

IN THE SUPREME COURT OF THE STATE OF WASHINGTON

STATE OF WASHINGTON,)	
)	
Petitioner,)	No. 84585-9
)	
v.)	En Banc
)	
RENE P. PAUMIER,)	
)	Filed November 21, 2012
Respondent.)	
)	

OWENS, J. -- Rene P. Paumier appeals his conviction for residential burglary and second degree theft. This case requires us to determine if Paumier's right to a public trial was violated when the trial court individually questioned potential jurors in chambers. We have previously held that a court may close a courtroom to the public only after considering the factors established in *State v. Bone-Club*, 128 Wn.2d 254, 258-59, 906 P.2d 325 (1995). Moreover, we have held in *State v. Wise*, No. 82802-4, slip op. at 19 (Wash. Nov. 21, 2012), that individual questioning of potential jurors in chambers without first considering the *Bone-Club* factors is a closure creating a presumption of prejudice. Therefore, Paumier is entitled to a new trial because the

trial court closed the courtroom without first considering the *Bone-Club*

factors. Because we affirm the Court of Appeals on this issue, there is no reason to address whether the trial court also violated Paumier's right to self-representation. We affirm the Court of Appeals reversal of the trial court on the public trial right grounds alone.

FACTS

Paumier was convicted of residential burglary and third degree theft in Mason County Superior Court. He was sentenced to 25 months for the burglary and 365 days for the theft. Paumier is now appealing the jury selection process and his right to represent himself.

During voir dire, the trial judge individually questioned four potential jurors in her chambers. The trial judge, sua sponte, offered to privately question any juror on sensitive matters if a juror so chose. Specifically, the judge said:

[I]f there is anything that is of a sensitive nature and you would prefer not to discuss it in this group setting, please let us know. And I make a list and we take those jurors individually into chambers to ask those questions because we don't intend to embarrass you in any way.

Suppl. Report of Proceedings (RP) at 9-10. The private matters discussed included personal health issues, criminal history, and familiarity with the defendant or the crime. The prosecution, defense counsel, and Paumier were all present for the questioning and offered no objections. Further, the in-chambers questioning was recorded and transcribed by the court. But the trial judge never conducted a *Bone-*

Club analysis¹ prior to privately questioning the potential jurors. Such an analysis would have, among other things, required the judge to consider alternatives to closure and to mention Paumier's right to a public trial. Finally, of the four privately questioned, two jurors were excused.

After two days of jury selection, Paumier requested to represent himself. The trial judge denied Paumier's request stating that "the request comes too late" as the jury had already been selected (although not sworn in). 1 Partial RP at 9. The jury ultimately convicted Paumier of both residential burglary and second degree theft.

Paumier then appealed his convictions, claiming that the trial court violated both his right to a public trial and his right to self-representation. The Court of Appeals reversed the trial court on both grounds. *State v. Paumier*, 155 Wn. App. 673, 685, 687, 230 P.3d 212 (2010). The State petitioned for review by this court on both

¹ The *Bone-Club* factors 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."

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)).

issues, which we granted. *State v. Paumier*, 169 Wn.2d 1017, 236 P.3d 206 (2010).

ISSUE

Did the trial court err in failing to conduct a *Bone-Club* analysis prior to individually questioning jurors in chambers?

ANALYSIS

Failing To Conduct a Bone-Club Analysis before Privately Questioning Potential Jurors in Chambers Is Structural Error

Paumier claims the private questioning of four potential jurors violated his right to a public trial. Whether a defendant’s constitutional right to a public trial has been violated is reviewed de novo on direct appeal. *Wise*, No. 82802-4, slip op. at 5 (quoting *State v. Easterling*, 157 Wn.2d 167, 173-74, 137 P.3d 825 (2006)).

It is well established that a criminal defendant has a right to a public trial as guaranteed by our state and federal constitutions. U.S. Const. amend. VI; Wash. Const. art. I, § 22 (“the accused shall have the right . . . to have a speedy public trial”); *State v. Momah*, 167 Wn.2d 140, 147, 217 P.3d 321 (2009), *cert. denied*, 131 S. Ct. 160 (2010). “This presumption of openness extends to voir dire.” *Id.* at 148. However, as “[t]he right to public trial is not absolute,” the presumption may be overcome. *Wise*, No. 82802-4, slip op. at 6; *see also Bone-Club*, 128 Wn.2d at 259. A trial court may close the courtroom, so long as it considers the five criteria outlined in *Bone-Club*, 128 Wn.2d at 258-59. As part of the *Bone-Club* analysis, the trial judge

must consider alternatives to closure to ensure the least restrictive means of closure is adopted. *Wise*, No. 82802-4, slip op. at 7; *Bone-Club*, 128 Wn.2d at 259-60. Even the United States Supreme Court requires a trial court to consider alternatives before closing the courtroom. *Presley v. Georgia*, 558 U.S. 209, 130 S. Ct. 721, 725, 175 L. Ed. 2d 675 (2010).

