No. 40333-1-II

THE COURT OF APPEALS FOR THE STATE OF WASHINGTON
DIVISION II

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**STATE OF WASHINGTON**,

Respondent,

vs.

**KENNETH L. SLERT,**

Appellant.

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Appeal from the Superior Court of Washington for Lewis County

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# Supplemental Response Brief

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## I. ISSUES

A. Did the destruction of the completed juror questionnaires at some point after voir dire violate the defendant's right to a public trial?

## II. STATEMENT OF RELEVANT FACTS

During oral argument in this case on Sept. 9, 2011, the Court raised the issue of whether the jury questionnaire used to screen the venire for exposure to pretrial publicity was constitutional. The Court allowed the parties to brief the issue of whether the use of the jury questionnaire violated the defendant's right to a public trial or the public's right to open courts. Order of Sept. 13, 2011. In addition to argument about the use of the jury questionnaires, the Appellant's Supplemental Brief also argued that the destruction of the original jury questionnaires violated Slert's right to a public trial. Appellant's Suppl. Br. at 7-10. The Court ordered additional briefing regarding whether this violated the defendant's public trial right and whether any such error was structural.

At a pretrial hearing on January 6, 2010, Slert's trial counsel (Mr. Cordes) submitted a proposed jury questionnaire designed to screen the venire for exposure to pretrial publicity. Supplemental Verbatim Report of Proceedings (January 6, 2010) (hereafter

SVRP1) at 3-4. The purpose of the questionnaire was to prevent the venire from being tainted by a loose comment from someone who had heard about the incident. *Id.* The State asked for time to review the proposed questions in case it wanted to supplement or amend them. *Id.* at 14. This exchange occurred on the record in open court, in the defendant's presence. *Id.* at 2.

On January 21, 2010, the parties again appeared on the record in open court, in Slert's presence. Supplemental Verbatim Report of Proceedings (January 21, 2010) (hereafter SVRP2) at 2. The State had no additional questions it wished to include in the jury questionnaire. *Id.* at 3. The parties resolved an issue regarding two words in the questionnaire's introduction, but the final version was essentially identical to Mr. Cordes's original. *Id.* at 3-4.

The prospective jurors were given the questionnaire when they appeared for voir dire. SVRP1 at 14. They filled them out that morning, *id.*, with instructions that their responses were under oath. CP 359-61 at 1. The court and counsel for both parties reviewed the questionnaires while the prospective jurors were all in the courthouse and available for questioning. *See* Verbatim Report of Proceedings (VRP) (January 25, 2010) at 5. After this review and

by mutual agreement, the Court excused four jurors on the record, in open court, and in the defendant's presence.[1] *Id.* at 3-5.

Counsel discussed the questionnaire responses on the record. Mr. Cordes indicated that 15 potential jurors had heard something about the case. *Id.* at 10-11. The parties resolved to conduct individual voir dire of these potential jurors in open court, in the defendant's presence, and on the record. *Id.* at 11-14. Mr. Cordes did not object to this procedure. *Id.* at 14.

The parties conducted extensive individual voir dire of the prospective jurors based on their questionnaire responses. The jurors were sworn under oath for this questioning, *id.*, the transcript of which is 55 pages long. *Id.* at 14-69. The defendant was present with counsel for all of it. *Id.*

Neither Slert's trial counsel nor the prosecutor asked that the completed jury questionnaire be formally included in the record. The record does not reveal what happened to the completed questionnaires. Both parties have concluded that they were

[1] Slert criticizes the State's characterization of these facts. After review, the State still believes it has fairly represented the facts.

destroyed at some indeterminate point after voir dire. *See* Appellant's Suppl. Br. at 2 (agreeing with the State on this point).

## III. ARGUMENT

*Summary of Argument*

The jury questionnaires' destruction at some point after voir dire did not violate the defendant's or the public's right to open courts. The questionnaire was discussed in open court during pretrial hearings, and the jurors were examined extensively on their responses during open voir dire. No member of the public was denied access to the questionnaires during voir dire.

