IN THE SUPREME COURT OF THE STATE OF WASHINGTON

In the Matter of the Personal Restraint Petition of	)	No. 84929-3
PATRICK L. MORRIS,	)	En Banc
Petitioner.	)	Filed November 21, 2012

OWENS, J. -- Patrick L. Morris filed this timely personal restraint petition, alleging a violation of his right to a public trial when the trial court conducted part of voir dire in chambers. Further, he claims his appellate counsel was ineffective for failing to raise the violation on direct review. In *In re Personal Restraint of Orange*, 152 Wn.2d 795, 814, 100 P.3d 291 (2004), we resolved a similar claim on ineffective assistance of appellate counsel grounds. This case is analytically indistinguishable from *Orange*. We therefore reaffirm *Orange* and hold that where appellate counsel fails to raise a public trial right claim, where prejudice would have been presumed on direct review, a petitioner is entitled to relief on collateral review. Morris additionally challenges evidentiary decisions by the trial court relating to a proposed defense expert witness and argues that his trial counsel was ineffective in handling the expert

testimony issue. We hold that Morris fails to meet his burden on the evidentiary and trial counsel issues. Because of Morris's ineffective assistance of appellate counsel, we reverse and remand for a new trial.

FACTS

In 2004, Morris was convicted of two counts of first degree sexual molestation and one count of first degree rape of his daughter, A.W., who was five years old when she disclosed the abuse. Morris's defense was that the allegations were false and part of an effort by A.W.'s mother to terminate his parental rights. The jury disagreed and he was sentenced to 189 months in prison.

The record indicates that jury selection began in open court. After conducting some of the voir dire proceedings in the courtroom, the trial court announced, "Well, Ladies and Gentlemen, we have some interviews to do of those people who indicated they wanted to talk privately. We have quite a few of those to do, actually." Pers. Restraint Pet. with Legal Arg. & Auths. (PRP), App. A at 45.[1] The trial court then moved proceedings into chambers.

The record does not contain any reference to the factors a court must consider when closing proceedings to the public under *State v. Bone-Club*, 128 Wn.2d 254, 258-

[1] We rely on the additional Verbatim Report of Proceedings (VRP) that appears in "Appendix A" of the PRP because the transcripts that were certified to this court exclude the voir dire portion of trial proceedings. VRP (June 8, 2004) at 3.

59, 906 P.2d 325 (1995).[2] Nor does it contain any other discussion or acknowledgment of Morris's right to a public trial. The record does not reveal if anyone besides the prospective jurors, counsel, court employees, and the defendant was present in the courtroom before proceedings were moved into chambers. Neither the State nor counsel for Morris moved for the private voir dire and neither objected to conducting the proceedings in chambers. However, Morris did waive his own right to be present during the portion of voir dire conducted in chambers. In so waiving his right to be present, defense counsel indicated that "it would be more likely for jurors to be more forthcoming with what they are talking about if [Morris] were not in the room." PRP, App. A at 46.

Once in chambers, the prosecutor and defense counsel, along with the trial judge, questioned 14 prospective jurors and excused 6 for cause. The prospective

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[2] "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 (alteration in original) (quoting *Allied Daily Newspapers of Wash. v. Eikenberry*, 121 Wn.2d 205, 210-11, 848 P.2d 1258 (1993)).

jurors were selected for private interviews based only on their personal preferences indicated in their questionnaires. Some jurors opted for private questioning to discuss prior personal experiences with sexual violence, while others revealed just that they preferred to not talk in front of groups. The remainder of voir dire "resume[d] in the courtroom." *Id*. at 93.

During trial, as part of his defense, Morris proposed to call Lawrence Daly, a former police investigator with experience interviewing child victims of sexual abuse, to testify about several subject matters relating to the State's investigation of the case. The State challenged Daly's testimony. After hearing testimony from Daly and the parties' arguments about the admissibility of his testimony, the trial court limited Daly's testimony to certain subject matters. The trial court ruled that Daly *could* testify about the differences between his interview of A.W. and the interview of A.W. conducted by the State's investigator, Candy Ashbrook, including differences in interview techniques. However, the trial court ruled that Daly could not testify about the suggestibility or potential coaching of A.W. The trial court ruled that testimony about scientific studies about the suggestibility of children was inadmissible under this court's holdings in *State v. Swan*, 114 Wn.2d 613, 656, 790 P.2d 610 (1990), and *State v. Willis*, 151 Wn.2d 255, 261, 87 P.3d 1164 (2004).

