

FILED
COURT OF APPEALS
DIVISION II

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STATE OF WASHINGTON

BY: *cm*

NO. 37086-7-II
Cowlitz Co. Cause No. 07-1-01025-1

**COURT OF APPEALS, DIVISION II
OF THE STATE OF WASHINGTON**

STATE OF WASHINGTON,

Respondent,

v.

MICHAEL LEE LEYERLE

Appellant.

BRIEF OF RESPONDENT

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I. ISSUE

Whether the voir dire of an individual juror violated the appellant's right to a public trial where the appellant's attorney waived the appellant's right to be present at the individual voir dire; where there were no spectators or members of the public that were actually present in the courtroom prior to or during the individual voir dire; and where the individual voir dire was video and audio recorded so that members of the public could hear and see all that occurred during the individual voir dire?

II. STATEMENT OF THE CASE

The appellant was convicted in a jury trial back on November 16, 2007, in Cowlitz County Superior Court. The appellant was represented by Randy Furman during the trial. Judge Stonier was the trial judge. RP Volume 1 and II Trial 5-176.

During voir dire, Judge Stonier asked all of the prospective jurors if they could evaluate the facts of the case in an impartial manner. RP Voir Dire 18. A prospective juror, Mr. O'Conner, indicated to Judge Stonier that he would like to say something about his ability to be impartial. RP Voir Dire 19. Judge Stonier asked both Mr. Furman and the deputy prosecutor to step out into the hallway with Mr. O'Conner, the prospective

juror. The appellant's defense attorney indicated to Judge Stonier that his client had waived his right to be present during the individual voir dire of Mr. O'Conner. More importantly, Judge Stonier and the deputy prosecutor both noted that there were no "spectators" (members of the public) in the courtroom who were in any way excluded from the individual voir dire of Mr. O'Conner. RP Voir Dire 19-21. Finally, the entire individual voir dire process was both audio and video recorded in the hallway outside of the courtroom on the "For the Record System", which was and is available to members of the public to view upon request.

Mr. O'Conner was excused for cause, and the trial proceeded. The appellant was later found guilty.

III. ARGUMENT

The approach used in the present case was the functional equivalent of the approach recently suggested in *State v. Erickson*, 189 P.3d 245, 248 (2008) at Footnote 2. Namely, that:

Although we note that a courtroom closure requires a *Bone-Club* analysis, here the trial court could have followed a different procedure not implicating *Bone-Club*. It had already excused all other prospective jurors from the courtroom; questioning of individual jurors regarding sensitive topics separate from other prospective jurors could have then taken place in open court. *See State v. Vega*, 144 Wn.App. 914, 184 P.3d 677-79 (2008). Such an approach is not a closure of the courtroom and it secures the right to a public trial.

Moreover, the Court further stated that, “A trial court’s failure to undertake the *Bone-Club* analysis, which directs the trial court to allow anyone present an opportunity to object to the closure, undercuts the guarantees enshrined in both article I, section 10 as well as article 1, section 22. (citation omitted, emphasis added).

In the present case, the appellant waived his right to be present during the individual voir dire of Mr. O’Conner. Moreover, there were no spectators in the courtroom prior to and during the time of the individual voir dire of Mr. O’Conner. No member of the public was in fact excluded from the voir dire process. Moreover, the individual voir dire was audio and video recorded. The public and the appellant had access to this recording. Therefore, the right to a public trial was not vitiated by the individual voir dire proceeding.

IV. CONCLUSION

For the foregoing reasons the respondent respectfully requests that the Court finds that the right to a public trial was not abridged by the de minimus contact with the prospective juror in that there were no members of the public that were in fact excluded, the appellant waived his right to be present, and the entire procedure was both audio and video

recorded and available to the general public. Accordingly, the respondent requests that the Court affirm the appellant's conviction.

RESPECTFULLY SUBMITTED this 7th day of November, 2008.

SUSAN I. BAUR
Prosecuting Attorney

By: Jeffrey N. Riback
JEFFREY R. RIBACK/WSBA #15952
Representing Respondent

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STATE OF WASHINGTON
BY: *cm*

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DIVISION II

STATE OF WASHINGTON,)
)
 Respondent,)
v.) NO. 37086-7-II
) 07-1-01025-1
MICHAEL LEE LEYERLE,) AFFIDAVIT OF MAILING
)
 Appellant.)

JULIE DESPAIN, being first duly sworn, on oath deposes and says: That on November 7, 2008 November 6, 2008, I deposited in the mails of the United States of America a properly stamped and addressed envelope directed to the following

LISA TABBUT
ATTORNEY AT LAW
P.O. BOX 1396
LONGVIEW, WA 98632-7822

COURT OF APPEALS
950 BROADWAY, SUITE 300
TACOMA, WA 98402

each envelope containing a copy of the following documents:

- 1. BRIEF OF RESPONDENT
- 2. Affidavit of Mailing.

Julie Despain

JULIE DESPAIN

SUBSCRIBED AND SWORN to before me this 7th day of November, 2008.

Fredricka Moore

Notary Public in and for the State
of Washington residing in Cowlitz
Co. My commission expires: *02 09 10*