

NO. 59525-3-I

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

STATE OF WASHINGTON,

Respondent,

v.

GREGORY H. BELYEU,

Appellant.

FILED
COURT OF APPEALS
STATE OF WASHINGTON
2009 NOV 18 PM 4:14

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

The Honorable Steven J. Mura, Judge

SUPPLEMENTAL BRIEF OF APPELLANT

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A. SUPPLEMENTAL ARGUMENT¹

UNDER STRODE AND MOMAH, BELYEU'S CONVICTIONS MUST BE REVERSED.

1. *Factual Review*

At the beginning of jury selection, the trial judge and parties convened in the judge's chambers for individual, private questioning with prospective jurors based on their answers to a questionnaire. The judge, speaking to the first panelist, explained:

Normally what we do is we talk to people individually after we have spoken to the whole group. Before we even start the process we have to swear all the potential jurors in and since nobody has been sworn yet I'm going to swear you in.

RP4 2. The court then questioned and excused for cause the potential juror without questions from defense counsel. RP4 2-3. The judge called in three more prospective jurors and provided a similar explanation for the private process. RP4 4, 10, 17-18. The court, prosecutor, and defense counsel then privately questioned the prospective jurors in chambers before returning to the full panel in open court. CP 157; RP4 4-28.

The topics covered during the in-chambers questioning were panic attacks, professional experiences involving domestic violence allegations as

¹ On October 23, 2009, this Court ordered additional briefing to address the decisions in *State v. Strode*, __ Wn.2d __, 217 P.3d 310 (2009) and *State v. Momah*, __ Wn.2d __, 217 P.3d 321 (2009).

a United States Border Patrol employee, a nephew with a drug problem who may have appeared before the judge on a burglary charge, physical abuse by a panelist's father against her mother, and a Western Washington University police employee who knew some of the witnesses and knew about the trial process. RP4 2-28. The prospective jurors expressed no knowledge about Belyeu's case.

Toward the end of voir dire, the trial court and parties individually questioned three more prospective jurors in chambers. CP 158; RP4 15-60. The first two panelists recalled reading about the case in a local newspaper a month or two earlier and the third said a case was pending against his/her brother-in-law for sexually assaulting the prospective juror's daughters. RP4 150-60.

On appeal, Belyeu contends the trial court violated his constitutional rights to a public trial by conducting private voir dire in chambers, thereby precluding the public from observing proceedings. Brief of Appellant at 14-29; Reply Brief of Appellant at 1-10. The recent decisions in Strode and State v. Momah support Belyeu's argument.

2. *State v. Strode Supports Reversal of Belyeu's Convictions.*

Strode was charged with three sex offenses. His prospective jurors were asked in a confidential questionnaire whether they or anyone they were

close to had ever been the victim of or accused of committing a sex offense. The prospective jurors who answered "yes" were individually questioned in the judge's chambers to determine whether they could nonetheless render a fair and impartial verdict. *Strode*, 217 P.3d at 312. Before excluding the public from this private questioning, the trial court failed to hold a "Bone-Club² hearing." *Strode*, 217 P.3d at 313.

While privately questioning some of the potential jurors, the trial court state variously that "the questioning was being done in chambers for 'obvious' reasons, to ensure confidentiality, or so that the inquiry would not be 'broadcast' in front of the whole jury panel." *Strode*, 217 P.3d at 313. The trial judge, prosecutor and defense counsel questioned the prospective jurors, and challenges for cause were heard and ruled upon. *Id.*

A majority of the Supreme Court reversed Strode's convictions because the trial court failed to weigh the competing interests as required by Bone-Club. *Strode*, 217 P.3d at 314-15 (Alexander, C.J., lead opinion); 217 P.3d at 318-19 (Fairhurst, J. concurring).

The lead and concurring opinions differed, however, on whether a defendant can waive the issue through affirmative conduct.³ The lead

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

³ The concurring opinion also disagreed with the lead opinion on whether a defendant could assert the rights of the public and/or press under

opinion concluded a defendant's failure to object to courtroom closure does not constitute a waiver of the issue for appeal, and that waiver occurs only if it is shown to be knowing, voluntary and intelligent. Strode, 217 P.3d at 315 n.3 (Alexander, C.J.).