The trial judge additionally ruled that Daly could not testify about the "standard

of care" of law enforcement officers as it compared to Detective Kathleen Ryan's investigation of this case. Detective Ryan acknowledged during cross-examination that she did not personally interview anyone for this case, that she did not carefully read the medical reports, and that the Anacortes Police Department does not have any policies or procedures for the investigation of sexual abuse allegations. With regard to admitting Daly's proposed testimony about a standard police investigation of sexual abuse allegations of a child and how it compares to Detective Ryan's investigation, the trial judge reasoned that "[t]he jury isn't going to be asked to evaluate Detective Ryan's standard of care. [They] may think she's a lousy Detective, but that doesn't really matter in terms of what they have to decide, does it?" Verbatim Report of Proceedings (VRP) (June 14, 2004) at 76.

Morris's defense ultimately did not call Daly as a witness. While both Daly and the defense expressed timing concerns regarding Daly's availability, the reason for not calling him is unclear because, on the same day that he was present and the trial court approved his testimony in part, the defense called Morris, not Daly, to the stand. The defense also rested its case without showing the videotape of Daly's interview of A.W. after which the State called a rebuttal witness and sought to play the videotape of Daly's interview of A.W. for the jury. Defense counsel indicated some concerns about playing the videotape but ultimately did not object:

> THE COURT: You want the whole [tape]?

> [DEFENSE COUNSEL]: Yes, if it's going to be played at all.
>
> THE COURT: All right. What do you mean "if it's going to be played at all"?
>
> [DEFENSE COUNSEL]: Well, apparently it's going to be played.
>
> THE COURT: No objection then to playing the whole thing from beginning to end?

VRP (June 15, 2004, afternoon) at 3-4. There was no objection. The defense did not object to the foundation of the videotape or to identifying the interviewer as a "defense child interview expert." VRP (June 16, 2004) at 2-3. The defense did not call Daly to the stand to explain anything about the interview.

On direct appeal, Morris challenged several evidentiary decisions of the trial court, particularly the admission of testimony by four State witnesses. He also claimed ineffective assistance of counsel for his counsel's failure to object to the witnesses' testimony. The appeal did not include a claim regarding the right to a public trial. The Court of Appeals affirmed Morris's conviction. We denied Morris's petition for review and the mandate issued in August 2007. He timely filed this PRP with the Court of Appeals in August 2008, raising several new issues. The Court of Appeals stayed review pending the final resolution of two cases, which impacted the public trial right issue• *State v. Momah*, 167 Wn.2d 140, 217 P.3d 321 (2009), *cert. denied*, 131 S. Ct. 160 (2010), and *State v. Strode*, 167 Wn.2d 222, 217 P.3d 310

(2009) (plurality opinion). Upon their resolution, the Court of Appeals certified Morris's PRP for review by this court based on his public trial right claim. Specifically, the Court of Appeals asked "[w]hether a personal restraint petitioner must establish prejudice before he or she may obtain relief from an alleged violation of the right to a public trial?" Order of Cert. We accepted review of all issues raised in Morris's PRP.

ISSUES

1. Did the trial court violate Morris's right to a public trial by conducting voir dire in chambers?

2. Did the trial court err in refusing to admit portions of proposed expert testimony?

3. Did Morris receive ineffective assistance of counsel at trial for the handling of the expert witness's testimony?

4. Did these errors, if not individually redressible, result in cumulative error?

ANALYSIS

1. Closure of the Courtroom During Voir Dire

Morris claims that the trial judge violated his right to a public trial by privately questioning 14 potential jurors in chambers. We hold that an appellate counsel's failure to raise a public trial right violation under such facts constitutes ineffective

assistance of appellate counsel.

When we initially accepted review of this case it was to address how *Momah* and *Strode* impacted *Orange* and the courtroom closure issue. Since accepting review, we have decided two more cases, *State v. Wise*, No. 82802-4 (Wash. Nov. 21, 2012), and *State v. Paumier*, No. 84585-9 (Wash. Nov. 21, 2012), which guide our analysis on the courtroom closure issue. Those cases make it clear that failing to consider *Bone-Club* before privately questioning potential jurors violates a defendant's right to a public trial and warrants a new trial on direct review. *Wise*, No. 82802-4, slip op. at 19; *Paumier*, No. 84585-9, slip op. at 4-5. We need not address whether a public trial violation is also presumed prejudicial on collateral review because we resolve Morris's claim on ineffective assistance of appellate counsel grounds instead.