Even if the questionnaire's destruction were error, the error is not structural and there is no prejudice. Slert actively participated in the creation and use of the questionnaires to ensure robust voir dire and a fair trial. Their eventual destruction only encouraged prospective jurors' candor, which is what defense counsel wanted.

More fundamentally, the defense argument misapprehends the nature of the right to open courts or a public trial. Those rights require that any records maintained by the court be publicly accessible, not that the court retain records it otherwise would not. In other words, the court is responsible for its records' openness

but not their sufficiency. It is the *appellant's* duty to create a sufficient record. A criminal defendant cannot use the open-courts or public-trial provisions to foist this duty upon the court.

### A. NEITHER THE USE OF THE JURY QUESTIONNAIRES NOR THE DESTRUCTION OF THE QUESTIONNAIRES INFRINGED ON THE RIGHT TO OPEN COURTS OR A PUBLIC TRIAL.

This court recently decided that the sealing of juror questionnaires does not infringe on the right to open courts or a public trial. *State v. Smith*, 162 Wn. App. 833, --- P.3d ----, 2011 WL 4778643 (Div. 2, 2011) (republication); *accord In re Pers. Restraint of Stockwell*, 160 Wn. App. 172, 177-81, 248 P.3d 576 (Div. 2, 2011). In *Smith*, the defendant had full access to the jury questionnaires and was able to use them to conduct voir dire. Therefore, only the public's right to open courts, not the defendant's personal right to a public trial, was implicated by the courts' sealing of the questionnaires. *Smith*, 2011 WL 4778643 at 7. The public's right was not infringed because the parties used the contents of the jury questionnaire in open court during voir dire, where the public could observe if it wanted. *Id.* Consequently, there was no courtroom closure and no *Bone-Club* analysis was required. *Id.*

*Smith* builds on the reasoning from *Stockwell*, which came to the same conclusion about sealed jury questionnaires in light of the invited-error flavor of the case. *Stockwell,* 160 Wn. App. at 179 (assuming error and holding that the defendant could not demonstrate prejudice because he actively participated in and benefitted from the confidentiality of the jury questionnaires). *Stockwell* solidified plurality holdings from the Supreme Court that defense-participatory practices are not grounds for a new trial even if they interfere with the openness of court proceedings. *See State v. Momah*, 167 Wn.2d 140, 156, 217 P.3d 321 (2009); *State v. Strode*, 167 Wn.2d 222, 223, 217 P.3d 310 (2009).

In deciding *Smith,* this Division expressly disagreed with a Division One case from 2009, which opined that sealing the jury questionnaire violated the public's rights to open courts, but that the error was not structural. *State v. Coleman*, 151 Wn. App. 614, 618-24, 214 P.3d 158 (2009). *Coleman* relied on a prior case holding that the same analysis applies to court records and court proceedings—ergo, sealing the questionnaires was tantamount to closing the voir dire itself. *See id.* at 622-23 (relying on *State v. Waldon*, 148 Wn. App. 952, 202 P.3d 325 (2009) to extrapolate

from a private-voir-dire case, *State v. Duckett*, 141 Wn. App. 797, 173 P.3d 948 (2007)).

What *Coleman* failed to address (and what *Smith* recognized) is that a situation in which a jury questionnaire is made inaccessible *after* its use in open court for voir dire differs significantly from a situation in which the voir dire is closed and the questionnaires are never used in open court. *Duckett*'s jury questionnaire facilitated private voir dire in the jury room. *Duckett*, 141 Wn. App. at 801. The jurors' responses were subject only to nonpublic voir dire and thereafter sealed. *Id. Duckett* treated this whole process, through which the questionnaire responses were never made publically accessible, under a single open-courts analysis. But in *Coleman,* as in *Smith* and this case, the questionnaires were the basis for *open* voir dire at which the defendant had the opportunity to make public any response he wished. Thus, the defendant had full opportunity to avail himself of the safeguard of public scrutiny and used any resulting confidentiality as a tool to gain more candid voir dire responses. Because *Smith* recognizes this distinction, its analysis is superior to *Coleman*'s, and *Smith* should control.