The concurring opinion, however, concluded that defense participation in the closed courtroom proceedings can, under certain circumstances, constitute a valid waiver of the right to a public trial. Strode, 217 P.3d at 318 (Fairhurst, J., concurring). As an example, Justice Fairhurst noted that in Momah, the trial court expressly advised that all proceedings are presumptively public. Strode, 217 Wn.2d at 318. Despite this admonishment, defense counsel affirmatively requested individual questioning of panel members in private, urged the court to expand the number of jurors subject to private questioning, and actively engaged in discussions about how to accomplish this. *Id.* "At no time," Justice Fairhurst observed, "did the defendant or his counsel indicate in any way that any of the proceedings held in a closed room that was not a courtroom violated his public trial right." Strode, 217 P.3d at 318. Justice Fairhurst

article I, section 10. Compare 217 P.3d at 315 (lead opinion noting Strode could not waive the public's right to open proceedings) and 217 P.3d at 316, 319 (concurring opinion chastising lead opinion for conflating the right of a defendant, the media and the public). Because Belyeu relies on his personal right as guaranteed by article I, section 22, this split should not affect this Court's decision in his case.

concluded counsel's conduct "shows the defendant intentionally relinquished a known right." *Id.*

The facts in Belyeu's case mirror those in *Strode*. It is evident from the trial court's explanations to the prospective jurors that private, in-chambers voir dire was a routine part of proceedings. The court told the first panelist, "Normally what we do is we talk to people individually after we have spoken to the whole group." RP4 2. The other explanations were similar. The private voir was plainly the method the court employed to protect the privacy of protective jurors. The court neither addressed the *Bone-Club* factors nor in any other way weighed the competing interests before closing a portion of the voir dire. As in *Strode*, the trial court violated Belyeu's constitutional right to a public trial.

3. *State v. Momah is Distinguishable and Does Not Control the Outcome of Belyeu's Appeal.*

The state charged Momah, a gynecologist, with committing sex offenses against several patients. *Momah*, 217 P.3d at 324. Unlike the "unexceptional circumstances" in *Strode*, 217 P.3d at 312 (Alexander, C.J., lead opinion), Momah's case was "heavily publicized" and "received extensive media coverage." *Momah*, 217 P.3d at 324.

As a result, the court summoned more than 100 prospective jurors and gave them a written questionnaire. By agreement of the parties, jurors

who said they had prior knowledge of the case, could not be fair, or requested private questioning, were questioned individually in chambers. *Id.*

Concerned about poisoning the entire panel, defense counsel also argued for expansion of the private voir dire:

Your Honor, it is our position and our hope that the Court will take everybody individually, besides those ones we have identified that have prior knowledge. Our concern is this: They may have prior knowledge to the extent that that might disqualify themselves, or we have the real concern that they will contaminate the rest of the jury.

Momah, 217 P.3d at 324.

The trial court compiled a list of jurors to be questioned individually. Defense counsel agreed with the list. *Id.* Both the defense and prosecution actively participated in the in-chambers jury selection. Most of the questions concerned prospective jurors' knowledge of the case gained from media publicity. *Id.* at 324 n.1.

The six-justice majority in *Momah* noted that when "the record lack[s] any hint that the trial court considered the defendant's right to a public trial when it closed the courtroom[.]" the error is "structural in nature" and reversal is required. *Momah*, 217 P.3d at 326-27. The majority found reversal was not required because, despite failing to explicitly discuss the ~~Bone-Club~~ factors, the trial court balanced *Momah's* right to a public trial with his right to an impartial jury. *Momah*, 217 Wn.2d at 329.

In addition, the court essentially found *Momah* "waived" his public

trial right:

Momah affirmatively assented to the closure, argued for its expansion, had the opportunity to object but did not, actively participated in it, and benefited from it. Moreover, the trial judge in this case not only sought input from the defendant, but he closed the courtroom after consultation with the defense and the prosecution. Finally, and perhaps most importantly, the trial judge closed the courtroom to safeguard Momah's constitutional right to a fair trial by an impartial jury, not to protect any other interests.