To establish ineffective assistance of appellate counsel, a petitioner must establish that (1) counsel's performance was deficient and (2) the deficient performance actually prejudiced the defendant. *Orange*, 152 Wn.2d at 814; *Smith v. Robbins*, 528 U.S. 259, 285, 120 S. Ct. 746, 145 L. Ed. 2d 756 (2000). Here, there is little question that the second prong of this test is met. In *Wise* and *Paumier*, we clearly state that a trial court's in-chambers questioning of potential jurors is structural error. Had Morris's appellate counsel raised this issue on direct appeal, Morris would have received a new trial. *See Orange*, 152 Wn.2d at 814 (finding prejudice where

appellate counsel failed to raise a courtroom closure issue that would have been presumptively prejudicial error on direct appeal). No clearer prejudice could be established.

The State, in claiming otherwise, attempts to circumvent the underlying public trial right violation by claiming that Morris implicitly waived his right to a public trial when he waived his right to be present. Waiver of the right to be present, however, should not be conflated with waiver of the right to a public trial. *See State v. Duckett*, 141 Wn. App. 797, 805-07, 173 P.3d 948 (2007). Morris waived his right to be present only *after* the trial judge moved voir dire proceedings in chambers. The rationale Morris's counsel gave for his waiver was that "it would be more likely for jurors to be more forthcoming with what they are talking about if he were not in the room." PRP, App. A at 46. One can easily imagine that such a consideration is especially valid in the presumptively close quarters in chambers, as compared to the open courtroom. The closure itself may have compelled Morris to waive his right to be present. Moreover, a defendant must have knowledge of a right to waive it. *Duckett*, 141 Wn. App. at 806-07. Here, there was no discussion of Morris's public trial right before the closure. Thus, we do not find that Morris waived his right to a public trial.

Having established prejudice, the remaining question is deficiency.

"[P]erformance is deficient if it falls 'below an objective standard of reasonableness.'" *State v. Grier*, 171 Wn.2d 17, 33, 246 P.3d 1260 (2011) (quoting *Strickland v. Washington*, 466 U.S. 668, 688, 104 S. Ct. 2052, 80 L. Ed. 2d 674 (1984)). This is a high threshold, and the petitioner "must overcome 'a strong presumption that counsel's performance was reasonable.'" *Id*. (quoting *State v. Kyllo*, 166 Wn.2d 856, 862, 215 P.3d 177 (2009)). One method of overcoming this presumption is by proving that counsel's performance was neither a legitimate trial strategy nor a reasonable tactic. *Id*. at 33-34.

In this case, proving deficient performance necessarily requires proving that counsel should have known to raise the public trial right issue on appeal. Here, Morris's appellate counsel should have known to raise the public trial right issue even though we had yet to decide *Strode*. Morris filed his appeal in March 2005. *Orange* had been decided at that time and clarified, without qualification, both that *Bone-Club* applied to jury selection and that closure of voir dire to the public without the requisite analysis was a presumptively prejudicial error on direct appeal. *Orange*, 152 Wn.2d at 807-08, 814.

Morris's appellate counsel had but to look at this court's public trial jurisprudence to recognize the significance of closing a courtroom without first conducting a *Bone-Club* analysis. This case is no different from the situation in

Orange where the appellate counsel failed to raise the public trial right issue. In *Orange*, "[t]he failure to raise the courtroom closure issue was not the product of 'strategic' or 'tactical' thinking, and it deprived Orange of the opportunity to have the constitutional error deemed per se prejudicial on direct appeal." 152 Wn.2d at 814. The *Orange* rule derived from the clear rule in *Bone-Club*. 152 Wn.2d at 812. The court reasoned that "had Orange's appellate counsel raised the constitutional violation on appeal, the remedy for the presumptively prejudicial error would have been, as in *Bone-Club*, remand for a new trial." *Id*. at 814. We accordingly remanded for a new trial in *Orange*. *Id*. We do the same here.

