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COURT OF APPEALS
DIVISION II

03 SEP -4 11:55

STATE OF WASHINGTON
BY *Ms*
DEPUTY

No. 37244-4-II
COURT OF APPEALS, DIVISION II
OF THE STATE OF WASHINGTON

STATE OF WASHINGTON,

Respondent,

v.

DOUGLAS D. McDONALD,

Appellant.

APPEAL FROM THE SUPERIOR COURT OF THE
STATE OF WASHINGTON FOR MASON COUNTY

The Honorable James B. Sawyer, II, Trial Court Judge
Cause No. 07-1-00378-9

BRIEF OF RESPONDENT

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09-01-08

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A. ASSIGNMENTS OF ERROR

1. The court denied Mr. McDonald his right to a public trial and the public's right to open court proceedings as guaranteed by the First and Sixth Amendment, as well as Article I, §§ 10 and 22 of the Washington Constitution.
2. Violation of U.S. Constitution Sixth Amendment [,] violation of Washington State Constitution, Article I § 10 "Administration of Justice [,] violation of Washington State Constitution, Article I § 22 "Rights of the Accused" [,] violation of Washington Court Rules CrR 3.3(c)(2)(i), (d)(2), (e)(3),(g).
[Statement of Additional Grounds 1]

B. ISSUES PERTAINING TO ASSIGNMENTS OF ERROR

1. Was McDonald's right to a public trial violated when the courtroom was never closed?
2. Were McDonald's speedy trial rights violated under CrR 3.3 when his trial commenced in a timely fashion?

C. EVIDENCE RELIED UPON

The official Report of Proceedings will be referred to as "RP."

The Clerk's Papers shall be referred to as "CP."

D. STATEMENT OF THE CASE

1 & 2. Procedural History & Statement of Facts. Pursuant to RAP 10.3(b), the State accepts McDonald's recitation of the procedural history and facts and adds the following:

McDonald was charged on August 8, 2007, with one count of vehicular homicide, all three alternatives, in Mason County Superior Court. CP 4. He was arraigned on that charge on August 20, 2007. CP 7. On September 17, 2007, McDonald's attorney requested a continuance, and his next hearing was held on October 1, 2007. CP 22. Counsel for McDonald requested a Campbell continuance on October 5, 2007, and the trial court set his readiness hearing for October 15, 2007. CP 23, 24. On October 15, 2007, McDonald's attorney requested a continuance, the trial court advised that interviews should be scheduled, and the case was continued to October 19, 2007. CP 28.

On October 19, 2007, the State noted that McDonald's attorney was currently in trial in State v. Balaski, 07-1-00342-8, and unable to start trial that day. RP Vol. I, 1: 8-10; 2: 1-2. On October 19, the State also noted that the deputy prosecuting attorney handling McDonald's case was on a pre-planned vacation and that McDonald's time for trial was in an excluded period. RP Vol. I, 2: 6-8. The trial court found that an excluded period would end when that deputy prosecutor returned on October 23, 2007. RP Vol. I, 2: 11-15. As the trial court reasoned:

Under the court rule, once the excluded period ends there is an additional thirty days to bring the matter to trial, which will actually take us to November 26th, because the thirtieth day is actually Thanksgiving, and then of course there's no

court on Friday and the weekend, so November 26th will be the new final start date. RP Vol. I, 2: 19-24.

As of October 19, 2007, McDonald's new final start date was set for November 26, 2007. RP Vol. I, 3: 4. McDonald had a pretrial hearing on November 9, 2007, and the written order from that hearing instructed him to be ready for trial on November 13, 2008. CP 34.

McDonald appeared in court again on November 28, 2007, for a status check regarding the excluded period, as the deputy prosecutor assigned to his case remained in trial on a separate matter. RP Vol. I, 4: 1-15. Ongoing discovery issues were voiced to the trial court, defense counsel noted that he had a pre-paid CLE to attend on December 7, 2007, and that he was waiting to finish interviewing witnesses. RP Vol. I, 6: 3-13. On November 28, 2007, the trial court made the following record regarding the ongoing excluded period:

...[T]he [c]ourt is simply making the record of yes, we are in an excluded period. That excluded period will end when the deputy prosecutor is again available. Right now, he's still finishing up that other trial, and we need to get your [defense] investigation finished. The indication is that this case should be targeted for next week if that's possible; however, understand that with respect to the excluded period, as soon as the deputy prosecutor is out of that trial, then there's a thirty-day window to try your case in, essentially. RP Vol. I, 7: 20-25; 8: 1-3.

