

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 Reply to Supplemental
Response Brief**

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**REPLY TO RESPONDENT’S “STATEMENT OF RELEVANT
FACTS”**

Before jurors were questioned in open court, the trial judge announced that he had “already... excused jurors,” and listed the jurors that had already been excused:

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.

According to Respondent, this announcement was equivalent to “excus[ing] four jurors on the record, in open court, and in the defendant’s presence.” Respondent’s Supplemental Brief, p. 3.

The judge did not consult with counsel on the record, discuss the specific reasons each juror was excused, summon the jurors into court, or excuse them in open court. Accordingly, Appellant stands by the criticism leveled at Respondent’s mischaracterization of these facts. Appellant’s Supplemental Brief, p. 3 n. 3.

ARGUMENT

I. THE TRIAL COURT’S DESTRUCTION OF COMPLETED JURY QUESTIONNAIRES VIOLATED THE CONSTITUTION; RESPONDENT’S RELIANCE ON *SMITH* AND *STOCKWELL* IS MISPLACED.

The trial court made the decision to dismiss four prospective jurors behind closed doors, based on jury questionnaires that have since been destroyed. The questionnaires that provided the basis for this decision, the same ones that were relied upon by the parties during jury selection, are now permanently unavailable to Mr. Slert and to members of the public. The trial judge did not conduct a *Bone-Club* analysis prior to destroying the records. See *State v. Bone-Club*, 128 Wash.2d 254, 906 P.2d 325 (1995).

The destruction of the questionnaires distinguishes this case from the two cases relied upon by Respondent. Brief of Respondent, pp. 5-10 (citing *State v. Smith*, 162 Wash.App. 833, 262 P.3d 72 (2011) and *In re Pers. Restraint of Stockwell*, 160 Wash.App. 172, 248 P.3d 576 (2011)). Neither *Smith* nor *Stockwell* dealt with the permanent and irrevocable destruction of jury questionnaires.¹ Accordingly, they are inapplicable to Mr. Slert’s case.

¹ In both *Smith* and *Stockwell*, the trial court sealed (but did not destroy) the completed jury questionnaires. The *Smith* Court held that sealing the questionnaires did not amount to a courtroom closure. *Smith*, at _____. The *Stockwell* Court assumed a closure, but denied relief

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Furthermore, the reasoning underlying *Smith* and *Stockwell* does not apply in this case. In both *Smith* and *Stockwell*, the Court found that questions posed in open court (relating to jurors' answers to the questionnaire) provided sufficient public access to the questionnaires before they were sealed. *Smith*, at ___; *Stockwell*, at 181.

This rationale does not apply here for two reasons. First, the Court's decisions in *Smith* and *Stockwell* were made in a different context: both decisions were issued in cases where the completed questionnaires were still available for review (upon issuance of a court order). Any questions about a juror's responses could be resolved—even after trial—by examination of the completed questionnaires. Thus, for example, a reporter who learned a pertinent fact about a sitting juror could seek permission to examine the sealed questionnaires to determine if that juror disclosed the fact under oath. Similarly, any post-conviction questions raised by the defendant could be settled by unsealing and reviewing the questionnaires. The absence of these remedies in this case—because the completed questionnaires have been destroyed—changes the context of the problem.

because the error was not structural and the defendant was unable to demonstrate actual prejudice, as required to prevail in the personal restraint context. *Stockwell*, at 180-181.

Second, in Mr. Slert's case, no questions posed in open court allowed the public access to the content of the completed questionnaires.² The majority of the venire was not questioned about their responses to the questionnaire; hence, the public could not determine how each prospective juror responded. Furthermore, the four prospective jurors dismissed by the court in chambers were never questioned in open court about their answers to the questionnaire.

This is in contrast to the situation in *Smith* and *Stockwell*. In those cases, all jurors were apparently subject to questioning about their responses. *See Smith, at ___* ("the sealing procedure did not affect the public's right to open information because [the defendants] used the 'content of the questionnaires' to question the jurors 'in open court, where the public could observe,'" (quoting *Stockwell, at 183*).

Finally, unlike the defendants in *Smith* and *Stockwell*, Mr. Slert did not "benefit[] from the trial court's promise to the prospective jurors that their questionnaires would be [destroyed] after voir dire" because the trial court here made no such promise. *Smith, at ___*; *Stockwell, at 179-180* (citing *State v. Momah*, 167 Wash.2d 140, 217 P.3d 321 (2009)).

