

NO. 37086-7-II

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

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STATE OF WASHINGTON,

Respondent,

v.

MICHAEL LEE LEYERLE,

Appellant.

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

The Honorable James Stonier, Judge

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APPELLANT'S OPENING BRIEF

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STATE OF WASHINGTON  
BY *[Signature]*

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COURT OF APPEALS  
DIVISION II

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**A. ASSIGNMENTS OF ERROR**

1. THE TRIAL COURT ERRED BY CONDUCTING VOIR DIRE OF A JUROR IN A HALLWAY OUTSIDE OF THE COURTROOM.
2. THE TRIAL COURT ERRED BY INTERPRETING DEFENSE COUNSEL'S STATEMENT THAT DEFENDANT LEYERLE DID NOT WANT TO JOIN THE COURT IN QUESTIONING A JUROR IN THE HALLWAY AS A WAIVER OF HIS RIGHT TO A PUBLIC TRIAL.
3. THE TRIAL COURT ERRED WHEN IT CONDUCTED VOIR DIRE IN A HALLWAY OUTSIDE OF THE COURTROOM WITHOUT FIRST OBTAINING A KNOWING, INTELLIGENT, AND VOLUNTARY WAIVER OF MR. LEYERLE'S CONSTITUTIONAL RIGHT TO A PUBLIC TRIAL.
4. THE TRIAL COURT ERRED BY CLOSING THE COURTROOM DURING VOIR DIRE WITHOUT FIRST ENGAGING IN A *BONE-CLUB*<sup>1</sup> ANALYSIS.

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<sup>1</sup> *State v. Bone-Club*, 128 Wn.2d 254 , 906 P.2d 325 (1995)

**5. THE TRIAL COURT ERRED IF IT PRESUMED THAT MR. LEYERLE COULD WAIVE THE PUBLIC'S RIGHT TO AN OPEN TRIAL.**

**B. ISSUES PERTAINING TO ASSIGNMENT OF ERROR**

**1. DID THE TRIAL COURT DENY MICHAEL LEYERLE A PUBLIC TRIAL BY CONDUCTING VOIR DIRE OF A JUROR IN THE HALLWAY OUTSIDE OF THE COURTROOM?**

**C. STATEMENT OF THE CASE**

Michael Leyerle was tried to a jury on November 16, 2007. RP Volume I, II Trial 5-176<sup>2</sup>. Cowlitz County Superior Court Judge James Stonier presided. Id. Mr. Leyerle was represented by attorney Randolph Furman. Id.

During voir dire, Judge Stonier asked if there were any jurors who felt that they could not try the case impartially. RP Voir Dire<sup>3</sup> 18. A prospective juror, Mr. O'Connor did something to indicate he could not be impartial.<sup>4</sup> RP Voir Dire 19. Judge Stonier asked Mr.

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<sup>2</sup> "RP Volume I, II Trial" refers to the two-volume verbatim report of the proceedings for the trial held on November 16, 2007. These volumes were transcribed by Three Rivers Transcription.

<sup>3</sup> "RP Voir Dire" refers to the supplemental verbatim of the voir dire only prepared by transcriptionist Sharon A. Ball.

<sup>4</sup> What Mr. O'Connor did to catch the court's attention is not clear from the record.

O'Connor and counsel to step out in the hallway with him. RP Voir Dire 18. Judge Stonier stepped out into the hallway with the prosecutor, Mr. Furman, and Mr. O'Conner. RP Voir Dire 19. Judge Stonier asked Mr. Furman if Mr. Leyerle wanted to join them in the hallway. RP Voir Dire 19. Although Mr. Furman's answer at that point was inaudible, before the court returned to the courtroom, Mr. Furman told the court that his client did not want to be with them in the hallway. RP Voir Dire 20.

A jury was selected. The case was tried. RP Volume I Trial 5-176. Mr. Leyerle was convicted of a single count of possession of methamphetamine, CP 22, and later sentenced within his standard range. CP 25, 28.

