

No. 65053-0-I

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

STATE OF WASHINGTON, Respondent,

v.

GREGORY PIERCE SHEARER, Appellant.

BRIEF OF RESPONDENT

**DAVID S. McEACHRAN,
Whatcom County Prosecuting Attorney
By HILARY A. THOMAS
Appellate Deputy Prosecutor
Attorney for Respondent
WSBA #22007**

**Whatcom County Prosecutor's Office
311 Grand Avenue, Second Floor
Bellingham, WA 98225
(360) 676-6784**

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A. ASSIGNMENTS OF ERROR

None.

B. ISSUES PERTAINING TO APPELLANT'S ASSIGNMENTS OF ERROR

1. Whether a defendant's right to public trial is implicated by the in-chambers questioning of one venire member who expressed concerns about speaking in public regarding her prior experience with domestic violence and no one, including the defendant, objected when the judge inquired if anyone objected to the in-chambers questioning and whether structural error occurred as a result.
2. Whether defense counsel was ineffective for failing to object to the admission of the victim's statement as substantive evidence under ER 801(d)(1) where it is not likely that an objection would have been sustained because the victim's statement was voluntary and had the minimal guarantees of truthfulness where she wrote the statement and had an opportunity to make changes and declined to do so, and where the statement complied with the requisites of a declaration under RCW 9A.72.085 and she testified that she knew she signed it under penalty of perjury and the officer testified that he reviewed the penalty of perjury provision with her before she signed the statement and asked her if the statement was true.

C. FACTS

1. Procedural Facts.

On October 9, 2009 Appellant Gregory Shearer was charged with one count of felony Harassment – Domestic Violence, in violation of RCW 9A.46.020(1)(a)(i)(2)(b) and 10.99.020, and Assault in the Fourth Degree – Domestic Violence, in violation of RCW 9A.36.041(1) and

10.99.020, for his actions on or about October 5, 2009. CP 94-95. He was tried by a jury and found guilty as charged. CP 26-27. He was sentenced to three months on a standard range of one to three months on the felony harassment, and 365 days with all but 335 suspended on the fourth degree assault. CP 16, 19.

2. Substantive Facts¹.

On October 6, 2009 Lynn Honcoop arrived at work upset and crying and immediately went up to her manager Steve Austin and told him that Shearer had hurt her really bad the night before. RP 171, 180.

Honcoop was guarding her shoulder, holding her arm and back and was crying so hard she was almost in hysterics. She appeared very scared. RP 181. Austin told Honcoop he'd meet her in the loss prevention office in a few minutes. RP 180-81.

Austin knew Honcoop a little better than some other employees because he had had to speak with her about her being late or absent before as a result of problems at home. RP 12, 175. One time she showed up with a black eye, and she had said Shearer had bit her and elbowed her in the eye and knocked her down the stairs. RP 175-77. She had initially told

¹ Additional facts regarding the right to public trial issue is included within that argument.

Austin that she had fallen down the stairs from vertigo that time because she was afraid Shearer would retaliate. RP 176, 178.

When Austin entered the loss prevention office, Honcoop was still crying and scared. RP 182. Austin observed some bruising on her shoulder, neck area. Id. He encouraged Honcoop to make changes in her life and to call the police, and then he had to leave the office because he was unsettled by what he perceived had been a very violent act. RP 182-83. After he calmed down, he returned and Honcoop was still crying, so hard that he could not understand what she was saying. RP 183. He gave her a hug and she gathered the strength to call the police. Id. After she called 911 and spoke with the police, she was able to tell Austin what had happened. RP 184, 200. She told him that Shearer had gotten angry about her not doing enough around the house and about his having to pay back some unemployment. Id. She told him that Shearer had grabbed her arms and punched her in the head, back and abdomen. RP 185. Honcoop said she had been afraid, and when she said she would call the police, Shearer said go ahead and call the cops, that she'd be dead before they got there. RP 186. She told Austin she originally thought it wasn't going to happen and then she became scared that it would. RP 187.

When Officer Baca arrived to talk to Honcoop, she was crying uncontrollably, so much so that he had to raise his voice and tell her to

stop crying because he needed to talk to her. RP 272-73. She then calmed down and told him Shearer had hit her with a closed fist five to six times on her back and arms. RP 275, 277. Officer Baca observed some bruising on her arms and she complained of pain to her shoulder and back. RP 275-76. She said that when she didn't get up off the floor fast enough, Shearer had pulled her up by her hair. RP 277. She told the officer she was scared that if she didn't do what Shearer wanted, he would have continued to hit her and that he had threatened to kill her.² RP 278. She told the officer that Shearer told her that if she called the police that she would be dead before they got there, and she hadn't called the police that night because she thought he'd hear her.³ RP 279. She told Baca she slept on the floor that night. RP 280.

Officer Baca told her he would give her an opportunity to write a statement to describe what happened.⁴ RP 282. She did write one and her written statement stated:

I Lynn Honcoop was sitting on the floor upstairs in the master bedroom getting laundry done when Greg came in and started yelling at me about not doing what I need to do around the house like cleaning the kitchen, dishes, and general stuff around like that. He started yelling at me about not keeping promises like going to counseling for my past

² Honcoop had already testified at this point and defense objection to this testimony was overruled based on its being impeachment. RP 279.

³ There was no objection to this testimony. RP 279.

⁴ Additional facts surrounding Honcoop's written statement are discussed further in the section regarding ineffective assistance of counsel.

issues. Then I he went into my room (guest room) where my clothes and belongings are. to something away. Greg came in and went off about his credit card debit (sic) and I said that was not my fault and he ran into the room and started punching me with his closed fist about 5 or 6 times. I said I would call the police Greg said I would be dead before they (cops) would show up. he then told me to get up. I didn't get up as fast as he wanted to so he pulled me up by my hair. Greg wanted to show me what I wasn't doing so he told me to hurry up or he would push me down the stairs. When he was done showing me went back upstairs (?-illegible word stricken) into the master bedroom and I layed down on the floor and Greg asked if I wanted to sleep on the bed. I asked if it was because ~~ing~~ he was feeling guilty he agreed.