Of importance, McDonald's attorney made a request to expend public funds on November 28 "for 10 additional hours of investigative

services...” CP 37. The trial court next entered an order on December 10, 2007, stating that the excluded period ended on December 7, 2007. CP 41. McDonald’s trial began on December 12, 2007, when the jury selection commenced. RP Vol. I, 10: 1-9.

When the trial court judge brought the venire into the courtroom on December 12, 2007, he took considerable time to explain why they were there and how jury selection would work. RP Vol. VI, 3-8. In addressing how in chambers voir dire might proceed, the trial court judge engaged in a colloquy with the State and defense in open court:

Trial court: Counsel, do either of you have an objection to the jurors being allowed to step into chambers to take up questions that they may be uncomfortable with out here in the open courtroom or to deal with issues of their inability to be fair and impartial?

Mr. Schuetz: The State has no such objection.

The Court: Defense?

Mr. Sergi: No, sir. RP Vol. VI, 8: 12-19.

The trial court then went one step further and posited a general question to anyone in the courtroom:

Do we have any members of the public that would object to the opportunity of the jurors to step back into chambers to discuss issues that they may be uncomfortable with out here in the open courtroom, or to address matters where they have indicated that they could not otherwise be fair and impartial? You’re all looking at me like, what is he talking about? Well, I’ll explain. RP Vol. VI, 8: 19-25.

Following this explanation that McDonald correctly recited in his brief,
the trial court judge summarized for the venire:

Again, let's go back to what it is we're trying to accomplish is thirteen people, open-minded, fair, impartial, make their decision based on the evidence and the law and not on something else that might exist in their past, right?
RP Vol. VI, 9: 8-12.

¹During voir dire, ten prospective jurors were taken into chambers for individual questioning and voiced a variety of concerns:

- (1) No. 3, involvement as an EMT and volunteer firefighter
[RP 11: 19-25, 12: 1-16];
- (2) No. 28, father killed in traffic accident
[RP 12: 17-25; 13: 1-25; 14: 1-18];
- (3) No. 31, brother killed by drunk driver
[RP 14: 19-25; 15: 1-25; 16: 1-25; 17: 1-6];
- (4) No. 42, loss of relatives from "alcohol driving"
[RP 17: 14-25; 18: 1-19];
- (5) No. 50, issues with people drinking and driving
[RP 18: 20-25; 19: 1-25; 20: 1];
- (6) No. 54, alcohol abuse within family and does not tolerate alcohol [RP 20: 2-25; 21: 1-19];
- (7) No. 57, heard about a fatality accident in the area
[RP 21: 25; 22: 1-25; 23: 1-20];
- (8) No. 36, questioned whether McDonald had been convicted of DUI, impartiality issues [RP 23: 23-25; 24: 1-25; 25: 1-13];

¹ All citations to the RP in this section are from Volume V.

- (9) No. 44, admitted prior conviction for DUI from 1987 [RP 40: 23-25; 41: 1-25; 42: 1-16]; and
- (10) No. 48, admitted being stopped for DUI in the 1970s, no conviction [RP 42: 18-25; 43: 1-15].

Only one of these prospective jurors who went into chambers for voir dire, Ms. Bowen, No. 48, was actually seated on McDonald's jury². CP 43, 50.

A jury was empanelled, the case was tried, and McDonald was found guilty as charged of vehicular homicide, all three alternatives, on December 18, 2007. RP Vol. II, 363: 11-25; 364: 1-5.

3. Summary of Argument

The State asks the Court for a stay pending review in McDonald's case until the State Supreme Court renders decisions in State v. Strobe, No. 80849-0 and State v. Momah, 81096-6, both of which squarely address the issue of in chambers voir dire. These two cases were argued before the State Supreme Court on June 10, 2008.

The State also asks the Court to adopt the rationale of Momah and find that limited voir dire in chambers does not violate a defendant's right to a public trial. The voir dire for the ten prospective jurors that were brought into chambers in McDonald's case was both brief and conducted in the presence of all parties. This limited voir dire in chambers did not

² Ms. Bowen, No. 48 on the jury roll, was seated as Juror No. 10. CP 48.

violate McDonald's right to a public trial or trigger Bone-Club because the courtroom itself was never closed.

Additionally, McDonald's failure to object after the trial court put the question of in chambers voir dire to the entire courtroom constitutes invited error as the dissent argues in Erickson. Had McDonald or his attorney objected he would have preserved this issue for appeal. As it was, McDonald benefited from the in chambers voir dire because it allowed him to learn of strong biases that several prospective jurors had regarding alcohol, drinking and driving, and/or deaths that occurred in their families because of substance abuse and motor vehicle accidents. Had these ten jurors been required to complete this voir dire in the courtroom, they may not have candidly divulged the information that they actually did.