We addressed the same issue• whether private questioning of potential jurors in chambers without conducting a *Bone-Club* analysis violates a defendant’s public trial right• in *Wise*. Because the issue is identical and the facts are similar, we rely on and incorporate the reasoning from that case here. The following rules summarize part of our holding in *Wise*. To begin, individually questioning potential jurors is a courtroom closure requiring a *Bone-Club* analysis. *Wise*, No. 82802-4, slip op. at 9. Failure to conduct the *Bone-Club* analysis is structural error warranting a new trial because voir dire is an inseparable part of trial. *Id.* at 13, 18-19.

Applying those rules here, the trial court erroneously closed the courtroom when it privately questioned potential jurors during voir dire without first conducting a *Bone-Club* analysis. Such an error is structural and warrants a new trial just as it did in *Wise*. “[W]e cannot reasonably order a ‘redo’ of voir dire to remedy the public trial right violation that occurred here.” *Id.* at 18-19. Accordingly, we are left with no other choice but to order a new trial.

Today's holding may seem in conflict with our previous decision in *Momah*, but it is not. As we made clear in *Wise*, *Momah* relied on unique facts to conclude that no public trial right violation occurred when the jurors were individually questioned. *Id.* at 13. Specifically, the defendant in *Momah* “affirmatively assented to the closure of voir dire and actively participated in designing the trial closure and [] though it was not explicit, the trial court . . . effectively considered the *Bone-Club* factors.” *Wise*, No. 82802-4, slip op. at 12-13. In stark contrast, these facts do not exist here. Paumier's mere presence in the courtroom does not qualify as active participation. Further, the trial court gave no indication it considered any of the *Bone-Club* factors. Thus, our holding is not in conflict with *Momah*.

Structural Error, Like Violation of the Public Trial Right, Presumes Prejudice

The next concerns we must address are whether Paumier had to contemporaneously object to the individual questioning to preserve the error and if he must show prejudice on appeal. Ordinarily, a party must contemporaneously object to preserve an error. RAP 2.5. However, RAP 2.5(a) allows an unobjected to error to be raised on appeal if it is a “manifest error affecting a constitutional right.” This court has previously interpreted “manifest error” as requiring a defendant to show actual prejudice. *State v. O'Hara*, 167 Wn.2d 91, 99, 217 P.3d 756 (2009). Here, that would mean Paumier must show actual prejudice because he failed to object to the closure

during trial.² But RAP 2.5(a) does not apply in its typical manner here because the improper courtroom closure was structural error. As noted in *Wise*, “[n]othing in our rules or our precedent precludes different treatment of structural error as a special category of ‘manifest error affecting a constitutional right.’” *Wise*, No. 82802-4, slip op. at 17 n.11 (quoting RAP 2.5(a)(3)).

In fact, there is good reason to treat structural errors, like violation of a defendant’s public trial right, differently.³ A structural error “affect[s] the framework within which the trial proceeds” and renders a criminal trial an improper “‘vehicle for determin[ing] guilt or innocence.’” *Arizona v. Fulminante*, 499 U.S. 279, 310, 111 S. Ct. 1246, 113 L. Ed. 2d 302 (1991) (quoting *Rose v. Clark*, 478 U.S. 570, 578, 106 S. Ct. 3101, 92 L. Ed. 2d 460 (1986)). The right to a public trial is a unique right that is important to both the defendant and the public. *Wise*, No. 82802-4, slip op. at 14; *Momah*, 167 Wn.2d at 148. Moreover, assessing the effects of a violation of the public trial right is often difficult. *Wise*, No. 82802-4, slip op. at 15 (quoting *United States v. Marcus*, ___ U.S. ___, 130 S. Ct. 2159, 2165, 176 L. Ed. 2d 1012 (2010)). Requiring a showing of prejudice would effectively create a wrong without a remedy. Therefore, we do not require a defendant to prove prejudice when his right to a public

² Relatedly, Paumier never waived his right to a public trial through his silence. *Wise*, No. 82802-4, slip op. at 14.

³ In *Wise*, we discuss at length the reasons we presume a public trial violation prejudicial, *id.* at 14-19, and see no reason to reiterate that analysis here.

trial has been violated. *Wise*, No. 82802-4, slip op. at 18.

CONCLUSION

Following the rule enunciated in *Wise*, we find that Paumier need not prove that violation of his public trial right prejudiced him. The trial court's failure to conduct a *Bone-Club* analysis was structural error that warrants reversal on appeal, with or without a contemporaneous objection.⁴ To be clear, our holding does not preclude a trial judge from closing a courtroom for individual questioning. Rather, our holding merely requires a trial court to conduct a *Bone-Club* analysis first. Because that analysis was not conducted here, Paumier is entitled to a new trial. We affirm the Court of Appeals.

⁴ Paumier also claims his right to self-representation was violated. Because we find the violation of his public trial right warrants reversal of his conviction, we do not reach his self-representation claim.

AUTHOR:

Justice Susan Owens

WE CONCUR:

Justice Debra L. Stephens

Justice Tom Chambers

Gerry L. Alexander, Justice Pro Tem.

Justice Mary E. Fairhurst