RP 282-83; Ex. 2.

Officer Baca offered to go to the house so that she could get some things and did a risk assessment. RP 283-85. Honcoop told Baca that the current incident was the most frightening because Shearer had threatened to take out others as well, that she was afraid of Shearer, things were getting worse and she thought he would kill her. RP 286-87. She told Baca that he'd assaulted her before ten times and that he told her that if she called the police, he'd deal with her when he got out. RP 287.

She told him about weapons Shearer had at the house and went with Baca to retrieve them. RP 109, 288-292. One of the weapons was a pistol that was strapped to the sideboard of the bed and had a magazine in it and a round in the chamber. RP 109, 290-93. Another weapon was a knife that was kept under the mattress. RP 109. After Shearer had been

arrested,⁵ Honcoop gave a handgun that had been in Shearer's truck to another officer. RP 250-54. She also expressed concern about a shotgun, but she didn't know where it was. RP 256.

Photos of Honcoop's bruises were taken at her work. RP 219. Baca called Honcoop three times afterwards and left messages that if additional bruising appeared to contact him. RP 296. Honcoop did contact him about a week later and additional photos of her bruises were taken. RP 225.

Honcoop testified at trial that Shearer and she had a loving, respectful relationship and she still intended on marrying him. RP 38, 114. She admitted that she had been very upset that morning when she arrived at work and spoke with Austin, but claimed she was upset because Shearer had said hurtful things to her, about how she was worthless, during their argument the night before. RP 46-48, 74. She denied that Shearer hit her that night and that he had ever hit her before, although they had had arguments before. RP 38, 49-65, 110-11. She testified that Shearer had only gently pulled her hair to get her attention. RP 110-11. She did not deny telling Austin that Shearer had hit her or telling dispatch that she'd been in domestic dispute, but testified that she had lied to Austin to get

⁵ Shearer, who was 6'2" and about 215 pounds, was arrested without incident. RP 250, 295-96.

Shearer in trouble and to teach him a lesson that he could become physically abusive.⁶ RP 81, 84. She also said that she lied to the officer about how she'd gotten her injuries. RP 87. She denied, though, telling Austin and the officer that Shearer had said if she called the cops, she'd be dead before the cops arrived. RP 82, 89. She testified that Shearer threatened to kill himself, not her, if she called the cops. RP 120.

D. ARGUMENT

1. Shearer's right to public trial was not implicated by the court's closing the courtroom to question one juror in chambers regarding her prejudice.

Shearer asserts that his right to public trial under the Sixth Amendment of the federal constitution and Art. 1§22 of the state constitution were violated when the trial court heard one venire member's concern about sitting as a juror in chambers. Shearer does not assert a violation of the public's right to open proceedings under Art. 1 §10 of the State constitution. Shearer's constitutional right to a public trial was not implicated here where the court ordered closure to hear only one juror's concerns in chambers and no one, including the defense, objected to the closure and the juror was excused for cause. Any closure of the courtroom was de minimis and did not implicate his right to public trial. Even if

⁶ Honcoop testified that her father had been verbally abusive and then became physically abusive. RP 81.

Shearer could demonstrate that his right to public trial was implicated by this very limited closure, under Momah reversal would not be appropriate because the closure did not render his trial fundamentally unfair.

In alleging a violation of the right to public trial, the reviewing court first determines whether the trial court's ruling implicates the defendant's right to public trial, and if so, whether the trial court properly considered the Bone-Club⁷ factors. State v. Lormor, 154 Wn. App. 386, 391, 224 P.3d 857, *rev. granted*, 169 Wn. 2d 1010 (2010). In determining whether there was an order closing the courtroom, the court looks at the plain language of the trial court's ruling. State v. Brightman, 155 Wn.2d 506, 516, 122 P.3d 150 (2005). A trial court's decision to close courtroom proceedings is subject to de novo review. Brightman, 155 Wn.2d at 514.

The right to public trial extends to jury selection. State v. Momah, 167 Wn.2d 140, 148, 217 P.3d 321 (2009). That right is not absolute, however, and the presumption for an open courtroom may be overcome by an overriding interest if the court finds that a closure is necessary to preserve higher values and is narrowly tailored to serve that interest. *Id.* To protect a defendant's right to public trial, a court should address and make specific findings regarding five factors:

⁷ State v. Bone-Club, 128 Wn.2d 254, 906 P.2d 325 (1995).

“1. The proponent of closure ... 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.”

Id. at 149 (*quoting Bone-Club*, 128 Wn.2d at 258-59). A court should do the balancing and make findings before closing the courtroom. Id. at 152 n.2. The court’s failure to balance the factors on the record, however, does not always necessitate reversal. Id. at 150.

If the court on appeal “determines that the defendant’s right to public trial has been violated, it devises a remedy appropriate to the violation.” *Momah*, 167 Wn.2d at 149. If the error is structural, automatic reversal is warranted. Id. An error is only structural though if the error “necessarily render[s] a criminal trial fundamentally unfair or an unreliable vehicle for determining guilt or innocence.” Id. (*quoting Washington v. Recuenco*, 548 U.S. 212, 218-19, 126 S.Ct. 2546, 165

L.Ed.2d 466 (2006)). In previous cases where a new trial has been ordered on appeal, prejudice was sufficiently clear from the record, the closures impacted the fairness of the proceedings and were ordered without seeking input from the defendant. *Id.* at 151.