The reasoning in *Smith* applies with full force to this case, despite the fact that the questionnaires were destroyed rather than sealed. Slert actively participated in submitting the questionnaire to the prospective jurors. Defense counsel proposed the juror questionnaire in Slert's presence, for Slert's benefit. SVRP1 at 3-4. The final questionnaire was almost exactly the same as Mr. Cordes's initial proposal. SVRP2 at 3-4. Slert had no objection to the Court's procedure for submitting the questionnaires to the venire. SVRP1 at 14. He was present with counsel on the day of trial, when the jurors filled out the questionnaires, and sat beside counsel during extensive voir dire regarding the questionnaire responses. VRP (Jan. 25, 2010) at 3-69. All of this contact ensured that Slert had time to review the responses and pose whatever voir dire questions he wished to the venire in open court. He therefore had a full opportunity to make public any aspect of voir dire he chose. As in *Smith*, his public trial rights were not violated.

Nothing about the analysis changes because, after Slert was finished conducting public voir dire and the jury was empaneled, the questionnaires were destroyed. Slert still enjoyed the safeguard of public scrutiny for the selection of his jury, as he did for the whole trial. Slert had time to review the questionnaire

responses with counsel and make public, during voir dire, whatever responses he wished. Slert did not even intend that the public have access to the questionnaires: his attorney wrote into the questionnaire that the responses would be confidential, and he declined to ask that the questionnaires be preserved in the court record. As in *Smith* and *Stockwell*, the defendant's active and full use of the questionnaires and his ability to make public whichever aspect of them he wished eliminate his public-trial claim.

Nor was the public's right to open proceedings violated by the destruction of the questionnaires. The parties discussed the contents of the jury questionnaire on the record in open court both before trial and during voir dire. SVRP1, SVRP2, VRP (Jan 25, 2010) at 3-69. Anyone who wished to observe these proceedings could have heard about the contents of the questionnaire. *Smith,* 2011 WL 4778643 at 7. Furthermore, there is no indication that any member of the public would have been forbidden to see the jurors' responses if he or she had asked during voir dire. The defendant's inability to show that a member of the public would have been denied access to the questionnaires is fatal to his open-courts and public-trial claims. *State v. Tarhan*, 159 Wn. App. 819, 246 P.3d 580 (Div. 1, 2011) ("[W]e will not speculate on how the

court would have ruled had anyone mentioned the question of public access to these questionnaires. . . . [O]n this record, [Tarhan] fails in his burden to show that the questionnaires were unavailable for public inspection during jury selection."). Thus, there was no courtroom closure regarding the questionnaires, no need for a *Bone-Club* analysis, and no violation of the public's open-courts right. *Smith*, 256 P.3d at 456. This Court should affirm Slert's conviction.

### B. EVEN IF THE USE OF THE JURY QUESTIONNAIRES OR THE DESTRUCTION WAS ERROR, IT WAS NOT STRUCTURAL, AND SLERT CANNOT DEMONSTRATE PREJUDICE.

Even if this Court were to abandon *Smith*'s analysis in favor of *Coleman*'s, neither the use nor the destruction of the questionnaires in this case were structural error. Because of the invited-error concerns motivating *Momah* and *Strode*, and because a defendant benefits from the confidentiality of juror questionnaires, both Divisions have decided that the post-voir-dire inaccessibility of the juror questionnaires is not a structural error. *See Smith*, 2011 WL 4778643 at 7 ("[T]he trial court's sealing of juror questionnaires after voir dire is not 'structural error'; nor does it render the trial fundamentally unfair." (footnote omitted)); *Stockwell*, 160 Wn. App.

at 180-81 (requiring a prejudice showing when the defendant "had full access to the questionnaires and the parties questioned the jurors [about them] in open court"); *Coleman*, 151 Wn. App at 623-34 (because the questionnaires were available during open voir dire, the error was not structural).