Lastly, the court ensured that McDonald's speedy trial rights were not violated under CrR 3.3, because his trial commenced within the 30 days allowed following the excluded period under CrR 3.3(e)(8)-Unavoidable or unforeseen circumstances. As CrR 3.3(b)(5)-Allowable time after excluded period-states, if any period of time is excluded pursuant to subsection (e), the allowable time for trial shall not expire earlier than 30 days after the end of that excluded period. The excluded

period in McDonald's case ended on December 7, 2007, and his case went to trial on December 12, 2007. CP 41; RP Vol. I, 10: 1-9.

The record shows that the deputy assigned to prosecute McDonald was in trial on another matter, and that it would have been unreasonable to require him to transfer a vehicular homicide case to another deputy on short notice. Additionally, McDonald's attorney requested more time to attend a prescheduled CLE, interview witnesses and adequately prepare his case. McDonald's rights to a public and/or speedy trial were not violated, and the State asks the court to affirm the judgment and sentence of the trial court as being complete and correct.

E. ARGUMENT

1. McDONALD'S RIGHT TO A PUBLIC TRIAL WAS NOT VIOLATED BECAUSE THE COURTROOM WAS NEVER CLOSED.

McDonald's right to a public trial was not violated because the courtroom was never closed.

Article I, section 22 of the Washington State Constitution guarantees criminal defendants the right to a speedy, public trial. State v. Momah, 141 Wash.App. 705, 708, 171 P.3d 1064 (2007); see State v. Duckett, 141 Wash.App. 797, 803, 173 P.3d 948 (2007); State v. Erickson, 183 P.3d 245, 248, 2008 WL 2901573. Whether a trial court procedure

violates the right to a public trial is a question of law that is reviewed de novo. Duckett, 141 Wash.App. at 802.

Article I, section 10 of the Washington State Constitution provides that ‘[j]ustice in all cases shall be administered openly...’ Momah, 141 Wash.App. at 708; see State v. Easterling, 157 Wash.2d 167, 174, 137 P.3d 825 (2006). These rights extend to jury selection, which is essential to the criminal trial process. Momah, 141 Wash.App. at 708; see In re Pers. Restraint of Orange, 152 Wash.2d 795, 804, 100 P.3d 291 (2004).

To protect these rights, a court faced with a request for trial closure must weigh five factors, known as the Bone-Club factors, to balance the competing constitutional interests. Momah, 141 Wash.App. at 709; see State v. Bone-Club, 128 Wash.2d 254, 258-259, 906 P.2d 325 (1995).

The five Bone-Club factors are:

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; and

5. The order must be no broader in its application or duration than necessary to serve its purpose.
Bone-Club, 128 Wash.2d at 258-259.

To overcome the presumption of openness, the party seeking closure must show an overriding interest that is likely to be prejudiced and that the closure is narrowly tailored to serve that interest. Momah, 141 Wash.App. at 708. The trial court must consider the alternatives and balance the competing interests on the record. This test mirrors the one articulated by the United States Supreme Court to protect the Sixth Amendment right to a public trial and the First Amendment right to open hearings. We look to the plain language of the closure request and order to determine whether closure occurred, thus triggering the Bone-Club factors.

Once the reviewing court determines there has been a violation of the constitutional right to a public trial right, ‘[p]rejudice is presumed’ and a new trial is warranted. Momah, 141 Wash.App. at 709. On the other end of the spectrum from a full closure is a trial court’s inherent authority and broad discretion to regulate the conduct of a trial. Thus, a ‘closure’ in which one disruptive spectator is excluded from the courtroom for good cause will not violate the defendant’s right to a public trial even absent an analysis of the Bone-Club factors. Likewise, limited seating by itself is insufficient to violate the defendant’s public trial right.

Three recent decisions, Momah, Erickson and Duckett, issued by Divisions 1, 2 and 3 of the Court of Appeals respectively, are analogous to McDonald's case because they squarely address in chambers voir dire in terms of public trial rights.

In Momah, the defendant was charged with multiple sex crimes. Momah, 141 Wash.App. at 707. Due to the nature of the charges and the extensive media coverage, a large number of potential jurors were called for voir dire by the parties and the trial court. Some of the potential jurors asked to be questioned individually, and the court and both counsel agreed to honor those specific requests. Some jurors had been exposed to media coverage about the case, also requiring individual juror questioning to avoid jury contamination.