The State asserts that Shearer should be obligated to demonstrate that the extremely limited in chambers questioning here constitutes a manifest error of constitutional magnitude given his failure to object when the court inquired of all the persons in the courtroom if anyone had an objection, but acknowledges this Court has held otherwise. *See, In Detention of Ticeson*, ___ P.3d ___ (2011), 2011 WL 167476 ¶ 20 (“It is well settled that a criminal defendant may raise the Section 22 right to a public trial for the first time on appeal and will enjoy a presumption of prejudice where the right has been violated.”).⁸ Under RAP 2.5(a), an error is waived if not preserved below unless it is a “manifest error affecting a constitutional right.” RAP 2.5(a)(3); *State v. Scott*, 110 Wn.2d 682, 686-87, 757 P.2d 492 (1988). It is the defendant’s burden to show how the alleged constitutional error was manifest, i.e., how it actually prejudiced his rights. *State v. McDonald*, 138 Wn.2d 680, 691, 981 P.2d 443 (1999). While some assertions of violations of the right to public trial

⁸ In *Ticeson*, the court also held that in order for a party in a civil case to assert an Art. 1 §10 violation of the State Constitution for the first time on appeal, they must do so in

have been permitted for the first time on appeal,⁹ and most recently in Momah and Strode, the Supreme Court has also held that a defendant can waive the right to public trial issue by failing to assert it below. *See, State v. Collins*, 50 Wn.2d 740, 748, 314 P.2d 660 (1957) (defendant could not raise court's closure of the courtroom due to overcrowding for the first time on appeal). Shearer should be required to demonstrate that any constitutional error was *manifest, i.e.*, prejudicial, given the holding in Momah that not all errors regarding a defendant's right to public trial result in automatic reversal.¹⁰ Now, post-Momah, violations of the right to public trial are not always structural error or prejudicial per se. Therefore, Shearer should be obligated to demonstrate that the court's in chambers questioning of one venire member constituted a manifest error in the context of his case. However, the State acknowledges that this Court has held otherwise and therefore Shearer is not obligated before this Court to demonstrate how the in-chambers voir dire of one juror that was excused for cause based on defense motion was a manifest error of constitutional magnitude.

accord with RAP 2.5(a)(3). Ticeson, __ P.3d at ¶¶20-21. Shearer does not assert a violation of Art. 1 §10.

⁹ *See, e.g., Bone-Club, supra, In re Orange*, 157 Wn.2d 167, 137 P.3d 825 (2006).

¹⁰ In State v. Strode the plurality opinion relied on Orange for the proposition that the right to public trial was an issue of "such constitutional magnitude" that it could be raised for the first time on appeal. State v. Strode, 167 Wn.2d 222, 229, 217 P.3d 310 (2009). In Orange, the court, however, assumed that the constitutional error would have been

- a. *Hearing one juror's concern in chambers about her experience with domestic violence did not implicate the defendant's right to a public trial.*

The closure that occurred here was so minimal that it did not implicate Shearer's right to public trial. Closures that have a de minimis effect on a proceeding do not necessarily violate the right to public trial. Brightman, 155 Wn.2d at 515; *see also*, Lormor, 154 Wn. App. at 391, 394 (assuming trial court's actions constituted a closure, the closure did not implicate the defendant's right to public trial). While the lead opinion in Strode observed that the Supreme Court had never found a violation to be de minimis, the observation did not preclude such a holding in the future. The lead opinion noted that the in chambers voir dire that occurred in that case was neither brief nor inadvertent. Strode, 167 Wn.2d at 230.

In order to determine whether the right to a public trial is implicated by a closure, courts have looked to whether the principles underlying the right to public trial are negatively impacted by the closure.

“... [W]hether a particular closure implicates the constitutional right to a public trial is determined by inquiring whether the closure has infringed the ‘values that the Supreme Court has said are advanced by the public trial guarantee...’ ... This analysis tends to safeguard the right at stake without requiring new trials where these values have not been infringed by a trivial closure.”

prejudicial per se and therefore it could be raised for the first time on appeal. *See, In re Orange*, 152 Wn.2d 795, 800, 100 P.3d 291 (2004).

State v. Easterling, 157 Wn.2d 167, 183-84, 137 P.3d 825 (2006) (J. Madsen concurring); *see also*, State v. Rivera, 108 Wn. App. 645, 653, 32 P.3d 292 (2001), *rev. den.*, 146 Wn.2d 1006 (2002) (opening a chambers conference regarding a juror's complaint to the public would not further the goals of the right to public trial). "[T]he requirement of a public trial is primarily for the benefit of the accused: that the public may see he is fairly dealt with and not unjustly condemned and that the presence of interested spectators may keep his triers keenly alive to a sense of the responsibility and to the importance of their functions." Momah, 167 Wn.2d at 148. In the context of a closure of voir dire, the public nature of the proceeding permits the defendant's family to contribute their knowledge or insight to jury selection and permits the venire to see the interested individuals. Brightman, 155 Wn.2d at 515.

In addition to considering the values guaranteed by the public trial right in determining whether a closure is de minimis, courts have also considered the duration of the closure. U.S. v. Ivester, 316 F.3d 955, 960 (9th Cir. 2003); *see also*, Peterson v. Williams, 85 F.3d 39 (2nd Cir. 1996), *cert. den.*, 519 U.S. 878 (1996) (inadvertent closure of courtroom during defendant's testimony for 20 minutes met de minimis standard); Snyder v. Coiner, 510 F.2d 224, 230 (4th Cir. 1975) (short closure of courtroom

during closing arguments was too trivial to implicate right to public trial). The de minimis standard has been applied in cases where closure was purposeful as well as unintentional. Easterling, 157 Wn.2d at 184-85 (J. Madsen concurring).

