No. 40333-1-II

COURT OF APPEALS, DIVISION II
OF THE STATE OF WASHINGTON

STATE OF WASHINGTON,

Respondent,

vs.

Kenneth Slert,

Appellant.

Lewis County Superior Court Cause No. 04-1-00043-7

The Honorable Judge James Lawler

Appellant's Supplemental Brief

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1. The trial court erred by failing to maintain an official copy of the jury questionnaire in the court file.

2. The trial court erred by allowing completed juror questionnaires to be destroyed.

SUPPLEMENTAL STATEMENT OF THE ISSUE

Both the federal and state constitutions require that criminal proceedings be open to the public. In this case, the trial court destroyed questionnaires that had been completed by prospective jurors. Did the destruction of the completed juror questionnaires violate the First, Sixth, and Fourteenth Amendments and Article I, Sections 10 and 22?

SUPPLEMENTAL FACTS AND PRIOR PROCEEDINGS

Before the start of Mr. Slert's third trial, the parties agreed to a jury questionnaire, which prospective jurors were to complete prior to answering questions in the courtroom in *voir dire*. RP[1] (1/6/2010) 3-4, 14; RP (1/21/2010) 2-4. The questionnaire was not filed in the trial court file; instead, the trial judge apparently retained a copy of the blank questionnaire in his private files. *See* Respondent's Motion for an Oder [sic] Staying Decision, Authorizing Supplimental [sic] Designation of

[1] The Verbatim Report of Proceedings from the trial was sequentially numbered, and is referred to as "RP." Citations to dates other than the trial include the date of the hearing.

Clerk's Papers and Allowing Additional Briefing (hereafter "Respondent's Motion"), p. 2.

Members of the jury venire apparently completed the questionnaire; however, counsel for Respondent conceded at oral argument that all the completed questionnaires were destroyed at some point. Recording of Oral Argument, September 9, 2011.[2] In any event, those completed questionnaires are not available for appellate review.

Before jurors were questioned, the judge noted that he had excused four prospective jurors "based on the answers" to the questionnaire, "after consultation with counsel." [3] RP 5. Both the consultation and the decision to excuse these four jurors took place during the "[p]retrial conference [which] was held in chambers." CP 125. Mr. Slert was not present for this pretrial conference in chambers, and the court did not explain why the proceeding occurred behind closed doors.[4] RP 5.

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[2] Available at: http://www.courts.wa.gov/appellate_trial_courts/appellateDockets/index.cfm?fa=appellateDockets.showOralArgAudioList&courtId=a02&docketDate=20110909

[3] Respondent erroneously states that "by mutual agreement [sic], the Court excused four jurors on the record, in open court, and in the defendant's presence." Supplemental Brief of Respondent, p. 3 (citing RP 3-5). This is incorrect. In fact, the judge noted on the record that he had "already… excused" the four prospective jurors (during the conference in chambers), after consultation with counsel. RP 5. Furthermore, this brief statement does not establish that counsel agreed with the court's decision to dismiss the four jurors. Any objections that may have been raised in chambers are not part of the record.

[4] Respondent claims that "[t]he court and counsel for both parties reviewed the questionnaires while the prospective jurors were all present…" Supplemental Brief of

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On appeal, Mr. Slert challenged the decision to hold proceedings behind closed doors in his absence. Appellant's Opening Brief, pp. 61-65. At oral argument, the Court of Appeals questioned the parties regarding the missing jury questionnaires. The prosecutor subsequently obtained permission to supplement the record with transcripts of two pretrial hearings, and with what purports to be a copy of the jury questionnaire, obtained from the judge's private files. *See* Respondent's Motion; Order Staying Decision; Order Denying Motion for Reconsideration; CP 359.

The questionnaire obtained from the judge does not bear a file stamp; the copy that is now part of the clerk's papers was filed after oral argument (on September 19, 2011). *Compare* Supplemental Brief of Respondent, Exhibit 3, *with* CP 359. Respondent apparently did not consult with Mr. Slert's trial counsel, or obtain his agreement that the questionnaire from the judge's private files matched the one actually completed by prospective jurors. Respondent's Motion, p. 2.

Respondent, p. 3 (citing RP 5). This is untrue. There is no indication anywhere in the record that the questionnaires were reviewed in the jury's presence. *See* RP 1-14.

ARGUMENT

I. THE TRIAL COURT VIOLATED THE FIRST, SIXTH, AND FOURTEENTH AMENDMENTS AND ARTICLE I, SECTIONS 10 AND 22 BY HOLDING AN *IN CAMERA* HEARING AND DISMISSING FOUR PROSPECTIVE JURORS IN MR. SLERT'S ABSENCE.