There is no distinction to be made based on the questionnaires' destruction instead of their sealing. In either circumstance, the questionnaires were fully publically available during voir dire, their contents were discussed on the record for anyone to hear, and the defendant had a fair opportunity to publicize any juror's response he wished. Because of the public's access to the whole voir dire process, this is not the type of error that fundamentally renders a trial unfair or makes it impossible to determine whether the voir dire was tainted by secrecy. Structural error is too blunt a remedy; prejudice is required.

The defendant's burden to show prejudice in these cases requires real, tangible evidence. In *State v. Tarhan*, 159 Wn. App. 819, 246 P.3d 580 (Div. 1, 2011), the defendant cited portions of the record indicating that the Court was uncomfortable with releasing the jury questionnaires even to the parties. *Id.* at 829-30.

Yet, because no member of the public asked to see the questionnaires, there was no evidence that the trial court considered or would have denied access to a member of the public. There was no evidence that the questionnaires were publically inaccessible during or after voir dire, either. *Id.* at 830-31. On this record, the court would not speculate that the public might have been denied access and Tarhan could not demonstrate prejudice. *Id.* "*Strode* and *Momah* recognize that a defendant should not receive a new trial where his right to a public trial has been safeguarded, or where this would be a 'windfall' remedy." *Id.* at 833. The defendant has a high burden to establish prejudice when he actively uses jury questionnaires in open court and benefits from their lack of public accessibility afterwards.

As in all of the preceding cases, Slert cannot prove prejudice because the confidentiality of the jurors' responses encouraged them to be candid. *Smith*, 2011 WL 4778643 at 7. In fact, Slert's attorney originally asked for in-chambers voir dire to encourage candidacy and avoid tainting the jury. VRP (Jan 25, 2010) at 10-12. The trial court accounted for the public's open-courts rights by conducting individual voir dire in open court, instead. *Id.* at 12. The point of this process was to ensure that Slert got a fair trial by jurors

untainted by pretrial publicity. Ex. 1 at 3-4. The only reason the questionnaires were destroyed is because Slert did not ask that the records be preserved in the court record. Again, this procedure benefitted Slert by giving jurors the security to provide personal responses. Slert cannot establish any detriment to him from the destruction of the questionnaires after voir dire had been carried out in open court. He fails to carry his burden to show prejudice, and the Court should deny his public-trial claim.

### C. SLERT'S CHALLENGE TO THE SUFFICIENCY, RATHER THAN THE OPENNESS OF THE COURT'S RECORDS MISUNDERSTANDS THE OPEN-COURTS AND PUBLIC-TRIAL RIGHTS.

Slert's challenge to the destruction of the questionnaires in this case is neither error nor prejudicial under existing open-courts and public-trial case law. But more fundamentally, Slert's challenge also attempts to stretch these doctrines to an unprecedented point: a claim that the court must not only maintain its records openly, but also retain specific documents *not* made part of the record. This reasoning is jurisprudentially dangerous because it foists the appellant's duty to create a sufficient record onto the court.

1. **The Open-Courts Doctrine Requires Courts To Provide Public Access To Records It Maintains, But Does Not Require The Court To Retain Records It Otherwise Would Not Retain.**

General Rule 31(c)(4) defines a court record as something "maintained by a court in connection with a judicial proceeding" and specifically distinguishes other materials "to which the court has access but which is not entered into the record." The Supreme Court promulgated this rule "to facilitate access to court records as provided by Article I, Section 10 of the Washington State Constitution." GR 31(a). Yet, by its own terms, the rule assumes that the court will not keep every piece of paper connected with a case. *See id.* ("Access to court records . . . shall not unduly burden the business of the courts."). This reflects a judgment that courts must provide open access to any records they maintain, but need not retain all documents they encounter.

The Constitution itself presupposes that courts "not of record" will exist, Wash. Const. Art I, sec. 21; Art. IV, sec. 11, so it follows that records of proceedings may cease to exist without offending the maxim that judicial proceedings should be open. Similarly, when a superior court destroys any document, it prevents the public from ever again accessing that document even if it was

public for the duration of their existence. But some documents are in fact destroyed: the general rules anticipate that certain records will be routinely destroyed pursuant to retention schedules, GR 15(h)(5), and this has not heretofore been considered and open-courts problem. This makes sense because "open courts" requires that court records be accessible so longs as they are maintained, but does not specify how long the court should retain documents. [2]

A corollary to this principle is found in the public records act. The PRA requires that public agencies retain a record once it has been requested, but generally does not require agencies to retain any records in the absence of a request. *See* RCW 42.56.100 ("If a public record request is made *at a time when such record exists* but is scheduled for destruction in the near future, the agency . . . may not destroy or erase the record until the request is resolved." (emphasis added)); *O'Neill v. City of Shoreline*, 170 Wn.2d 138,

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[2] The Secretary of State publishes retention schedules governing local court records. *See* Local Government Records Retention Schedules, http://www.sos.wa.gov/archives/ RecordsRetentionSchedules.aspx. The schedule applicable to superior courts provides that the court file be kept permanently, but that general jury questionnaires should be kept only until the end of the term or until superseded. County Clerk and Clerk of the Superior Court Records Retention Schedule item 2.1.8, .23-24 (ver. 6.0 2009), http://www.sos.wa.gov/_assets /archives/County Clerk and Clerk of the Superior Court Records Retention Schedule ver 6.0 rev.pdf. Case-specific questionnaires such as the one in this case would seem to be "superseded" at the conclusion of voir dire.

148-49, 240 P.3d 1149 (2010) (record must be retained after request); *West v. Dept. of Natural Resources*, 163 Wn. App. 235, 245, 258 P.3d 78 (Div. 2, 2011) (destruction of the record before the request obviated duty to disclose); *Building Industry Ass'n of Washington v. McCarthy*, 152 Wn. App. 720, 740-41, 218 P.3d 196 (Div. 2, 2009) (same). Thus, the PRA requires that the documents maintained by an agency must be publically accessible, but does not require the agency to retain any specific document.

The PRA has been found inapplicable to the courts in part because the common law and constitution already served the same goals with regard to court records. *See generally City of Federal Way v. Koenig*, 167 Wn.2d 341, 217 P.3d 1172 (2009); *Nast v. Michels*, 107 Wn.2d 300, 730 P.2d 54 (1986). But because the PRA and the open-courts doctrine serve similar purposes, it makes sense to consider this aspect of the PRA as evidence of the extent of the right to open courts or a public trial. Just as the PRA enforces public access to existing records but does not require retention of any particular records (absent a request), the open-courts doctrine requires public access to existing court records but not the retention of any particular document used in court.

Even if the open-courts doctrine does require the court to retain certain types of trial documents, the doctrine would not include the questionnaires here. In the 1980s, the state Supreme Court addressed the extent to which the common law and the constitutions required access to different types of court records. *Seattle Times Co. v. Eberharter*, 105 Wn.2d 144, 713 P.2d 710 (1986) (constitutions); *Cowles Pub. Co. v. Murphy*, 96 Wn.2d 584, 637 P.2d 966 (1981) (common law). *Cowles* concludes that, as a matter of common law, affidavits for search warrants should be filed and made public absent special circumstances. *Cowles*, 96 Wn.2d at 590. *Eberharter* concludes that the state and federal constitutions do not require the public accessibility of such affidavits until criminal charges are filed. *Eberharter*, 105 Wn.2d at 156. *Eberharter* also includes a list of materials to which the public has a right of access. *Id.* at 155 (listing "(1) trials, (2) pretrial hearings, (3) transcripts of pretrial hearings or trials, and (4) exhibits introduced at pretrial hearings or trials"). Neither of these cases provides an exclusive list of materials that should be made part of the public court file, but each suggests that materials not filed with the court will not be publically available.

The jury questionnaires here were used as voir dire aides but never entered into evidence, marked as items, or used as exhibits. By not being formally included in the record, they differ markedly from the list of public materials in *Eberharter. Cf. id.* (including only those exhibits *introduced* at trial or a hearing). The appropriate analogy is something along these lines:

> At trial, a testifying witness takes notes in response to counsels' questioning to help her answer. Each party reads the notes and uses that information to ask further questions of the witness. However, neither party introduces the notes as evidence, marks them as an item or exhibit, or shows them to the jury. At the end of the witness's testimony, the notes are discarded.

Although it may not be prudent for neither party to mark the sheet of notes as an exhibit for preservation, the fact that the notes were discarded does not make the trial any less open to the public or make the court's records any less publically accessible. What must to be open an public are the witness's responses to questioning and any exhibits or marked items used during the testimony, not incidental pieces of paper that no party chose to include in the record. In other words, it is the openness of the proceedings and the record thereof, not the *sufficiency* of that record, that the open-courts and public-trial provisions target.

2. **The Real Focus Of Slert's Challenge Is The Sufficiency Of The Record Below, Which It Is The Appellant's Duty To Ensure**.

Slert's challenge to the destruction of the jury questionnaires is actually a challenge to the sufficiency of the record maintained by the court below. Despite the fact that the questionnaires were fully available to the parties for use in voir dire in open court, Slert contends that his rights were violated because the trial court did not preserve them in the record and later destroyed them.

This argument fails because it is the *appellant's* duty, not the court's, to create an adequate record. The party who seeks relief from the trial court's ruling bears the burden of establishing a record on which relief can be granted. *State v. Garcia*, 45 Wn. App. 132, 140, 724 P.2d 412 (1986). "If the appellant fails to meet this burden, the trial court's decision stands." *State v. Tracy*, 128 Wn. App. 388, 395-96, 115 P.3d 381 (2005). This is true for both sides: the State has the responsibility of creating the record if it loses below, and loses the appeal if the record is inadequate. *City of Spokane v. Neff*, 152 Wn.2d 85, 91, 93 P.3d 158 (2004). This rationale applies even in the open-courts context. *See State v. Tarhan*, 159 Wn. App. 819, 831, 246 P.3d 580 (2011) (rejecting the

appellant's claim because he failed to establish an adequate record that the public had been denied access to jury questionnaires).

Slert's counsel did not make any attempt to put these questionnaires in the record so that they would be preserved. It was not the trial court's responsibility to ensure the adequacy of the record, it was Slert's. This Court should not permit criminal defendants to foist their burden to create the record onto the court through the guise of open courts. This is especially true in this context because it was in Slert's interest not to include the jury questionnaires in the record, so as to encourage the prospective jurors' candor. The Court should rebuff Slert's attempt to extend the open courts doctrine in this manner.

## III. CONCLUSION

The jury questionnaires' destruction at some point after voir dire did not violate the defendant's or the public's right to open courts. The questionnaire was discussed in open court during pretrial hearings, and the jurors were examined extensively on their responses during open voir dire. No member of the public was denied access to the questionnaires during voir dire. Even if the questionnaire's destruction were error, the error is not structural

and there is no prejudice. More fundamentally, the right to open courts or a public trial requires that any records maintained by the court be publicly accessible, not that the court retain records it otherwise would not. The court is responsible for its records' openness but not their sufficiency; it is the *appellant's* duty to create a sufficient record. A criminal defendant cannot use the open-courts or public-trial provisions to foist this duty upon the court.

RESPECTFULLY submitted this 15 day of November, 2011.

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