In State v. Lormor, decided post Momah and Strode, Division II acknowledged that a courtroom closure error allegation can be so minimal as not to implicate the defendant's right to a public trial. In that case the trial court ordered the defendant's young child who required a ventilator removed from the courtroom mainly because it was concerned that her presence, particularly given her medical condition, could distract the jury. Lormor, 154 Wn. App. at 389. The court noted that the first step in analyzing a claim of a violation of the right to public trial is to determine if the trial court's ruling implicated that constitutional right. *Id.* at 391. It found that even if a closure is determined to have occurred, it can be such that the right to public trial is not implicated. *Id.* In determining that exclusion of the defendant's daughter did not implicate his right to public trial, the court considered whether her presence would have served the purposes of the right to public trial, *i.e.*, to ensure that the prosecutor and the judge carried out their duties responsibly, to encourage witnesses to come forward, and to assist the defendant in selecting a jury. *Id.* at 394.

Shearer relies upon another Division II Court of Appeals case, State v. Leyerle, 158 Wn. App. 474, 242 P.3d 921 (2010), in asserting that in chambers questioning of one juror was not a de minimis violation. Leyerle was a split decision. The majority decision indicated it believed its decision was dictated by Division II's decision in State v. Paumier, 155 Wn. App. 673, 230 P.3d 212, *rev. granted*, 169 Wn.2d 1017 (2010), in which the court held that whenever there was a closure of the courtroom without the court first having considered alternatives to the closure and making appropriate closure findings, the defendant's right to public trial was violated and reversal of the conviction required. Paumier, 155 Wn. App. at 685.

The State, obviously, disagrees with the majority opinion in Leyerle that questioning one juror outside the courtroom is not a de minimis violation and one which entitles a defendant to a new trial. The State urges this Court to review the entire dissent in that case and to adopt its rationale that de minimis violations of the right to public trial do not necessitate reversal of the conviction and a new trial.¹¹ As noted by the dissent in Leyerle, the Paumier case was wrongly decided. (See further discussion *infra* at 19-20.)

¹¹ The Leyerle dissent also asserts that the questioning of the one juror in the public hallway was not a closure of the courtroom. However, the State concedes here that the in

Presley v. Georgia, ___ U.S. ___, 130 S.Ct. 721, 175 L.Ed.2d 675 (2010), relied on by the Paumier decision in reaching its conclusion that reversal is warranted whenever the court fails to consider alternatives and make findings regarding courtroom closure, does not preclude a de minimis analysis. See, People v. Bui, 107 Cal. Rptr. 3d 585 (Cal. App. 1 Dist. 2010) (“But *Presley* did not consider or address, either expressly or implicitly, the “de minimus (sic) rationale” or “triviality standard” recognized by both the California Supreme Court and several federal courts). Nothing in Strode or Momah likewise precludes this Court from finding that the closure had a de minimis effect on the proceedings.

In this case, one juror, juror no. 7, answered in general voir dire that she was a victim of and a witness to domestic violence. VDRP 37-38. When asked how she felt about it, she stated, “I don’t want to talk about it.” When asked why she didn’t want to talk about it, she asked if she could write it down instead, and indicated she did not want to talk about it in front of a bunch of strangers. VDRP 38. When the judge inquired if she’d be more comfortable discussing it with the judge and counsel in chambers, she answered yes. *Id.* The court then inquired:

Is this (sic) anyone in this courtroom who would have any objection if we leave the courtroom for a moment? If the

chambers questioning of the juror did constitute a closure of the courtroom and therefore does not address that issue. Leyerle, 242 P.3d at 928-29.

court reporter, counsel, and myself and the defendant went into chambers to ask some questions of Juror Number 7 in private?

Is there anyone here who would object at all to having that take place in that manner?

VDRP 39. There being no objection the judge, counsel and defendant went into chambers for seven minutes, and juror no. 7 disclosed that her baby grandson had been killed by his father in their family home three years before and informed the court she felt that experience would affect her view of the case. Supp CP ___, Sub Nom. 28 at 9; VDRP 39-40.

Defense counsel then moved to excuse the juror for cause, to which the State did not object and juror no. 7 was excused. Supp CP ___, Sub Nom. 28 at 9; VDRP 40-41, 119.

Here none of the values underlying the right to a public trial is implicated by the seven minute in-chambers colloquy with one prospective juror. None of the public, nor the defendant, expressed any objection to the in chambers questioning. The rest of the panel could have been tainted by hearing the details of another person's experience with domestic violence.¹² Requiring the one juror to state her concerns in public would not have encouraged any witnesses to come forward and would not have assisted the defendant in selecting a jury. In fact it's clear

¹² Juror no. 7 stated that she thought it would take longer than 3 years to even be able to talk to another person who had been a victim of domestic violence. VDRP40.

from the record that having the questioning in private assisted the defendant in selecting the jury, and eliminating a potentially biased juror, because juror no. 7 indicated she didn't want to talk about it and quite likely wouldn't have in public. Requiring her to talk about it in public would only have served to embarrass her, even assuming she would have relented and talked about it in public, and could potentially have prejudiced the venire against the defendant since he was accused of domestic violence. Such a de minimis closure did not implicate Shearer's right to public trial.

b. Even if Shearer's right to public trial was implicated by the in chambers questioning of one juror, under Momah reversal of the conviction is not warranted.

Although the trial court did not make specific findings regarding the Bone-Club factors, Shearer's counsel did not object when the court inquired if anyone objected to the in chambers questioning and there is no showing of prejudice to the defendant here as there was in Orange and Easterling. As such, no structural error warranting reversal occurred. As the court summarized in Momah:

... courts grant automatic reversal and remand for a new trial only when errors are structural in nature. An error is structural when it necessarily renders a criminal trial fundamentally unfair or an unreliable vehicle for determining guilt or innocence. In each case, the remedy must be appropriate to the violation.

Momah, 167 Wn.2d at 155-56 (emphasis added).