#### **D. ARGUMENT**

##### **1. MICHAEL LEYERLE IS ENTITLED TO A NEW TRIAL BECAUSE THE TRIAL COURT DENIED HIM HIS CONSTITUTIONAL RIGHT TO A PUBLIC TRIAL.**

Both the Sixth Amendment of the United States Constitution and Article I, Section 22 of the Washington State Constitution guaranteed a criminal defendant the right to a public trial. *State v. Brightman*, 155 Wn.2d 506, 514, 122 P.3d 150 (2005). The right to

a public trial extends to jury selection. *In re Pers. Restraint of Orange*, 152 Wn.2d 795, 804-05,100 P.3d 291 (2004); *State v. Bone-Club*, 128 Wn.2d 254, 259, 906 P.2d 325 (1995). Article I, Section 10 of the Washington State Constitution provides that “[j]ustice in all cases shall be administered openly, and without unnecessary delay.” This provision secures the public's right to open and accessible proceedings. *State v. Easterling*, 157 Wn.2d 167, 174, 137 P.3d 825 (2006). While the public trial right is not absolute, it is strictly guarded to assure that proceedings occur outside the public courtroom only in the most unusual circumstances. *Easterling*, 157 Wn.2d at 174-75.

A claimed violation of the right to a public trial is reviewed de novo. *Easterling*, 157 Wn.2d at 173-74. A criminal defendant's right to a public trial is an issue of constitutional magnitude that may be raised for the first time on appeal. *Orange*, 152 Wn.2d at 800; *Bone-Club* 128 Wn.2d at 257; RAP 2.5(a).

Our Supreme Court has made clear that the trial court must engage in the five-part analysis set out in *Bone-Club*, 128 Wn.2d 258-59, before conducting all or a portion of voir dire outside of the public forum of the courtroom. *Orange*, 152 Wn.2d 795. Here, the trial court conducted a portion of voir dire outside of the public

forum in a hallway outside of the courtroom and outside of the public eye without engaging in the necessary *Bone-Club* analysis.

*Bone-Club* and later *Orange* set out the standards for closing all or any portion of a criminal trial. *Bone-Club*, 128 Wn.2d at 258-59; *Orange*, 152 Wn.2d at 805. The court in *Bone-Club* adopted five workable guidelines drawn from case law construing Washington Constitution, Article I, Section 10 and the protection of a criminal defendant's rights under Article I, Section 22. *Bone-Club*, 128 Wn.2d at 258-60; *see also Seattle Times Co. v. Ishikawa*, 97 Wn.2d 30, 36-39, 640 P.2d 76 (1982) (setting forth five-part analysis under Article I, Section 10.)

The court in *Bone-Club* set forth the necessary analysis:

1. The proponent of closure or sealing must make some showing [of a compelling interest], and where that need is based on a right other than an accused's right to a fair trial, the proponent must show a 'serious and imminent threat' to that right.
2. Anyone present when the closure motion is made must be given an opportunity to object to the closure.
3. The proposed method for curtailing open access must be the least restrictive means available for protecting the threatened interests.
4. The court must weigh the competing interests of the proponent of closure and the public.

5. The order must be no broader in its application or duration than necessary to serve its purpose.”

*Bone-Club*, 128 Wn.2d at 258-59.

The five-part analysis includes both substantive and procedural requirements. *Orange*, 152 Wn.2d at 807. The court in *Ishikawa* made clear that the trial court must weigh the competing constitutional interests and enter appropriate findings and conclusions that should be as specific as possible before closing the courtroom. *Ishikawa*, 97 Wn.2d at 38. Here, the trial court did not identify the relevant considerations or enter findings and conclusions on the necessary factors. This is “one of the limited classes of fundamental rights not subject to harmless error analysis.” *Easterling*, 157 Wn.2d at 181; see also *State v. Marsh*, 126 Wash. 142, 147, 217 P. 705 (1923) (holding that when a defendant is denied a public trial, “the law conclusively presumes that he has suffered an actual injury” (quoting *People V. Yeager*, 113 Mich. 228, 230, 71 M.W. 491 (1998))); *Waller v. Georgia*, 467 U.S. 39, 104 S. Ct. 2210, 81 L. Ed. 2d 31 (1984) (recognizing denial of public trial right as structural error). The presumptive remedy is a new trial. *Orange*, 152 Wn.2d at 814.

It is assumed that the State will argue that Mr. Leyerle waived his right to challenge the denial of a public trial by not accepting his attorney's invitation to join the court and counsel in the hallway when prospective juror O'Connor was questioned. However, the failure to assert this right at trial does not effect a waiver, nor free the court from its independent obligation to consider public trial rights before closing all or a portion of the proceedings. *Brightman*, 155 Wn.2d at 514-15; *Bone-Club*, 128 Wn.2d at 257, 261.

