinn v. Cherry Lane Auto Plaza, Inc.*, 153 Wn. App. 710, 717, 225 P.3d 266 (2009).

Even viewing the evidence in a light most favorable to the prosecution, this is a close case. The only contested issue is whether the defendants were the people who entered the fenced premises and removed the stolen items, which they admittedly sold. Given the brief time between when the theft must have occurred and the time when the defendants sold the material, it was reasonable for the jury to reject their story that they found the items outside a garbage bin. It is unlikely that someone would go to the effort of stealing two hundred pounds of recyclable material and then simply abandon it at a garbage bin near Mr. White's residence. The jury was free to find that story untenable. It could then reasonably conclude that disposing of the stolen property shortly after it was taken and lying about how it was acquired led to the conclusion that the defendants were the persons who stole the items in the first place.

While thin, the evidence was sufficient to support the jury's verdicts on the burglary charges.

The convictions are reversed and the cases remanded for a new trial.

A majority of the panel has determined this opinion will not be printed in the Washington Appellate Reports, but it will be filed for public record pursuant to RCW

2.06.040.

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Korsmo, J.

WE CONCUR:

_____ _____
Kulik, C.J. Brown, J.