The Paumier majority recently held that the U.S. Supreme Court decision in Presley v. Georgia, resolved the issue left open by Momah and Strode, *i.e.*, what remedy, if any, is appropriate when the trial court does not specifically address the Bone-Club guidelines before ordering a closure of the courtroom. Paumier, 155 Wn. App. at 683, 685. The majority held that, under Presley, the appropriate remedy when a defendant's right to a public trial is violated is automatic reversal in all cases where the trial court fails to consider reasonable alternatives or to make findings appropriately justifying the closure. *Id.* at 685.

The majority's analysis of the impact of Presley upon Momah was flawed, as recognized by the dissent in that case and the dissent in Leyerle. *Id.* at 688-89 (J. Quinn-Brintnall dissenting); Leyerle, 242 P.3d at 933-34 (Hunt, J. dissenting). Presley was a per curiam decision in which the Supreme Court held the Georgia trial court violated the defendant's right to a public trial by excluding the public from the voir dire proceedings *over the defendant's objection*. Presley, 130 S.Ct. at 722 (emphasis added); *see also*, Reid v. State, 690 S.E.2d 177, 180-81 (Georgia 2010) (Presley, which held that trial courts are required to consider alternatives to closure even when they are not offered by the parties, was

distinguishable because the defendant in Presley had objected to the closure of voir dire). It was only in the face of the defendant's objections that the Presley court summarily determined the defendant's right to a public trial had been violated by the exclusion of the defendant's uncle. *See, State v. Bowen*, 157 Wn. App. 821, 829, 239 P.3d 1114 (2010) (Presley case addressed circumstances in which a party objected to the closure and does not control situation where defendant does not object to the closure at trial but attempts to use the closure on appeal to obtain a new trial). As a per curiam decision, Presley did not announce any new law and did not redefine the scope of the right to public trial beyond that which had previously existed, and certainly did not overrule the holding in Waller¹³ that the remedy must be appropriate to the violation. *See, People v. Bui, supra* ("As indicated by its summary per curiam disposition, we do not read *Presley* as defining any greater scope to the public trial right under either the First or Sixth Amendments than that already articulated in *Press-Enterprise* and *Waller*."). As noted by the Leyerle dissent, the Supreme Court in Presley cited *with approval* the Waller case a number of times within its decision. Leyerle, 242 P.3d at 932. Therefore, Paumier's conclusion that Presley superseded Momah's analysis and that a trial

¹³ Waller v. Georgia, 467 U.S. 39, 104 S.Ct. 2210, 81 L.Ed.2d 31 (1984).

court's failure to address the closure factors will always result in automatic reversal, *even where there was no objection below*, is mistaken.

Here, the reason for the court going into chambers, to address the juror's unwillingness to discuss her prior experience with domestic violence in a public courtroom, was obvious from the juror's and judge's statements. Shearer acknowledges that protecting a juror's privacy is a compelling interest but asserts that private questioning does not result in more honest answers. However, while juror no. 7 was not necessarily more "honest" in her answers in chambers, she was more *forthcoming* than she had been and would have been if required to answer the questions in a public forum.¹⁴ As was required by the second Bone-Club factor, everyone in the courtroom was given an opportunity to object. Apparently no one, including the defendant and defense counsel, did. The court's inquiry as to whether anyone objected demonstrates that it was cognizant of the defendant's right to public trial, as well as the public's right to open proceedings.¹⁵ If the judge had not permitted the juror to be questioned in

¹⁴ Shearer also asserts that the case did not call for questioning on "sensitive matters" as only felony harassment and a misdemeanor assault were charged. Shearer ignores the rather painful reality that some domestic violence victims experience. Certainly it cannot be doubted that some victims of domestic violence are embarrassed by their experience, find the matter to be an intensely personal issue for them, and do not wish to revisit or share the violence of their experience with strangers.

¹⁵ Shearer contends that judge did not consider alternatives to in-chambers questioning. However, it was clear that the juror did not want to talk about her experience in a courtroom in front of strangers. Employing the "preferred method" for individual voir dire, excusing the venire and the questioning the juror in an open courtroom, would not

chambers and the juror continued to refuse to discuss her domestic violence experience, it is highly likely the defense would have had to use one of its peremptory challenges to preclude her from sitting on the jury, instead of being able to excuse her for cause.¹⁶ A new trial would not be an appropriate remedy here because Shearer was not prejudiced by the minimal closure and it did not render Shearer's trial fundamentally unfair.

As the dissent expressed in Leyerle,

What wrong or prejudice did this two-minute hallway voir dire cause for Leyerle or the public that only a new trial can correct? How could a new trial, without this two-minute voir dire of a biased juror out of earshot of the venire, actually produce a fairer trial for Leyerle or a more open trial for the public?

...

If the United States Supreme Court refused to grant Waller a new trial to remedy an actual courtroom closure and exclusion of the public for seven days, only a fraction of which was necessary, how can the majority justify a new trial to "remedy" the two-minute hallway interview to ferret out a biased juror here?

have alleviated the juror's concerns about talking about the death of her baby grandson at the hands of his father in front of any other, non-venire, strangers that may have been present in the courtroom.

¹⁶ Shearer asserts he gained no benefit from the in-chambers questioning, that nothing was disclosed in chambers that would have tainted the rest of the venire. On the contrary, Shearer obtained information from the in-chambers questioning that revealed juror no. 7 would not be a good juror for him, which led to his motion to excuse her for cause. There is no guarantee that if they hadn't gone into chambers that the juror would have revealed the information she did that led to her being excused. Moreover, hearing about the death of someone's baby grandchild at the hands of his father certainly would be likely to lead to some of the venire pool feeling sympathetic to victims of domestic violence and wanting to express their sympathy for juror no. 7.