[A]ny waiver must be addressed under the *Bone-Club* analysis. A constitutional waiver of some trial rights may be inferred from conduct. See *State v. Thomas*, 128 Wn.2d 553, 559, 910 P.2d 475 (1996) (noting waiver of right to testify or right to self-representation may be found when defendant does not take the stand or appears through counsel). The right to a public trial has never been viewed in this context. The distinct nature of the public trial right is clear from the rigor of the constitutional analysis required under *Bone-Club*. It encompasses not simply the defendant's individual interest in being present, but also the public's interest. *Bone-Club*, 128 Wn.2d at 261; see also *Easterling*, 157 Wn.2d at 187 (observing that "the constitutional requirement that justice be administered openly is not just a right held by the defendant. It is a constitutional obligation of the courts") (Chambers, J., concurring). Accordingly, the burden is on the trial court to affirmatively provide the defendant and members of the public an opportunity to object. See *Easterling*, 157 Wn.2d at 176 & n.8. There is no meaningful opportunity to object "unless the court informs potential objectors of the nature of the asserted interests." *Bone-Club*, 128 Wn.2d at 261; *Ishikawa*, 97 Wn.2d at 39.

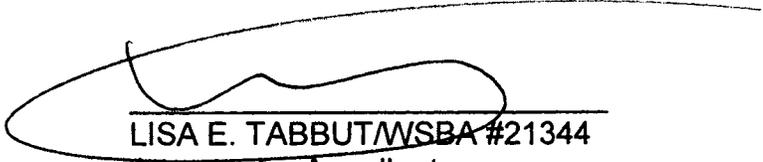
*State v. Duckett*, 141 Wn. App. 797, 173 P.3d 948 (2007).

In our case, Judge Stonier never advised Mr. Leyerle of his public trial right or asked him to waive it. While Mr. Leyerle was apparently told by defense counsel that he had the right to be present during the individual questioning of prospective juror O'Connor, and may have waived that right, that is all he waived. Because the trial court never advised Mr. Leyerle of his public trial right or asked him to waive it, he could not have made a knowing, intelligent, and voluntary waiver of that constitutional right under Washington Constitution, Article I, Sections 10 and 22 and the Sixth Amendment. And certainly Mr. Leyerle could not waive the public's right to an open trial. It is the State's burden to demonstrate that Mr. Leyerle made a voluntary, knowing, and intelligent waiver of a constitutional right. *State v. Sweet*, 90 Wn.2d 282, 286, 581 P.2d 579 (1978) (waiver most clearly shown by a demonstration in the record that the court questioned the defendant about his understanding of his constitutional right to appeal and his intentions with regard to an appeal). The State cannot do that with the record before this court.

**E. CONCLUSION**

The trial court violated Mr. Leyerle's public trial right by conducting a portion of voir dire in chambers without first weighing the necessary factors. Prejudice is presumed, and the remedy is a new trial. *Bone-Club*, 128 Wn.2d at 261-62.

Respectfully submitted this 7<sup>th</sup> day of July, 2008



LISA E. TABBUT/WSBA #21344  
Attorney for Appellant

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

STATE OF WASHINGTON,	)	No. 37086-7-II
	)	
Respondent,	)	
	)	AFFIDAVIT OF MAILING
vs.	)	
	)	
MICHAEL LEE LEYERLE,	)	
	)	
Appellant.	)	

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LISA E. TABBUT, being sworn on oath, states that on the 7<sup>th</sup> of July 2008, affiant deposited in the mails of the United States of America, a properly stamped envelope directed to:

Susan I. Baur  
Cowlitz County Prosecuting Attorney  
312 S.W. First Avenue  
Kelso, WA 98626

And

Michael L. Leyerle  
231 - 20th Avenue, #2,  
Longview, WA 98632

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DIVISION II

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STATE OF WASHINGTON

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**LISA E. TABBUT**  
ATTORNEY AT LAW

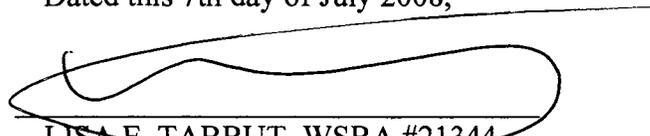
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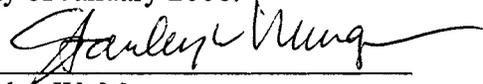
- (1) APPELLANT'S BRIEF
- (2) AFFIDAVIT OF MAILING (PA only)

Dated this 7th day of July 2008,



LISA E. TABBUT, WSBA #21344  
Attorney for Appellant

SUBSCRIBED AND SWORN to before me this 11th day of January 2008.



Stanley W. Munger  
Notary Public in and for the  
State of Washington  
Residing at Longview, WA 98632  
My commission expires 05/24/12