2. Trial Court's Exclusion of Expert Testimony

Morris challenges two of the trial court's decisions to preclude specific testimony of his proposed expert witness, Daly. The trial court ruled that Daly could not testify about the "standard of care" of police investigations involving allegations of sexual abuse nor about studies regarding the suggestibility of young children. "We review a trial court's decision to exclude expert testimony for abuse of discretion." *Willis*, 151 Wn.2d at 262. "We review a trial court's interpretation of case law de novo." *Id*. at 261. To prevail on collateral review on a claim of evidentiary error, a petitioner must show that the error constitutes a "'fundamental defect' amounting to a 'miscarriage of justice.'" *In re Pers. Restraint of Pirtle*, 136 Wn.2d 467, 489, 965

P.2d 593 (1998) (quoting *In re Pers. Restraint of Cook*, 114 Wn.2d 802, 811, 792 P.2d 506 (1990)).[3]

ER 702 allows for the admission of expert testimony. Such testimony is admissible if "(1) the witness qualifies as an expert, (2) the opinion is based upon an explanatory theory generally accepted in the scientific community, and (3) the expert testimony would be helpful to the trier of fact." *State v. Allery*, 101 Wn.2d 591, 596, 682 P.2d 312 (1984).

On the two topics at issue, the trial court found that the information would not be helpful to the jury. "Under ER 702, expert testimony will be deemed helpful to the trier of fact only if its relevance can be established." *State v. Greene*, 139 Wn.2d 64, 73, 984 P.2d 1024 (1999).[4] The trial court ruled that Daly could not testify about the "standard of care" for police investigations of sexual abuse allegations. The stated rationale was that it would not be helpful to the jurors because "[t]he jury isn't going to be asked to evaluate Detective Ryan's standard of care." VRP (June 14, 2004) at

[3] Here we apply the nonconstitutional error standard for collateral review. Morris argues that his evidentiary claims rise to the level of constitutional error because he was allegedly prevented from presenting a defense. *Cf. State v. Maupin*, 128 Wn.2d 918, 928-30, 913 P.2d 808 (1996) (treating failure by the court to allow Maupin to call a witness as constitutional error). However, Morris was allowed to present almost everything he wanted and explore the theory of his case through both direct testimony and cross-examination.

[4] We decline to address the State's argument, raised for the first time on review, that Daly was unqualified as an expert and that his proposed testimony was not based on theories that are generally accepted. Further, there is sufficient evidence in the record regarding Daly's experience and the bases for his proposed testimony.

76. The State argued that the standard of care and breach are civil legal matters and were therefore irrelevant. The exacting focus on the terminology "standard of care," though the term came from the defense, was misguided. The defense's theory was clearly that the allegations of sex abuse were created by A.W.'s mother as part of a child custody dispute and went unchecked. The fact that the police failed to conduct a thorough investigation of the charges, beyond merely funneling information to the prosecutor's office, is relevant to the defense's theory.

However, we review the ruling under an abuse of discretion standard; a trial court's evidentiary ruling is an abuse of discretion only if it is "manifestly unreasonable or based upon untenable grounds or reasons." *State v. Powell*, 126 Wn.2d 244, 258, 893 P.2d 615 (1995). Even if we were to go as far as saying that the failure to admit testimony about standards for a police investigation was untenable, Morris must show that the error resulted in a "complete miscarriage of justice." *Cook*, 114 Wn.2d at 812.

He cannot meet this burden. Detective Ryan admitted that she did little investigatory work, including that she did not interview any witnesses for this case. She also admitted that the Anacortes Police Department does not have any procedures or policies regarding the investigation of sex abuse cases. The defense was able to clearly establish that little police investigation occurred without the admission of

expert testimony highlighting what should have been done. As a result, there was not a complete miscarriage of justice.

On the issue of testimony about the suggestibility of young child witnesses, the trial judge ruled, "That is the one thing *Swan* and *Willis* say; it's not admissible under this expert's testimony, the suggestibility of young children and how their memory could be affected by adult manipulation. This is not coming in." VRP (June 14, 2004) at 84. The trial court treated *Swan* and *Willis* as creating a categorical rule excluding expert testimony about the suggestibility of young children, but we clarified in *Willis* that this is not the case. *Willis*, 151 Wn.2d at 261. The court observed that, while the suggestibility of young children is generally understood by the jury, "specialized knowledge regarding the effects of specific interview techniques and protocols 'is not likely within the common experience of the jury.'" *Id*. (quoting *State v. Willis*, 113 Wn. App. 389, 394, 54 P.3d 184 (2002)). The *Willis* court held that "merely because it is a matter of general knowledge that children's memories are changeable does not preclude testimony that specific interview techniques might compromise specific memories." *Id*. The trial court's statement of the law is an erroneous oversimplification. Because the rationale for the ruling was based on "untenable grounds," *Powell*, 126 Wn.2d at 258, the trial court abused its discretion. Under *Willis*, the trial court should have considered whether testimony about the

suggestibility of young children, as it related to specific interview techniques, would have been helpful to the jury.