Leyerle, 242 P.3d 931. Similarly in our case, what wrong or prejudice did the seven minute in-chambers questioning that resulted in the juror being excused upon defense motion cause for the defendant that only a new trial can correct? The seven minute in chambers questioning here did not render Shearer's trial fundamentally unfair or an unreliable vehicle for determining his guilt or innocence. If anything it rendered his trial more fair as it resulted in the juror being excused upon defense motion for cause. If this Court were to grant a new trial in this case, this would be a windfall to the defendant, a result that the Supreme Court has held should not occur even if the defendant's right to public trial was violated in some manner.

2. Shearer's two attorneys were not ineffective for failing to object to the admission of the "Smith affidavit" as substantive evidence because the document was admissible under ER 801(d)(1).

Shearer claims that it was ineffective assistance for his attorney to fail to object to the admission of the "Smith affidavit" signed by the victim in this case. He also contends that the trial court erred in admitting the document and considering it as substantive evidence. However, he failed to object to its admission at trial, therefore he waived any error regarding its admission and is limited to asserting ineffective assistance of counsel. Counsel, Shearer had two of them, were not ineffective in failing to object

to admission of Honcoop's statement because it contained the requisite indicia of reliability to be admissible under ER 801(d)(1), and not just as a prior inconsistent statement. Shearer's ineffective of assistance counsel claim fails and his convictions should be affirmed.

Shearer first asserts that the trial court erred in admitting and considering Honcoop's statement as substantive evidence. However, defense counsel never objected when the document was initially admitted, nor did they request a limiting instruction for its use, either at the time of its admission, during the defense motion to dismiss after the State had rested, or as part of the instructions.¹⁷ RP 98, 403-07; CP 53-82. In fact, the defense motion to dismiss was not based on there not being any threat to kill, just that the threat was not a "true threat" and the threat to kill in Honcoop's statement only referred to Shearer threatening to kill himself, not her. RP 403-04. Having failed to object to its admission or use below, Shearer may not assert such error on appeal. *See, State v. Finch*, 137 Wn. 2d 792, 819, 975 P.2d 967 (1999) (without objection, evidentiary errors are not preserved for appeal).

Alternatively Shearer asserts ineffective assistance of counsel for both of his attorneys' failure to object to admission of the document and

¹⁷ If a party wants the jury's consideration of evidence to be limited to a specific purpose, that party has an obligation to request such a limiting instruction or they waive the issue. ER 105; *State v. Russell*, __ Wn.2d __ (Feb. 24, 2011), 2011 WL 662927 ¶8-9.

its use as substantive evidence. In order to demonstrate ineffective assistance of counsel, a defendant must show that (1) his counsel's representation fell below a minimum objective standard of reasonableness based on all the circumstances, and (2) there is a reasonable probability that but for counsel's unprofessional errors, the outcome would have been different. State v. Benn, 120 Wn.2d 631, 663, 845 P.2d 289 (1993), *cert. den.*, 510 U.S. 944 (1993); State v. Wilson, 117 Wn. App. 1, 15, 75 P.3d 573, *rev. den.*, 150 Wn.2d 1016 (2003). It is the defendant's burden to overcome the strong presumption that counsel's representation was effective. Wilson, 117 Wn. App. at 15; Strickland v. Washington, 466 U.S. 668, 690, 104 S. Ct. 2052, 80 L. Ed. 2d 674 (1984). Defendant must meet both parts of the test or his claim of ineffective assistance fails. State v. Mannering, 150 Wn.2d 277, 285-86, 75 P.3d 961 (2003). In order to show prejudice, a defendant must show that there is a reasonable probability that but for counsel's deficient performance, the result of the trial would have been different. State v. West, 139 Wn.2d 37, 42, 983 P.2d 617 (1999).

In order to prevail on an ineffective assistance of counsel claim based on counsel's failure to object, the appellant "must show (1) an absence of legitimate strategic or tactical reasons supporting the challenged conduct ...; (2) that an objection to the evidence would likely

have been sustained ...; and (3) that the result of the trial would have been different had the evidence not been admitted ...” State v. Saunders, 91 Wn. App. 575, 578, 958 P.2d 364 (1998).

In order for a recanting victim’s prior written statement to be admissible as substantive evidence, and not just as a prior inconsistent statement, the document must satisfy the requirements of ER 801(d)(1). A prior statement by a witness is not hearsay if

The declarant testifies at the trial or hearing and is subject to cross examination concerning the statement, and the statement is (i) inconsistent with the declarant's testimony, and was given under oath subject to the penalty of perjury at a trial, hearing, or other proceeding, or in a deposition, ...

ER 801(d)(1). In State v. Smith, 97 Wn.2d 856, 651 P2d 207 (1982) the Supreme Court set forth some parameters for a recanting victim’s prior written statement being admissible under ER 801(d)(1), which statements then became known as “Smith affidavits.” In addition to deciding what “other proceeding” means for purposes of ER 801(d)(1), the court chose to rely upon the concept of “reliability” in determining the admissibility of such evidence, rather than setting forth a broad rule. *Id* at 861. “In many cases, the inconsistent statement is more likely to be true than the testimony at trial as it was made nearer in time to the matter to which it relates and is less likely to be influenced by factors such as fear or forgetfulness.” *Id*. “Minimal guarantees of truthfulness” are necessary

before the statement is admissible. Examples of such include the statement being made before a notary, under oath and subject to penalty of perjury, as well as the statement being made in the witness's own words.

Id at 862. The Court concluded:

Each case depends on its facts with reliability the key. Here, the complaining witness-victim voluntarily wrote the statement herself, swore to it under oath with penalty of perjury before a notary, admitted at trial she had made the statement and gave an inconsistent statement at trial where she was subject to cross-examination. ER 801(d)(1)(i) is satisfied under the totality of the circumstances.

Id. at 863.