By dismissing four jurors in chambers, the trial judge violated the constitutional requirements that criminal justice be administered openly and publicly. *State v. Bone-Club,* 128 Wash.2d 254, 259, 906 P.2d 325 (1995); *Presley v. Georgia*, ___ U.S. ___, ___, 130 S.Ct. 721, 175 L.Ed.2d 675 (2010) (*per curiam*). By conducting the proceeding in Mr. Slert's absence, the judge also violated Mr. Slert's right to be present. *State v. Irby*, 170 Wash.2d 874, 884, 246 P.3d 796 (2011).[5]

The newly supplemented record does not affect this result. Neither the blank questionnaire submitted by Respondent nor the two pretrial hearings at which the questionnaire was mentioned reveal the specific facts underlying the trial judge's backroom decision to dismiss the four prospective jurors. CP 359; RP (1/6/2010); RP (1/21/2010). Nor does the supplemented record suggest that Mr. Slert was allowed to communicate with his attorney during the *in camera* discussions leading up to dismissal of the prospective jurors. *See* RP 5.

[5] As the Court in *Irby* noted, completion of the questionnaire relates to jurors' qualifications to serve on a particular case, and is therefore part of the jury selection process. *Irby, at* 882.
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Furthermore, Respondent's supplemental brief does not even attempt to address these issues.[6] *See* Supplemental Brief of Respondent. Instead, without mentioning the hearing that occurred in the judge's chambers, Respondent outlines the proceedings that *did* take place in open court, and argues that *these* proceedings did not violate the constitution. Supplemental Brief of Respondent, pp. 2-3; 5.

Respondent's arguments are wholly irrelevant. They do not address the key facts, which are that the trial judge met with counsel in chambers and dismissed four jurors:

> THE COURT: There are a couple other things. We have had the questionnaires that have been filled out. I have already, based on the answers, after consultation with counsel, excused jurors number 19, 36, and 49 from panel two which is our primary panel and I've excused juror number 15 from panel one, the alternate panel that we'll be using today.
> RP 5.

Even assuming—as Respondent contends—that all other proceedings took place openly and publicly, the *in camera* meeting behind closed doors violated the First, Sixth, and Fourteenth Amendments and Article I, Sections 10 and 22. *Bone-Club, at* 259; *Presley, at*___; *Irby, at* 884. The

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It cannot be likened to excusing jurors for hardship, or for other reasons that disqualify them from service in general. *Id.*

[6] Part of Respondent's basis for requesting permission to file a supplemental brief was to address *Irby,* which "came down literally one day after the State submitted its responsive brief." Respondent's Motion, p. 2.

judge should not have met with counsel in chambers to discuss and excuse jurors from serving on Mr. Slert's case.

Respondent's claim that the *Smith* case "is the silver bullet" for the state's position is difficult to comprehend. *See* Supplemental Brief of Respondent, p. 5 (citing *State v. Smith,* ___Wash. App. ___, ___, ___P.3d ___ (2011)).[7] *Smith* did not involve a trial court's decision to excuse jurors during an *in camera* meeting with counsel. *Smith, at* ___.

Respondent also fails to address the *in camera* hearing in its discussion of Mr. Slert's right to be present. Supplemental Brief of Respondent, pp. 7-10. Again, Respondent erroneously focuses on the hearings that took place in the courtroom; however, these public hearings do not excuse the closed *in camera* hearing, which took place in Mr. Slert's absence and which resulted in the dismissal of four jurors.[8] RP 5. The dismissal of the four prospective jurors violated Mr. Slert's right to be present. *Irby, supra.*

Mr. Slert's right to a public trial was violated. *Bone-Club, supra.* The public's right to an open trial was violated. *Id.* Mr. Slert's right to be

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[7] Respondent provides a citation for *Smith* which has since been withdrawn.

[8] Without citation to the record, Respondent claims that Mr. Slert "had the opportunity to confer with counsel about the questionnaire before any prospective juror was dismissed." Supplemental Brief of Respondent, p. 9. Nothing in the record supports this assertion. *See* RP 1-14. Furthermore, even if he'd had the opportunity to confer before his attorney met

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present was violated. *Irby, supra.* Because of these constitutional violations, the conviction must be reversed and the case remanded for a new trial. *Bone-Club, supra; Irby, supra.*

II. THE COURT'S DESTRUCTION OF COMPLETED JURY QUESTIONNAIRES VIOLATED THE RIGHT TO AN OPEN AND PUBLIC TRIAL.

Respondent's Supplemental Brief involves a misguided effort to shift attention away from the closed *in camera* hearing. Supplemental Brief of Respondent, pp. 4-10. Unfortunately for the Respondent, the supplemental record reveals an additional basis for reversal. The destruction of jury questionnaires permanently removes them from public view, and is the functional equivalent of an irreversible courtroom closure. *See State v. Coleman*, 151 Wash.App. 614, 214 P.3d 158 (2009).

Following Mr. Slert's third trial, neither Mr. Slert nor the public nor the press will ever be able to examine the official record[9] of the answers put forth by any of the jurors who sat on the jury and convicted Mr. Slert. Nor will Mr. Slert, the public, or the press be able to investigate the answers of those jurors whom the court and counsel excused from

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with the court and the prosecutor in chambers, his absence from that proceeding violated his right to be present. *Irby, supra.*

[9] The record suggests that counsel was required to return any copies of the completed questionnaire to the court as in the *Smith* and *Stockwell* cases. CP 359. *See Smith, supra; In re Personal Restraint of Stockwell*, 160 Wash. App. 172, 178, 248 P.3d 576 (2011).

serving, including those four jurors dismissed during the *in camera* proceeding. Thus, for example, if questions arise regarding a juror's candidness on the questionnaire, an examination of the official record will be impossible.

The destruction of the completed questionnaires is only one of several facts that distinguishes this case from those cited by Respondent. Supplemental Brief of Respondent, pp. 5-7 (citing *Smith* and *Stockwell*). In *Smith,* the Court held that an order sealing juror questionnaires, entered after *voir dire* with the explicit consent of the parties, did not violate either the defendant's or the public's right to an open trial. *Smith, at* ___. In reaching this conclusion, the Court relied on the defendant's explicit consent to the procedure, the use of the questionnaire in open court during *voir dire*, and the trial court's promise to jurors that their answers would be sealed. *Smith, at* ___.

Similarly, the *Stockwell* Court upheld a decision sealing juror questionnaires, finding that the trial court's order did not create structural error. The Court relied on the defendant's consent, the benefit he derived from the court's promise to jurors that answers would be kept confidential, and the fact that the questionnaires were used to question jurors in open court. *Stockwell, at* 180-181.

In this case, by contrast, the records were destroyed rather than sealed, as noted above. Furthermore, Mr. Slert did not explicitly consent to destruction of the records. In addition, the questionnaires were used *in camera* to dismiss four jurors, outside of the public view and without Mr. Slert's presence. Finally, the trial court made a promise only to *seal* the questionnaires (as in *Smith* and *Stockwell*), rather than to *destroy* them. CP 359.

In light of these differences, Respondent's contention that "this case implicates the defendant's and the public's open trial rights less than *Smith* [sic]" is inexplicable. Supplemental Brief of Respondent, p. 6. According to Respondent, the key difference is that the questionnaire in this case was "not sealed." Supplemental Brief of Respondent, p. 6. Respondent is apparently referring to the blank questionnaire retrieved from the judge's private files. The focus in *Smith,* however, was on the *completed* questionnaires that were sealed in that case. *Smith, at* ___. In this case, the completed questionnaires were destroyed, and not merely sealed.

The trial court's destruction of the completed juror questionnaires is antithetical to the values protected by the First and Sixth Amendments, and by Article I, Sections 10 and 22. The completed questionnaires are not simply unavailable without a court order; instead, having been

destroyed, they are permanently unavailable, even if a court desired to issue an order allowing their review. As with any courtroom closure, this error is structural error.[10] *State v. Strode*, 167 Wash.2d 222, 217 P.3d 310 (2009).

Accordingly, Mr. Slert's conviction must be reversed and the case remanded for a new trial. If juror questionnaires are used at the next trial, the court should maintain them rather than destroying them.

CONCLUSION

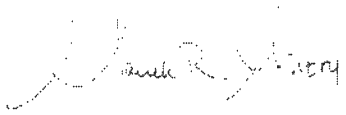
Mr. Slert's conviction must be reversed and the case remanded for a new trial.

Respectfully submitted on October 24, 2011 by:

BACKLUND AND MISTRY

Jodi R. Backlund, WSBA No. 22917
Attorney for the Appellant

[10] Respondent erroneously claims that Mr. Slert must demonstrate prejudice (as in *Smith* and *Coleman*). Supplemental Brief of Respondent, pp. 6-7. This is incorrect; *Smith* and *Coleman* both involved orders sealing juror questionnaires. Unlike this case, the orders in those cases can be countermanded, allowing the defendants and the public to view the completed questionnaires. In this case, by contrast, the records were destroyed, and are permanently unavailable.



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CERTIFICATE OF MAILING

I certify that on October 24, 2011:

I mailed a copy of Appellant's Supplemental Brief to:

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With the permission of the recipient, I delivered an electronic version of the brief, using the Court's filing portal, to:

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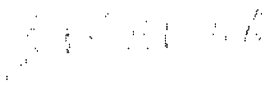
I filed the Appellant's Supplemental Brief electronically with the Court of Appeals, Division II, through the Court's online filing system.

I CERTIFY UNDER PENALTY OF PERJURY UNDER THE LAWS OF THE STATE OF WASHINGTON THAT THE FOREGOING IS TRUE AND CORRECT.

Signed at Olympia, Washington on October 24, 2011.



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Answer/Reply to Motion: ____

Brief: __Supplemental Appellant's__

Statement of Additional Authorities

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Objection to Cost Bill

Affidavit

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