217 P.3d at 327.

The court reiterated this theme later in the opinion, presuming Momah made the following "tactical choices to achieve what he perceived as the fairest result[:]"

- Before any private voir dire, the parties and the judge discussed numerous proposals concerning juror selection;
- Although Momah was given a chance to object to the in-chambers procedure, he never objected;
- Momah never suggested closed voir dire might violate his right to public trial;
- Defense counsel deliberately chose to pursue in-chambers questioning to avoid tainting the panel; counsel "affirmatively assented to, participated in, and even argued for the expansion of in-chambers questioning."

Momah, 217 P.3d at 328-29.

Counsel's affirmative and aggressive pursuit of private voir dire is an atypical and distinctive feature of Momah. Much more common is the unexceptional case where a trial court merely informs the parties it will

honor prospective jurors' requests to be spared the embarrassment of revealing sensitive matters in open court. In short, Momah is the aberration and Strode is the ordinary. And because the Momah Court relied so heavily on counsel's unusually assertive conduct, its holding will apply only in the rare case.

Belyeu's case is hardly rare; it is instead ordinary, like Strode. Unlike in Momah, the trial court did not discuss various courses of action with the parties. Rather, the court granted the request of those prospective jurors who wished to speak in private. Unlike in Momah, there was no opportunity to object to private voir dire. Unlike in Momah, Belyeu's counsel neither requested closed voir dire nor sought its expansion.

In addition, Momah's trial counsel exercised "numerous challenges for cause." Momah, 217 P.3d at 324, 329. Belyeu's counsel exercised one. RP4 26-28.

Finally, the trial judge in Momah closed proceedings to protect Momah's constitutional right to an impartial jury. Momah, 217 P.3d at 327. In Belyeu's case, the trial court's primary concern was respecting the privacy of panel members. For example, the judge began the examination of prospective juror 16 by saying, "We understand on your questionnaire you indicated there was some things you might want to talk about in chambers and not before a large group." RP4 4. The court explained to the third

panelist questioned in private that "there was a matter that you wanted to talk in a more private setting about and we said we'll go ahead and start doing this process first." RP4 10.

As in Strode, the trial court gave no consideration to Bone-Club factors before moving part of voir dire into chambers. It failed to identify a compelling interest justifying closure, failed to give anyone present the opportunity to object to the closure, failed to evaluate whether closure was the least restrictive means to protect whatever interest the court may have perceived was threatened, failed to weigh that interest against the public's interest in an open proceeding, and failed to ensure the closure was no broader or longer than necessary. Bone-Club, 128 Wn.2d at 258-59.

For all the reasons stated above, this Court should conclude that the trial court violated Belyeu's right to a public trial, that the violation was structural error, and that reversal is warranted. Strode, 217 P.3d at 312.

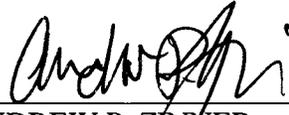
B. CONCLUSION

For the reasons set forth here and in his opening and reply briefs,
Belyeu requests this Court to reverse his convictions.

DATED this 18 day of November, 2009.

Respectfully submitted

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v.)	COA NO. 59525-3-I
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GREGORY BELYEU,)	
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Appellant.)	

DECLARATION OF SERVICE

I, PATRICK MAYOVSKY, DECLARE UNDER PENALTY OF PERJURY UNDER THE LAWS OF THE STATE OF WASHINGTON THAT THE FOLLOWING IS TRUE AND CORRECT:

THAT ON THE 18TH DAY OF NOVEMBER, 2009, I CAUSED A TRUE AND CORRECT COPY OF THE **SUPPLEMENTAL BRIEF OF APPELLANT** TO BE SERVED ON THE PARTY / PARTIES DESIGNATED BELOW BY DEPOSITING SAID DOCUMENT IN THE UNITED STATES MAIL.

[X] HILARY THOMAS
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SIGNED IN SEATTLE WASHINGTON, THIS 18TH DAY OF NOVEMBER, 2009.

x *Patrick Mayovsky*