In re PRP of Morris (Patrick L.)

No. 84929-3

CHAMBERS, J. (concurring) — I agree with the lead opinion that this case is analytically indistinguishable from our decision in *In re Personal Restraint of Orange*, 152 Wn.2d 795, 100 P.3d 291 (2004), and that *Orange* therefore controls the disposition of this case. I write separately to address several points.

This court's jurisprudence regarding public trials under article I, sections 10 and 22 is still developing. As a threshold question in public trial rights cases, we should always decide first whether a closure of the courtroom has occurred. If there is no closure, then the analysis ends there.

We have just set forth a new test for determining whether an event constitutes a courtroom closure. In *State v. Sublett*, No. 84856-4 (Wash. Nov. 21, 2012) (plurality opinion), we adopted an "experience and logic" test from the United States Supreme Court. *Id.* slip op. at 12-13 (quoting *Press-Enter. Co. v. Superior Court*, 478 U.S. 1, 8, 106 S. Ct. 2735, 92 L. Ed. 2d 1 (1986)). Under that test, a closure is determined by examining (1) whether the place and process in question have historically been open to the public and (2) whether public access plays a significant positive role in the functioning of the process in question. *Id.* at 13.

It will not always be necessary to use this new test. For example, it is "well settled that the right to a public trial . . . extends to jury selection." *State v. Brightman*, 155 Wn.2d 506, 515, 122 P.3d 150 (2005). The private questioning of individual jurors is plainly part of jury selection. Once this court has decided that a

set of circumstances does or does not represent a closure, the issue is settled and it is no longer necessary to revisit the question with an experience and logic test or other analysis.

In this case, the question boils down to whether the defendant's counsel on appellate review should have known to raise the public trial issue. As the lead opinion makes clear, *Orange* had been decided at the time Morris filed his appeal. Lead opinion at 10. *Orange* stated without qualification that a *Bone-Club*[1] analysis applied to jury selection and that closure of jury selection without the required analysis was a presumptively prejudicial error on direct appeal. *Orange*, 152 Wn.2d at 807-08, 814. Because *Orange* should have made clear to all that private questioning of jurors outside the courtroom was an issue worth raising on appeal, I concur in the lead opinion.

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

AUTHOR:
Justice Tom Chambers

WE CONCUR: