No. 42938-1-II
Pierce County Superior Court No. 10-1-03149-1

IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON
DIVISION TWO

STATE OF WASHINGTON,
Plaintiff-Appellee,
v.

JEFFERY RAY MONTGOMERY,
Defendant-Appellant.

ON APPEAL FROM THE SUPERIOR COURT OF THE STATE OF WASHINGTON FOR PIERCE COUNTY

The Honorable John R. Hickman, Judge

APPELLANT'S OPENING BRIEF

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Jeffery Ray Montgomery was charged with one count of first degree perjury. The State alleged that on March 16, 2010, he made a false statement under oath in an official proceeding. CP 325-26. The prosecution hinged on the question of whether Montgomery lied during a CrR 3.6 suppression hearing when he testified that he did not enter Robert Barham's house to retrieve a gun.

On January 21, 2009, Robert Barham was arrested by Pierce County Deputy Sheriffs Jeffery Montgomery and Rex McNicol. The deputies were called in response to a 911 call from Jesse Anderson, age 12. ER 458. He said that he was afraid of his mother's boyfriend, Robert Barham, and that there was a gun in the house. A police report, authored by Montgomery, stated that during the welfare check both officers had entered the Barham house and retrieved a gun.

Kawyne Lund was the Pierce County Deputy Prosecuting Attorney assigned to prosecute Robert Barham for being felon in possession of a firearm in the first degree. RP 108. Prior to trial Barham moved to suppress the firearm seized from him at the time of his arrest. RP 108-109. He argued that Deputies McNicol and Montgomery found that gun after entering his home but that they did not have the right to enter. RP 110. According to Lund, based on her review of the police reports, she thought Barham's motion was "ridiculous" because the deputies had the right to enter under the "community caretaking function." RP 110, 112-114.

The suppression hearing was held on March 16, 2010. RP 116. Prior to the hearing Lund had a brief, joint meeting with McNicol and Montgomery. RP 117-118. Lund told the officers that she believed they had a right to be in the house. *Id* But while Montgomery and McNicol were waiting outside the courtroom, McNicol asked to see the report. After reviewing the report McNicol told Montgomery that the report was incorrect – that they had not entered the house to get the gun. Instead Barham brought it out to them. RP 402.

At the suppression hearing Deputy Montgomery testified that he and Deputy McNicol received a call at about 6:30 p.m. on January 21, 2009 for a "welfare check." Plaintiff's Exhibit 3 at 39. He and McNicol walked up to the front door and Barham answered. *Id* at 40. He stepped down off the

porch with Jesse to ask why he had called the police. *Id* at 40. Montgomery stated that he was having a hard time recalling the details of the encounter. *Id.* at 42. But prior to arriving at the residence he confirmed that Barham was a convicted felon. *Id.* at 43. Montgomery concluded that Jesse was not at risk. When it came to the gun, Montgomery testified that when he first saw the gun, it was in McNicol's hands. RP 44. He said: "I went up on the porch and took the rifle from Deputy McNicol." *Id* Later, "after everything was secured, [I] went back in to speak with Jesse's mother, and she kind of walked us through the house to show us where it came from." *Id* at 45. Montgomery said that he and McNicol had discussed the case.

Mr. Barham's counsel, Chip Mosley, cross-examined Montgomery at length about the discrepancy between his report and his testimony. He testified quite clearly that he made a mistake in his report when he reported that he had gone into the house to get the gun. *Id* at 54. He stated that what he meant was that he had walked onto the covered porch to get the gun from Barham. *Id.* at 60. He reiterated that he did go into the house later to speak to Barham's girlfriend, Resch. *Id.* at 56.

Prosecutor Lund attempted to clarify and asked Montgomery to look at his report. She asked about the discrepancy between the report, which stated that that he had taken the gun from Barham on the porch, and

Montgomery's testimony. *Id* at 46. Montgomery stated that the report was incorrect and a mistake.

According to Lund, it was only after Montgomery testified that she thought the deputies had lied. "At this point I realized that they had changed their testimony, and I was stunned." RP 144.

Nonetheless, she said she did not ask for a recess because "it was improper." RP 144. Moreover, she said: "It was starting to dawn on me that this was no accident. These two had talked about it and I didn't figure there was going to be any difference.'" RP 144. Lund admitted that she never told defense counsel that she believed the deputies were lying. She also admitted that in her closing argument at the hearing, she said that it didn't really matter how the deputies got in the house. RP 169. In that hearing she argued as follows: "The Court saw Officer Montgomery. He's a young officer. He admitted he made a mistake. I can pretty well guarantee you that he is going to probably be one of the more careful report writers we're going to have from now on." Exhibit 7; RP 293. She put a memo about the hearing in her file, but that memo did not say that the deputies lied. RP 181.[1]

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[1] At trial Lund testified that this was the first time she had ever questioned a deputy's credibility RP 210. But in cross-examination, she admitted that she had previously reported a TPD police officer for lying RP 225

At the close of the hearing the trial judge suppressed the gun. RP 146. But it was not until May 2010, two months after the hearing, that Lund called the Sheriff's Office and told them that she believed the officers had lied. RP 148.

During the post-hearing investigation, Montgomery gave a statement to the Pierce County Sheriff's Department investigator. Exhibit 14, 15. The investigating officer accused Montgomery of discussing the case in the hall with McNicol and agreeing as to what they were going to say in court. Exhibit at 6. Montgomery said: "I can assure you that is not what it was." *Id.* Montgomery repeated that he believed, based upon Deputy McNicol's statement, that the police report was incorrect. He continued to state that given the discrepancy between what he remembered and what Deputy McNicol remembered, he was not sure what happened. *Id* at 13. Montgomery said that because McNicol had been the one to retrieve the gun, and because he trusted McNicol, he believed that his report was incorrect. *Id.* at 14. He stated that "looking back, I should have had him write a supplemental report." But Montgomery said that he had no reason to believe that Deputy McNicol would "lead me astray." *Id.*

Montgomery also testified at trial. He said that his job was to talk to Jesse about his welfare. RP 396. Deputy McNicol contacted Barham. McNicol got the gun, gave it to Montgomery and placed Barham in his patrol

car. The two then went into the house to talk to Barham's girlfriend, Resch. Montgomery filed his report and did not look at it again until March 16, 2010, in Ms. Lund's office. RP 401.

Montgomery also said that after the hearing Ms. Lund never questioned him about the difference between his report and his corrected testimony. RP 405. He stated that he believed the testimony he gave was the truth. *Id.*

McNicol testified that he did not prepare a police report regarding the incident. RP 443. He did not read Montgomery's report until just before the suppression hearing. RP 443. He told Montgomery that the report was wrong and that they were going to be cross-examined about it. RP 445. He said that he thought that as a result, the gun would be suppressed. RP 446. He said he never considered testifying in conformity with the report because that would have been untrue. *Id.* McNicol said that he told Lund about the discrepancy. *Id.* He said that he did not need to "change his story" to save the case because he believed he would have authority to enter the house in any event. RP 447. He categorically denied lying about any of his actions at the Barham residence. RP 446-48.

The only two other witnesses with direct evidence of the incident were State's witnesses Barham and Resch. They gave conflicting testimony.

Barham, a convicted felon, testified that on January 21, 2009, two deputies came to his home. RP 231. He knew that he was not supposed to have a gun. *Id.* He said that the deputies told him they were there for a child welfare check. RP 232. One deputy took his son off to the side; the other officer spoke with him. *Id.* According to Barham, he took McNicol to his back bedroom. His girlfriend, Resch, got the gun out of the closet and handed it to Deputy McNicol. *Id.* Barham stated that by the time the gun was out of the closet, Montgomery was in the bedroom. RP 238. Barham said that Montgomery took the clip out of the gun. *Id.* Barham said that he was arrested on the front porch. RP 242. Then he was placed in McNicol's patrol car. *Id*

Resch, Barham's girlfriend, testified that when she first saw the two deputies they were in the front room. RP 257. She said the deputies asked if there was a gun in the home. When Barham said that there was, the deputies took him to the front porch and handcuffed him. He was then placed in the police vehicle. *Id.* According to Resch, she pointed out the gun's location. *Id.*

> I pointed him to in the closet where the gun was at. I know this because there was a bunch of stuff in the middle of the floor. He had to step over. He reached in and grabbed it, and then he went out and put it in the back of the car.

RP 261. Resch had previously stated that she did not remember if she handed the gun to the deputy or he reached in and grabbed the gun. RP 269. Resch said that the other deputy remained in the front room with her son the entire time. RP 257.

The State's remaining three witness had no direct evidence. Lund testified to her participation in the suppression hearing and her belated report to the authorities. Chip Mosley testified that he filed a motion arguing that the officers did not have a legal basis to enter the home. RP 279. Ms. Lund never asked for a continuance. RP 288. Ms. Lund never told him that she suspected that Montgomery was lying. RP 289. Mosley explained that if a lawyer suspects a witness will lie, he or she must not call the witness or rely upon the witness's testimony. RP 297.

Detective Sergeant Ben Benson was called to lay the foundation for the admission of Montgomery's taped statement. He admitted that people were allowed to testify differently and admitted that people were mistaken at times. RP 346. Benson admits that Montgomery had almost no notes of the incident – just three names written on a piece of paper.

Three character witnesses testified on Montgomery's behalf. RP 367-372.

The jury subsequently convicted Montgomery as charged. CP 372. Judgment and Sentence were entered. CP 373-386. This timely appeal followed. CP 387-403.

IV.
ARGUMENT

A. THE STATE FAILED TO MEET THE HEIGHTENED BURDEN OF PROOF IN THIS CASE

First degree perjury is committed "if in any official proceeding" a person "makes a materially false statement which he knows to be false under an oath required or authorized by law." The requirements of proof in a perjury case are more stringent than those in any other area of law except treason. *State v. Olson*, 92 Wn.2d 134, 136, 594 P.2d 1337 (1979). Proof of the falsity must meet certain requirements as to form in addition to being proved beyond a reasonable doubt. To prove perjury, the State must present:

> 1. The testimony of at least one credible witness which is positive and directly contradictory of the defendant's oath; and
>
> 2. Another such direct witness or independent evidence of corroborating circumstances of such a character as clearly to turn the scale and overcome the oath of the defendant and the legal presumption of his innocence.

Olson, 92 Wn.2d at 136; *State v. Wallis*, 50 Wn.2d 350, 311 P.2d 659 (1957).

In *Wallis*, the defendant testified in the prosecution of another for the sale of beer to minors, that he had heard no words or had seen no acts by a store owner indicating the unlawful sale of beer to a minor. The state called

other witnesses who said that on several occasions the defendant stated that he had observed such acts and had heard such words in the store. The Court stated:

> Contradictory statements, sworn or unsworn, are not direct evidence of the falsity of the testimony which the law requires. Indeed, it may be said that while such evidence creates a strong probability of the appellant's guilt, or even proof beyond a reasonable doubt, the law still requires direct and independent evidence of the falsity of the testimony in addition. It is impossible to say whether the affidavit and the contradictory statements are true or whether the testimony is true.

Id. at 354-55.

The direct testimony must come "from someone in a position to know of his or her own experience that the facts sworn to by defendant are false." *Nessman v Sumpter*, 27 Wn. App. 18, 24, 615 P.2d 522, *review denied by State v. Howie*, 94 Wn.2d 1021 (1980). One purpose of the heightened proof requirement is to avoid swearing contests that pit one witness's oath against another. *State v. Dial*, 44 Wn. App. 11, 16, 720 P.2d 461, *review denied*, 106 Wn.2d 1016 (1986); *State v. White*, 31 Wn. App. 655, 660, 644 P.2d 693 (1982).

There is no credible, corroborated evidence that Montgomery knowingly testified falsely when he said that he and McNicol did not enter the house. The state had only two witnesses in a position to know of his or her own experience that the facts sworn to by Montgomery were false:

Barham and Resch. Barham, a convicted felon, had every reason to lie at both the suppression hearing and this trial. Moreover, his testimony conflicts with that supplied by Resch. Thus, even the other two witnesses who were present at scene disagree about what happened.

Moreover, the State has no corroborating evidence of the perjury. The State may rely on Plaintiff's Exhibit 1 in rebutting Montgomery's claims and argue that the report itself is such evidence. But this Court must remember that nothing in that exhibit was admitted as substantive evidence. Counsel objected to the admission of the police report because it was hearsay. RP 122. The State said that the report "is not being offered for the truth of the matter asserted." *Id.* The State also said that the report was a business record and a statement by a party opponent. Defense counsel argued that only portions of the exhibit would be admissible as "statements of a party opponent." RP 123. Nonetheless, the Court admitted the document.

Careful analysis reveals that the only basis on which the police report was admitted was on the basis that it could not be relied on for the truth of the matters asserted therein. That is because neither of the other reasons cited by the State would have permitted its introduction as substantive evidence. A police officer's investigative summary is inadmissible hearsay that does not qualify for admission under the business records exception to the hearsay

rule. *In re Det. of Coe*, 160 Wn. App. 809, 829, 250 P.3d 1056, 1066, *review granted*, 172 Wn.2d 1001, 258 P.3d 685 (2011); *State v Hines*, 87 Wn. App. 98, 101-02, 941 P.2d 9, 11 (1997).

Even if, at some level, the police report was a "statement" by Montgomery, although he has consistently disavowed its accuracy, in the absence of an applicable exception to the hearsay rule, the portions of the police report that contain the statements of others may not be admitted into evidence. *See, e.g., United States v Boyd*, 640 F.3d 657, 662, 664-65 (6th Cir.), *cert. denied*, 132 S.Ct. 271, 181 L.Ed.2d 160 (2011) (each level of hearsay must be independently admissible even where "top" level is plainly the statement of a party opponent); *United States v. $92,203 00*, 537 F.3d 504, 508 (5th Cir. 2008) (where law enforcement officer told agent about defendant's statements, and agent took the stand, agent's testimony about what law enforcement officer said was inadmissible hearsay even though defendant's statements to law enforcement officer were admissions of party-opponent); *Vazquez v. Lopez–Rosario*, 134 F.3d 28, 34 (1st Cir. 1998) (For hearsay-within-hearsay to be admissible, "[e]ach link in the chain must be admissible, either because it is an admission and thus not hearsay or under some other hearsay exception.").

Because the trial court did not redact those portions of the police report that were not statements made by Montgomery, it clearly did not admit

the report on the basis that it was a statement of a party opponent. Thus, it was admitted on the basis that nothing in the report was submitted for its truth. If the evidence was not submitted as true, then it cannot corroborate any other facts.

In the end, this case is precisely the type of swearing contest that the law seeks to avoid. None of it rises to the level of perjury. Worse yet, Deputy Montgomery had no intention of knowingly lying to anyone. After Deputy McNicol told him the report was incorrect, he believed that it was. After all, Deputy McNicol was the officer who actually obtained the gun and was in a better position to recall what happened. When corrected, Deputy Montgomery testified to the corrected facts. That simply cannot constitute perjury under the law.

B. THE TRIAL COURT VIOLATED MONTGOMERY'S RIGHT TO CONFRONT AND CROSS-EXAMINE HIS ACCUSER.

Robert Barham had convictions for VUSCA (1995), possession of stolen property (1996), attempting to elude the police (1996), attempted possession of stolen property (2000) and VUSCA (2003). Because of the heighten evidentiary standards for a perjury charge, defense counsel moved for the admission of Barham's 2000 conviction because it was for a crime of dishonesty. RP 87-89. The state argued that the conviction was outside the ten year limit of ER 609. The prosecutor argued:

> So it is presumptively out unless the defense can make some persuasive showing as to why it should get in. The reason the State doesn't think it should get in is they're already going to hear about this other felony conviction. I think this would just be stacking on top of that. As I said, I think that one is relevant because the deputies knew about that one.

RP 90-91.

> The judge ruled
>
> I'm going to -- because it's outside the time period allowed by statute, I'm going to deny the ability to use the attempted possession of stolen property in the second degree. The fact that he has been convicted of a drug offense, which is typically not allowed, I think will give the defense plenty of opportunity to question his credibility.

ER 93.

A person accused of a crime has a constitutional right to confront his or her accuser. U.S. Const. amend. VI; U.S. Const. amend. XIV; Wash. Const. art. 1, § 22; *State v Darden*, 145 Wn.2d 612, 620, 41 P.3d 1189 (2002). The primary and most important component is the right to conduct a meaningful cross-examination of adverse witnesses. *State v. Foster*, 135 Wn.2d 441, 456, 957 P.2d 712 (1998). ER 608(b) allows cross-examination of a witness regarding specific instances of misconduct to impeach a witness's credibility, particularly concerning the witness's character for truthfulness or untruthfulness. Adequate cross-examination includes the opportunity to question witnesses to reveal "possible biases, prejudices, or

ulterior motives of the witness as they may relate directly to issues or personalities in the case at hand." *Davis v. Alaska*, 415 U.S. 308, 316, 94 S.Ct. 1105, 39 L.Ed.2d 47 (1974). The more essential a witness is to the State's case, the more latitude the defendant should have to explore the motive, bias, and credibility of that witness. *Darden*, 145 Wn.2d at 619.

There is no doubt that attempted possession of stolen property is a crime of dishonesty. *State v. McKinse*y, 116 Wash.2d 911, 913, 810 P.2d 907 (1991). It is true that generally evidence of a conviction is not admissible ER 609 if a period of more than 10 years has elapsed since the date of the conviction or of the release of the witness from the confinement imposed for that conviction, whichever is the later date. ER 609. But conviction evidence more than 10 years old is admissible under ER 609(b) to impeach the credibility of a witness if the trial court enters "specific findings on the record as to the particular facts and circumstances it has considered in determining that the probative value of the conviction substantially outweighs its prejudicial impact." To perform the balancing test required by ER 609(b) a trial court must weigh on the record the following non-exclusive Rivers factors: " '(1) the length of the defendant's criminal record; (2) remoteness of the prior conviction; (3) nature of the prior crime; (4) the age and circumstances of the defendant; (5) centrality of the credibility issue; and (6) the impeachment value of the prior crime.' " *State v. Rivers*, 129 Wash.

2d 697, 706, 921 P.2d 495, 499 (1996). In exercising its discretion, the trial court is required to follow the balancing procedure in a meaningful way. Further, the trial court must articulate, for the record, the factors which favor admission or exclusion of prior conviction evidence under ER 609(a)(1). *State v. Jones*, 101 Wash.2d 113, 122, 677 P.2d 131 (1984), overruled on other grounds by *State v. Brown*, 111 Wash.2d 124, 761 P.2d 588 (1988), adhered to on reh'g, 113 Wash.2d 520, 782 P.2d 1013, 80 A.L.R.4th 989, corrected, 787 P.2d 906 (1990); *State v. Gomez*, 75 Wash.App. 648, 651, 880 P.2d 65 (1994).

In this case the trial judge violated Montgomery's right to confront the witness and present a defense when he excluded Barham's conviction. Applying the Rivers factors, it is clear that Barham's prior conviction should have been admitted. The conviction was just outside the ten year period for admissibility. It was clearly a crime of dishonesty. Barham was not a youthful, first-time offender. He consistently violated the law. And the impeachment value of the crime was very hight because this case was a credibility battle. In fact, given the heightened burden of proof, Barham was an essential witness for the prosecution. And, as pointed out above he had a very strong motive to lie about this entire incident.

Other cases have held that in a similar sort of battle, convictions for crimes of dishonesty that are more than ten years old are admissible. For

example, in a federal prosecution on a variety of narcotics and racketeering charges, the trial court properly admitted evidence of the defendant's burglary conviction that was more than 10 years old. The appellate court said admission of the evidence was justified because the jury essentially had to choose between two versions of the events, one presented by the prosecution and the other by the defense. Thus, the court said, the credibility of the witnesses, including the defendant, was "a critical factor in the jury's choice." *United States v. Brown*, 956 F.2d 782 (8th Cir. 1992).See also *United States v. Pritchard*, 973 F.2d 905 (11th Cir. 1992) (13-year-old burglary conviction properly admitted in prosecution for conspiracy and bank robbery; the defendant's credibility was the key issue in the trial, and the prosecution's need for impeaching evidence was substantial). See also *Zinman v Black & Decker (U.S.), Inc.*, 983 F.2d 431 (2d Cir. 1993) (in products liability action, the trial court properly admitted evidence of plaintiff's more than ten-year-old conviction for making false statement to a government agency; the court noted that the plaintiff's credibility was central to several disputed issues in the case).

Because this was not just a violation of the rules of evidence but also a constitutional violation, a different harmless error analysis applies. Constitutional error is harmless where appellate court is convinced beyond reasonable doubt that any reasonable jury would have reached same result in

the absence of the error. State v. Guloy, 104 Wash. 2d 412, 705 P.2d 1182 (1985). Here given the heightened burden of proof in a perjury charge, there is no doubt that the introduction of this offense would have made a difference to the jury.

C. FEDERAL AND STATE CONSTITUTIONAL RIGHTS TO AN OPEN AND PUBLIC TRIAL WERE VIOLATED WHEN THE TRIAL COURT SEALED JUROR QUESTIONNAIRES WITHOUT FIRST CONDUCTING A *BONE-CLUB* HEARING

The following issues are all pending in *State v. Tarhan*, Sup. Ct. No. 85737-7, review granted September 8, 2011. In *Tarhan* the Court will decide whether the improper sealing of juror questionnaires requires reversal of the conviction without a showing of prejudice.

After the jury was selected in this matter, the parties discussed whether the jury questionnaires should be sealed. The trial court ruled:

> This is always a balancing test as to the public's right to know versus the confidentiality of the jurors' information that they give. But because this Court would for appellate purposes -- if necessary, the Court would have no hesitation in unsealing them for some legal purpose that's related to your case. Preliminarily I will seal them just because of the confidentiality, but I want all parties to know that I would certainly consider an order unsealing if necessary to pursue justice in either the State's case or defense case.

9/15/11 Supplemental RP 4.

1. Introduction

The right to a public trial is protected by both the federal and the Washington State constitutions. *See* U.S. Const. amend. VI ("In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial."); Wash. Const., Art. 1, § 22 ("In criminal prosecutions the accused shall have the right ... to have a speedy public trial."); Wash. Const., Art. 1, § 10 ("Justice in all cases shall be administered openly."). This right includes the right to open jury selection. *State v. Strode*, 167 Wn.2d 222, 226-27, 217 P.3d 310 (2009), citing *In Re PRP of Orange*, 152 Wn.2d 795, 804, 100 P.3d 291 (2004), and *Press-Enterprise Co v. Superior Court*, 464 U.S. 501, 505, 104 S.Ct. 819, 78 L.Ed.2d 629 (1984).

Washington Courts have scrupulously protected the accused's and the public's right to open public criminal proceedings. And "[w]hile the right to a public trial is not absolute, it is strictly guarded to assure that proceedings occur outside the public courtroom in only the most unusual circumstances." *Strode*, 167 Wn.2d at 226, citing *State v Easterling*, 157 Wn.2d 167, 174-75, 137 P.3d 825 (2006). *See also State v. Brightman*, 155 Wn.2d 506, 514, 122 P.3d 150 (2005) (closing courtroom during voir dire without first conducting full hearing violated defendant's public trial rights); *Orange*, 152 Wn.2d at 812 (reversing a conviction where the court was closed during voir dire); *State v. Bone-Club*, 128 Wn.2d 254, 256, 906 P.2d 325 (1995) (reversible error to close the courtroom during a suppression motion); *Seattle Times Co.*

v. Ishikawa, 97 Wn.2d 30, 36, 640 P.2d 716 (1982) (setting forth guidelines that must be followed prior to closing a courtroom or sealing documents). "[P]rotection of this basic constitutional right clearly calls for a trial court to resist a closure motion except under the most unusual circumstances." *Orange,* 152 Wn.2d at 805, citing *Bone-Club*, 128 Wn.2d at 259.

2. A Hearing Must Precede Any Contemplated Closure or Sealing

The Washington Supreme Court recently re-affirmed the test that must be applied in every case where a closure is contemplated. *Strode*, 167 Wn.2d at 227-28. The factors that the trial court must analyze prior to any closure or sealing-also known as 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.

Strode, 167 Wn.2d at 227-28, citing *Bone-Club*, 128 Wn.2d at 258-59 (quotations in original). As the test itself demonstrates, analysis of the five factors must occur before the closure or sealing. For example, it is impossible to weigh the reasons given by a member of the press or public opposed to closure if the trial court fails to expressly invite comment on the matter. *See Strode*, 167 Wn.2d at 228-29.

The determination of a compelling interest for courtroom closure is "the affirmative duty of the trial court, not the court of appeals." *Bone-Club*, 128 Wn.2d at 261. Nor is it the responsibility of this Court to speculate on the justification for closure. Moreover, even if the trial court concluded that there was a compelling interest favoring closure, it must still perform the remaining four *Bone-Club* steps to thoroughly weigh the competing interests. *Id.*

After conducting a full hearing, the trial court must then make findings. The constitutional presumption of openness may be overcome only by an overriding interest based on findings that closure is essential to preserve higher values and is narrowly tailored to serve that interest. The interest is to be articulated along with findings specific enough that a reviewing court can determine whether the closure order was properly entered. *Orange*, 152 Wn.2d at 806, quoting *Waller v. Georgia*, 467 U.S. 39, 45, 104 S.Ct. 2210, 81 L.Ed.2d 31 (1984). These requirements are necessary

to protect both the accused's right to a public trial and the public's right to open proceedings. *Easterling*, 157 Wn.2d at 175.

3. The Right to an Open and Public Trial and the Requirement of a Hearing Applies to Jury Selection in General, and to Juror Questionnaires in Particular

It is now beyond dispute that the process of jury selection is subject to the *Bone-Club* requirements. *See, e.g., Strode*, 167 Wn.2d at 226-27; *State v. Momah*, 167 Wn.2d 140, 148, 217 P.3d 321 (2009), *cert denied*, 131 S.Ct. 160, 178 L.Ed.2d 40 (2010); *Brightman*, 155 Wn.2d at 514; *Orange*, 152 Wn.2d at 804. As the United States Supreme Court stated in *Press-Enterprise Co. v. Superior Court*, 464 U.S. at 505: "(t)he process of juror selection is itself a matter of importance, not simply to the adversaries but to the criminal justice system." This Court has recognized that this requirement applies with equal force to the handling of juror questionnaires. *State v. Coleman*, 151 Wn. App. 614, 621-23, 214 P.3d 158 (2009) (notwithstanding GR 310, trial court must hold *Bone-Club* hearing before ordering the sealing of juror questionnaires).

4. Violation of the Right to an Open and Public Trial is a Structural Error Which Necessitates a New Trial

Determining the harm that flows from the violation of a defendant's right to an open and public trial is not a quantifiable process. Because of the fundamental nature of the public trial right, and because violation of that

right does not easily lend itself to harmless error analysis, the Washington Supreme Court has announced that the violation of the right to an open and public trial is a structural error, and that the remedy is reversal of the defendant's conviction(s) and remand for a new trial. *Strode*, 167 Wn.2d at 223:

> Here, the trial court violated Tony Strode's right to a public trial by conducting a portion of jury selection in the trial judge's chambers in unexceptional circumstances without first performing the required *Bone-Club* analysis. This is a structural error that cannot be considered harmless. Therefore, reversal of Strode's conviction and remand for a new trial is required.

See also Easterling, 157 Wn.2d at 181 ("The denial of the constitutional right to a public trial is one of the limited classes of fundamental rights not subject to harmless error analysis.").

5. *Momah* is Distinguishable Because in that Case the Trial Court Held a *Bone-Club* Hearing or its Equivalent

Despite the clear language in *Strode*, some confusion regarding remedy may be engendered by the Washington Supreme Court's decision in *Momah*. *Strode* and *Momah* were argued on the same day, decided on the same day, and involved similar facts – closure of the courtroom during individual voir dire. However, the Court reached opposite conclusions, affirming in *Momah* and reversing in *Strode*. Although the Supreme Court could have made the distinction much clearer, the legal line that separates

Momah from *Strode* is simple. In *Momah*, the trial court conducted a *Bone-Club* hearing or its equivalent. In *Strode*, no *Bone-Club* hearing took place. The *Strode* concurrence noted that "(t)he specific concerns underlying the *Bone-Club* factors were sufficiently addressed by the *Momah* trial court." *Strode*, 167 Wn.2d at 234 (Fairhurst, J. concurring).

While the *Bone-Club* factors could have been more explicitly detailed in the record, the concurrence concluded:

> The purpose of the *Bone-Club* inquiry is to ensure that trial courts will carefully and vigorously safeguard the public trial right. Under the circumstances in Momah's case, it is apparent that this purpose was served, and the defendant's right to a public trial was carefully balanced with another right of great magnitude-the right to an impartial jury...

Unlike the situation presented in *Momah*, here, the record does not show that the court considered the right to a public trial in light of competing interests.

> The record does not show a knowing waiver of the right to a public trial. Although the dissent addresses the right of jurors to privacy, the record does not show that this interest was considered together with the right to a public trial. I agree with the dissent that "public exposure of jurors' personal experiences can be both embarrassing and perhaps painful for jurors." I agree that jurors' privacy is a compelling interest that trial courts must protect. I agree that had the trial judge failed to close a portion of voir dire to the public, he would have "undermined the court's procedural assurances that juror information will remain private [and] would have jeopardized jurors' candidness and potentially the defendant's right to an impartial jury."

Strode, 167 Wn.2d at 233, 235-36 (Fairhurst, J. concurring) (citations to dissent omitted).

But the potential for jeopardizing a defendant's right to an impartial jury does not necessitate closure; it necessitates a weighing of the competing interests by the trial court. Because, unlike in *Momah*, the record does not show that this occurred, this case fits into the category of cases where expressly engaging in the *Bone-Club* analysis on the record is required. The trial court here erred in failing to engage in the *Bone-Club* analysis.

Here, the trial court did not engage in a *Bone-Club* analysis. Instead, because the court determined that the questionnaires contained confidential information, it sealed them. But the Court did engage in a balancing of all of the factors. Absent a proper *Bone-Club* analysis, this Court must reverse.

V.
CONCLUSION

For the reasons stated above, this Court should reverse Montgomery's convictions.

DATED this 20 day of June, 2012.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that on the date listed below, I served by First Class United States Mail, postage prepaid, one copy of this brief on each of the following:

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