² This is certainly true about the four jurors excused in chambers. The court and parties did question roughly 15 prospective jurors specifically about their answers. *See* Respondent's Supplemental Brief: RP 10-69.

For all these reasons, Respondent's erroneous attempt to equate the destruction of records in this case with the sealing of records in *Smith* and *Stockwell* fails. Mr. Slert's conviction must be reversed and the case remanded for a new trial. *Bone-Club, supra*.

II. THE ERROR IN THIS CASE IS STRUCTURAL; FURTHERMORE, RESPONDENT HAS FAILED TO DEMONSTRATE HARMLESSNESS BEYOND A REASONABLE DOUBT.

Ordinarily, an erroneous courtroom closure is structural error requiring automatic reversal. *See, e.g., In re Detention of D.F.F.*, 172 Wash.2d 37, 41-42, 256 P.3d 357 (2011) ("Since the open administration of justice assures the structural fairness of proceedings, a court's failure to consider whether a closure is necessary is a structural error") (discussing Article I, Section 10); *see also State v. Strode*, 167 Wash.2d 222, 223, 217 P.3d 310 (2009). The Supreme Court has held that a partial courtroom closure is not structural error under certain narrow circumstances; however, those circumstances are not present here. Specifically, in *Momah*, the Supreme Court outlined conditions that permitted a court to uphold a conviction despite a partial courtroom closure:

The closure occurred to protect Momah's rights and did not actually prejudice him. The record reveals that due to the publicity of Momah's case, the defense and the trial court had legitimate concerns about biased jurors or those with prior knowledge of Momah's case. The record also demonstrates that the trial court recognized the competing article I, section 22 interests in this case. The court, in consultation with the defense and the prosecution,

carefully considered the defendant's rights and closed a portion of voir dire to safeguard the accused's right to an impartial jury. Further, the closure was narrowly tailored to accommodate only those jurors who had indicated that they may have a problem being fair or impartial. Momah affirmatively accepted the closure, argued for the expansion of it, actively participated in it, and sought benefit from it. Thus, the underlying facts and impact of the closure in Momah are significantly different from those presented by our previous cases.

Momah, at 156. The *Stockwell* Court relied on a portion of this language to hold that the partial closure in that case (sealing the questionnaires) did not amount to structural error. *Stockwell*, at 179; see also *Smith*, at ____.

However, unlike the defendants in *Stockwell* and *Smith*, Mr. Slert did not "affirmatively accept" the destruction of records; nor did he "argue[] for the expansion of it, actively participate[] in it, and [seek] benefit from it." *Momah*, at 156.

Furthermore, there is no indication that the court evaluated competing constitutional concerns, consulted with counsel, carefully considered Mr. Slert's rights, or acted to safeguard those rights prior to narrowly tailoring the destruction of records to the circumstances. *Cf. Momah*, at 156. In fact, the record has no indication that the trial judge even notified the parties of this action, much less requested their input. Accordingly, the exception created by *Momah* (and applied in *Stockwell* and *Smith*) does not apply to Mr. Slert's case.

The general rule—that a courtroom closure is structural error—applies in Mr. Slert’s case. *Strode*, at 223. Even if the error were not considered structural, the burden would be on the prosecution to establish that the error was harmless, under the stringent standard for constitutional error.³ *See, e.g., State v. Irby*, 170 Wash.2d 874, 886, 246 P.3d 796 (2011) (addressing error affecting defendant’s right to be present).

Constitutional error is presumed prejudicial, and the state bears the burden of proving harmlessness beyond a reasonable doubt. *Id.; City of Bellevue v. Lorang*, 140 Wash.2d 19, 32, 992 P.2d 496 (2000). To overcome the presumption, the state must establish beyond a reasonable doubt that the error was trivial, formal, or merely academic, that it did not prejudice the accused, and that it in no way affected the final outcome of the case. *Lorang*, at 32.

The prosecution has made no attempt to prove that the error here was harmless beyond a reasonable doubt. *See* Respondent’s Supplemental Brief, *generally*. Nor can it do so.