The Smith case has been interpreted as requiring the consideration of four factors in order to determine the reliability and thus admissibility of a statement under ER 801(d)(1):

(1) whether the witness voluntarily made the statement; (2) whether there were minimal guarantees of truthfulness; (3) whether the statement was taken as standard procedure in one of the four permissible methods for determining the existence of probable cause; and (4) whether the witness was subject to cross-examination when giving the subsequent inconsistent statement.

State v. Thach, 126 Wn. App. 297, 308, 106 P.3d 782, *rev. denied*, 155 Wn.2d 1005 (2005); *see also*, State v. Nelson, 74 Wn. App. 380, 387, 874 P.2d 170, *rev. denied*, 125 Wn.2d 1002 (1994). Here, Shearer only asserts that the first two factors were not met, *i.e.*, that the prior written statement

was not made voluntarily by Honcoop and that there were not minimal guarantees of its truthfulness.

A couple of cases have addressed these two factors. In State v. Nelson, the defendant asserted that the victim's statement was not voluntary, claiming the victim had been coerced or had a motive to lie in making the written statement because she claimed the police promised to release her as long as she named her pimp. The court concluded otherwise because the victim testified at trial that she had made the statement, and although she went a couple days later to the prosecutor's office to tell them she didn't want to proceed with charges, she testified she had voluntarily signed the affidavit. *Id.* The defendant also claimed that the statement did not meet the second factor because the victim had not been administered an oath or had the affidavit read to her. *Id.* The court determined that the statement, a declaration in conformance with RCW 9A.72.085, could be regarded as a sworn statement. *Id.* at 390. The court determined there was sufficient evidence that the victim knew that her statement was taken under penalty of perjury and therefore the second factor of minimal guarantees of truthfulness had been met. *Id.*

In State v. Thach the defendant also contended that the Smith factors had not been met and therefore the victim's statement was

inadmissible. The court however found the statement had been made voluntarily because the victim filled out the first page of the statement and testified that she had written and signed her statement soon after the assault, even though the officer filled out the second page.¹⁸ Thach, 126 Wn. App. at 304, 308. The court also found that there were sufficient guarantees of truthfulness where the victim testified that she wrote part of the statement herself, signed the document under penalty of perjury, and the officer witnessed her sign the statement *Id.* at 308.

Similarly in our case, Honcoop's written statement was voluntary and had sufficient guarantees of truthfulness to be admissible as substantive evidence under ER 801(d)(1). Honcoop testified that she walked into work the morning after the assault crying and very upset. RP 74. She immediately contacted her manager Steve Austin, in whom she had confided before when she had had arguments with Shearer, to tell him what happened. RP 74-76. While she testified she had felt pressured by Austin into calling the police, that she hadn't been the one to dial the phone, and that she had felt pressured by Officer Baca into making the statement, she admitted that she was the one who spoke to the 911

¹⁸ The victim was unable to fill out the second page because she was receiving medical care.

operator and told them she'd been in a domestic dispute with her boyfriend, that she wrote the statement herself, that she had looked it over before signing it and had had an opportunity to make changes to it. RP 82, 84, 87, 92, 95-98, 100. While she claimed at trial that she believed that Austin would have fired her if she didn't report the domestic assault, she admitted he was not in the room the entire time Officer Baca spoke with her, that she had asked to speak to Austin when she arrived at work in order to discuss a personal matter, and that she did so because she wanted things with Shearer to change. RP 74-77, 156-57. She also admitted that she had called the police back to report additional bruising about a week or so after the assault and that she did not write her recantation letters until about a month later. RP 155, 167.

Austin testified that Honcoop approached him when she first arrived at work and told him that Shearer had hurt her really bad the night before, that she was guarding her shoulder, and holding her arm and back and appeared very scared, not angry. RP 180-81. When he was able to speak with her privately in the office, she was crying almost hysterically and he noticed some bruising around her neck. RP 181-82, 203. He encouraged her to make changes in her life and to call the police, but then had to leave the office because he was so upset about what she told him that he was becoming ill. RP 182. When he went back in, Honcoop was

still crying so hard she was difficult to understand. RP 183. He tried to console her and after a little while, she gathered her strength and was able to call the police. RP 183. He testified he did not force her to call the police, and that in fact she wasn't able to tell him all that had happened until after she had called the police. RP 183-84. He testified he did not dial the phone to contact police, although he recommended that she call them. RP 200.

Officer Baca testified that when he arrived Honcoop was crying uncontrollably, so much so that he had to raise his voice and tell her to stop crying. RP 272-73. She then calmed down and was willing to talk with him. RP 273-74. After she told him what had happened, Officer Baca gave her an opportunity to write a statement to describe what happened. RP 282. He told her to describe everything about the incident. RP 282-83. He testified she wrote the statement herself and that she was given an opportunity to review it and make changes to it before signing. RP 283. Officer Baca testified that Honcoop did not have to write the statement that day. RP 346.

This record shows that Honcoop voluntarily wrote the statement. The statement is in her own writing, she was given an opportunity to review it and make changes. While she asserted at trial that she felt

pressured at the time to make the statement, the evidence indicates otherwise.

There were also minimal guarantees of truthfulness because she made the statement under penalty of perjury. On the first page of the statement, it states:

I Lynn Honcoop, certify or declare, under penalty of perjury under the laws of the State of Washington, that the following 2pgs statement voluntarily given by me is true and correct. I have read the statement or it has been read to me and I know and understand the contents of the statement.