While error, Morris cannot show that it resulted in a complete miscarriage of justice. *See Cook*, 114 Wn.2d at 812. The trial judge allowed testimony on the difference between the State's and defense's experts' interviews and techniques, which could have included some of the relevant information the defense sought to introduce as "suggestibility" evidence. The defense was also able to cross-examine other witnesses about the suggestibility of child witnesses and therefore to present this theory in argument.

We hold that Morris cannot meet his burden to show that any evidentiary errors made by the trial court regarding the inadmissibility of certain subjects of proposed expert testimony resulted in a complete miscarriage of justice.

3. Ineffectiveness of Trial Counsel

To prove ineffective assistance of counsel at trial, Morris would have to show that his trial "attorney's performance was deficient and not a matter of [reasonable] trial strategy or tactics" and that he was prejudiced. *State v. Mannering*, 150 Wn.2d 277, 285, 75 P.3d 961 (2003) (citing *State v. Hendrickson*, 129 Wn.2d 61, 77-78, 917 P.2d 563 (1996); *Strickland*, 466 U.S. at 687-89); *Grier*, 171 Wn.2d at 34. Morris alleges that two of defense counsel's actions meet this exacting standard. First,

counsel failed to object to Daly's videotaped interview of A.W. Second, counsel decided not to call Daly as a witness to explain the videotape after its admission. Neither action, however, establishes ineffective assistance of counsel.

"Generally the decision whether to call a particular witness is a matter for differences of opinion and therefore presumed to be a matter of legitimate trial tactics." *In re Pers. Restraint of Davis*, 152 Wn.2d 647, 742, 101 P.3d 1 (2004); *see also Mannering*, 150 Wn.2d at 287 (finding the failure to call a defense expert witness to be strategic). Here, there are possible strategic reasons for not calling Daly, including that he was argumentative with the judge and the prosecutor on the stand during the proffer for the admission of his testimony. VRP (June 14, 2004) at 42-43, 87 ("[DEFENSE COUNSEL]: . . . I noticed a definite deterioration between the two, [the prosecutor] and Mr. Daly, as the interview progressed."). To the extent the defense wanted to draw comparisons between Daly's interview and Ashbrook's interview of A.W., that was possible without Daly's testimony.

Morris also fails to rebut the presumption that his trial counsel's failure to object to the admission of the videotape was strategic or tactical. The certified record does not include the videotape or a transcript of it. However, defense counsel described the videotaped interview of A.W. as "[a]lmost a complete recantation" of statements A.W. made in the interview with Ashbrook. *Id*. at 75. Defense counsel

also stated that A.W.'s statements "to Mr. Daly [were] virtually identical to what she testified to on the stand." *Id*. Admission of the interview, therefore, could be strategic. Even if it was not, Morris cannot show prejudice from the failure to object since the videotape, according to counsel, was redundant of testimonial evidence that was already admitted. We hold that Morris cannot meet his burden to show that any of trial counsel's actions were deficient.

4. Cumulative Error

Finally, Morris argues that the alleged errors resulted in reversible cumulative error. The cumulative error doctrine applies "when there have been several trial errors that standing alone may not be sufficient to justify reversal but when combined may deny a defendant a fair trial." *State v. Greiff*, 141 Wn.2d 910, 929, 10 P.3d 390 (2000). For the reasons already noted, particularly that the defense was able to get in additional evidence relevant to its theory of the case, we hold that the alleged errors "had little or no effect on the outcome at trial" and therefore did not deprive Morris of a fair trial. *Id*.

CONCLUSION

We hold that the trial court erred by conducting part of voir dire in chambers without considering the *Bone-Club* factors, effecting a violation of Morris's public trial right. We reaffirm *Orange* and hold that Morris is entitled to relief under his

ineffective assistance of appellate counsel claim because this error would have been presumed prejudicial on direct review. On this basis, we reverse and remand for a new trial. Finally, while we note errors in the trial court's reasoning regarding the admission of the defense's proposed expert testimony, we hold that Morris fails to meet his burden to get relief on the bases of evidentiary errors and ineffective assistance of counsel at trial.

AUTHOR:

Justice Susan Owens

WE CONCUR:

Justice Debra L. Stephens

Gerry L. Alexander, Justice Pro Tem.

Justice Mary E. Fairhurst