³ Respondent erroneously places the burden of establishing prejudice on the appellant. Respondent’s Supplemental Brief, p. 11 (citing *State v. Tarhan*, 159 Wash.App. 819, 246 P.3d 580 (2011)). But *Tarhan* does not support Respondent’s position. In *Tarhan*, the Court found insufficient evidence of an actual closure for purposes of Article I, Section 22, and thus did not reach the issue of prejudice. *Tarhan*, at 830-831. Here, by contrast, there is no dispute that the questionnaires were destroyed. *See* Respondent’s Supplemental Brief at 3-4. Furthermore, the *Tarhan* Court *did* find a violation of Article I, Section 10, and remanded the case for a *Bone-Club* hearing. *Id.* at 834-835. Such a hearing would be futile in this case, since the records have already been destroyed.

The destruction of the questionnaires permanently deprives both Mr. Slert and the public of the opportunity to investigate and understand the trial court's decision, made behind closed doors, to dismiss four prospective jurors prior to the start of *voir dire*. It also prevents Mr. Slert and the public from independently investigating the veracity and completeness of each prospective juror's answers.

For all these reasons, the conviction must be reversed. *Strode, at* 223. The case must be remanded to the trial court for a new trial. *Id.*

III. TRIAL COURTS HAVE A CONSTITUTIONAL DUTY TO MAINTAIN RECORDS OF THEIR OWN PROCEEDINGS.

The trial judge in this case excused four jurors based on discussions that occurred behind closed doors, outside Mr. Slert's presence, based on questionnaires that were subsequently destroyed. This procedure violates Article I, Sections 10 and 22. *Bone-Club, supra*. It also violates the court's constitutional obligation to maintain a record of its proceedings.

The duty to ensure that criminal justice be administered openly and publicly falls on the judicial system; it does not rest with an accused person.⁴ *See Strode, at* 230 n. 4 ("courts have the overriding responsibility

⁴ Thus, a defendant can raise courtroom closure issues for the first time on review, even absent objection in the trial court. *Bone-Club, at* 257.

to ensure that the public's right to open trials is protected.”). Despite this, Respondent argues that Mr. Slert's challenge to the destruction of the completed questionnaires “foists the appellant's duty to create a sufficient record onto the court.” Brief of Respondent, p. 13-20.

This argument lacks merit. Mr. Slert was not tasked with ensuring retention of the completed jury questionnaires, any more than he was charged with securing a court reporter to transcribe the proceedings, or creating an official file to store the pleadings. As a court of record, the trial court is constitutionally responsible for ensuring a complete record of its own proceedings. Wash. Const. Article IV, Section 11; *see also, e.g., State ex rel. Henderson v. Woods*, 72 Wash.App. 544, 550-551, 865 P.2d 33 (1994) (A “court of record” is “ [a] court that is required to keep a record of its proceedings... ”) (quoting *Black's Law Dictionary* (5th ed. 1979)). This duty is also a part of the state and federal right to due process and the state constitutional right to appeal in criminal cases. U.S. Const. Amend. XIV; Wash. Const. Article I, Sections 3 and 22; *see also State v. Tilton*, 149 Wash.2d 775, 781, 72 P.3d 735 (2003) (criminal defendants are constitutionally entitled to a record of sufficient completeness to permit effective appellate review).⁵

⁵ Respondent erroneously conflates the court's duty to maintain a record with an appellant's responsibility to ensure that an adequate record is transmitted to the appellate court on

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Regardless of its source, the constitutional requirement to preserve records cannot be abridged by court rule or by statute. The trial court's failure to maintain the completed juror questionnaires violated Mr. Slert's right to an open and public trial under Article I, Section 22. It also violated the public's right under Article I, Section 10. Accordingly, Mr. Slert's conviction must be reversed and the case remanded for a new trial.

CONCLUSION

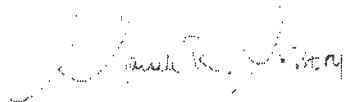
For the foregoing reasons, the conviction must be reversed and the case remanded for a new trial.

Respectfully submitted by:

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review. Brief of Respondent, p. 19. Had the court properly preserved the completed questionnaires, it would be Mr. Slert's duty to perfect the record on appeal by having them transmitted to the appellate court as clerk's papers. See RAP 9.1, RAP 9.6.

CERTIFICATE OF MAILING

I certify that on today's date:

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

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I filed the 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 November 28, 2011.



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