Ex. 2. Officer Baca signed under this statement as well as Honcoop. It states that she signed it in Bellingham on October 6, 2009 at 0930. Ex. 2. This verbiage complies with the requirements of RCW 9A.72.085.¹⁹ She also signed the second page of the statement. Honcoop testified that she

¹⁹ RCW 9A.72.085 provides in part:
Whenever, under any law of this state or under any rule, order, or requirement made under the law of this state, any matter in an official proceeding is required or permitted to be supported, evidenced, established, or proved by a person's sworn written statement, declaration, verification, certificate, oath, or affidavit, the matter may with like force and effect be supported, evidenced, established, or proved in the official proceeding by an unsworn written statement, declaration, verification, or certificate, which:
(1) Recites that it is certified or declared by the person to be true under penalty of perjury;
(2) Is subscribed by the person;
(3) States the date and place of its execution; and
(4) States that it is so certified or declared under the laws of the state of Washington.
The certification or declaration may be in substantially the following form:
"I certify (or declare) under penalty of perjury under the laws of the State of Washington that the foregoing is true and correct":
.....
(Date and Place) (Signature)

signed and dated it *after* she wrote it, while Officer Baca was present. She acknowledged at trial that she signed the statement under penalty of perjury. RP 99. She also testified that the information in the statement was the same information she told Officer Baca that day. RP 100. While she testified on cross examination that she lied to law enforcement, she also acknowledged on redirect that she knew she could be charged with perjury for lying under oath, that she knew she could get in trouble for lying in the written statement. RP 147, 151-52. Officer Baca testified that he told her that what she wrote in the statement had to be the truth and that he doesn't allow anyone to sign the statement until after the person has written the statement and he has gone over the statement with them. RP 346. Officer Baca also testified that he discussed the penalty of perjury section with her and asked her if everything in it was true, and after this discussion Honcoop had signed the statement. RP 347.

Under Nelson, where as here a witness signs a statement that complies with RCW 9A.72.085 and the evidence demonstrates that the witness knew her statement was signed under penalty of perjury, the statement meets the second factor regarding the minimal guarantees of truthfulness to be admissible under ER 801(d)(1). Moreover, the information in her written statement matched what she told both Austin and Baca. In fact, the only difference between her written statement and

her testimony at trial about what happened was that she asserted the statements in the document that Shearer hit her 5-6 times and that he pulled her up by hair weren't true²⁰ and that her reference to "I" in the statement meant that "Greg," not Honcoop, would be dead if she called the police. RP 49-65, 110-11, 120, 127-28; Ex. 2. Honcoop's statement here complied with RCW 9A.72.085, she wrote it knowing that it had to be the truth and that she was signing it under penalty of perjury. As such, it is sufficient to meet the second factor regarding minimal guarantees of truthfulness.

Shearer asserts that this case is more analogous to State v. Nieto, 119 Wn. App. 157, 79 P.3d 473 (2003), than Nelson or Smith, and therefore Honcoop's statement was inadmissible under ER 801(d)(1). He first argues that neither Austin nor Baca sought the expertise or authority of a notary, however in footnote 2 of his brief Shearer explicitly states that he "does not base his challenge to the statement's reliability on the absence of an oath administered by a notary or the form of an affidavit" because the statement was in compliance with RCW 9A.72.085. Appellant's Brief at 17. Given that concession, it should be of no moment that the officer did not seek the expertise of a notary before Honcoop signed the statement.

²⁰ Honcoop testified that he only pulled gently on her hair to get her attention. RP 111.

Next he argues the statement wasn't reliable because there wasn't any evidence that Honcoop read the certification language at the time she wrote and signed the statement and that she only understood that she could be charged with false reporting. However Officer Baca testified that he discussed the penalty of perjury section with her before she signed the statement and asked her if it was true. Honcoop also testified that she signed the statement under penalty of perjury, and while she may not of understood the nuances of perjury, she was aware that it was a crime to make a false statement to the police.

The facts of this case are distinguishable from Nieto as well. After noting that an unsworn statement satisfies the oath requirement if it is signed and in compliance with the requisites of RCW 9A.72.085, the court found that form statement troublesome in that case because the oath language, stating that the "foregoing" was true and correct, was set forth at the bottom of the first page, and at the top of the remaining pages, and therefore it was ambiguous as to what "foregoing" referred to. Nieto, 119 Wn. App. at 161-62. It determined that because of the ambiguity, it could not conclude that the statement satisfied the oath requirement: "The nature and placement of the boilerplate language does little to aver that the statement's content is true." Id. at 162. There is no such ambiguity with the verbiage of Honcoop's declaration nor its placement: she makes her

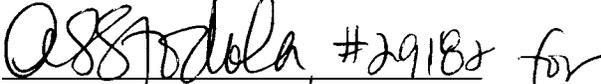
declaration, under penalty of perjury, at the top of the first page, referencing that the *following* 2 pages are true and correct.

In this case it is not likely that an objection to the admission of the Honcoop's written statement for consideration as substantive evidence would have been sustained because the document was admissible under ER 801(d)(1). The document here was signed under penalty of perjury, the victim acknowledged that she wrote the statement and signed it under penalty of perjury, and the circumstances surrounding its creation indicate that it was made voluntarily, had the minimal guarantees of truthfulness and was otherwise reliable. Shearer's claim of ineffective assistance of counsel fails because there is no likelihood that an objection to its consideration as substantive evidence would have been sustained.

E. CONCLUSION

For the foregoing reasons, the State requests that Shearer's appeal be denied and his convictions affirmed.

Respectfully submitted this 28th day of February, 2011.


HILARY A. THOMAS, WSBA#22007
Appellate Deputy Prosecuting Attorney
Attorney for Respondent

CERTIFICATE

I certify that on this date I placed in the mail a properly stamped and addressed envelope, or caused to be delivered, a copy of the document to which this Certificate is attached to this Court and Appellant's attorney, ANDREW P. ZINNER, addressed as follows:

NIELSEN, BROMAN & KOCH, PLLC
1908 E. MADISON STREET
SEATTLE, WA 98122

Sydney A. Ross
NAME

02/28/2011
DATE