On the second day of voir dire, the trial court had 52 potential jurors that needed to be examined further, as 48 of them had been excused the previous day. Momah, 141 Wash.App. at 709. The trial court informed all parties that it had a list of eight jurors who wanted private questioning, and both the prosecution and defense agreed this should occur. Momah, 141 Wash.App. at 709-710. The trial court then divided the prospective jurors who were to be questioned individually into two groups, the first group of 20 to be questioned that morning. Momah, 141

Wash.App. at 710. The rest were released with instructions to return for questioning that afternoon.

Shortly after the second group of potential jurors had been released, the record reflects that the trial court, the prosecution, defense, defendant Momah and the court reporter moved into chambers adjoining the presiding courtroom. Once in chambers, the record states:

We have moved into chambers here. The door is closed. We have the court reporter present, as well as all counsel and the defendant, along with the Court and juror number 36...Momah, 141 Wash.App. at 710.

Following questions by counsel and the court, prospective juror number 36 left chambers and prospective juror number 2 entered chambers. The record does not reflect whether the door to chambers was closed during this questioning or subsequent individual questioning of the prospective jurors during the morning session. During the afternoon session, the individual questioning continued with the second group of prospective jurors in a similar manner. Momah, 141 Wash.App. at 711. A jury was empanelled, the trial occurred, and defendant Momah was found guilty of rape and indecent liberties. Momah, 141 Wash.App. at 707.

On appeal, defendant Momah made two main arguments: (1) the record establishes that the trial court closed voir dire, infringing on his

right to a public trial; and (2) the record supports his view that the burden of proving there was no closure and that the requirements of Bone-Club and its progeny were fulfilled and shifted to the State. Momah, 141 Wash.App. at 711.

Division 1 of the Court disagreed with both of defendant Momah's arguments. Per the Court, nowhere in the record is there any evidence that the trial judge expressly closed voir dire to the public or press in violation of any of the controlling cases. Rather, the record expressly shows that the trial court, in response to the express request of defendant Momah, agreed to allow voir dire by individual questioning of prospective jurors who indicated prior knowledge about the case. Momah, 141 Wash.App. at 710-711.

Significantly, defendant Momah's request was based on the concern that prospective jurors might have knowledge about the case that could disqualify them, or that they might contaminate the rest of the prospective jurors with such knowledge. In addition, the trial court and the parties agreed to individually question jurors in response to their express requests. Per the Court, there is simply no indication in the record that the individual questioning was for the purpose of excluding either the press or the public from the trial. Momah, 141 Wash.App. at 712-713. The Court also reasoned that nothing in the record indicated that any

member of the public, including defendant Momah's family, or the press was excluded from voir dire. The record is also devoid of any mention that either the press or the public attempted to gain admittance to witness voir dire.

In looking at the plain-language of the transcript, the Court reasoned that no statement or order by the trial court triggered the application of the Bone-Club factors or shifted the burden to the State to prove that the proceeding was open. Momah, 141 Wash.App. at 714. Instead, the Court reasoned that a proceeding is not automatically closed to the public if it occurs in chambers and stated:

[A] 'door' to a courtroom being closed, which occurs in most proceedings, is not the same as a 'proceeding' in that courtroom being closed to the public. Momah, 141 Wash.App. at 715.

To the extent that Frawley holds that all in-chambers proceedings are per se closed to the public, Division 1 of the Court declined to follow Division 3's reasoning in that case. See State v. Frawley, 140 Wash.App. 713, 167 P.3d 593 (2007).

Division 3 of the Court in State v. Duckett, by sharp contrast, held that defendant Duckett's right to a public trial was violated because the trial judge never advised him of his right to a public trial, nor asked him to waive this right. Duckett, 141 Wash.App. at 806-807.

In Duckett, the State charged the defendant with multiple sex crimes and one count of burglary in the first degree. Duckett, 141 Wash.App. at 801. The case proceeded to trial in Spokane County Superior Court, and the trial judge told the prospective jurors that they would be provided with a questionnaire containing ‘some questions that are somewhat of a personal nature.’ Specifically, the questionnaire asked two questions concerning the prospective jurors’ experiences with sexual abuse. The trial judge told the jurors that the questionnaires would be filed in the court file under seal and would not be accessible to anyone without a court order.

Duckett and his attorney were then told by the judge that follow-up questioning of those jurors whose questionnaire responses indicated some experience with sexual abuse would take place outside the courtroom stating, ‘I generally do it in my jury room, Counsel, so as to maintain some privacy.’ A total of 16 jurors were apparently questioned in chambers, although the record did not contain any transcript of this voir dire. Defendant Duckett waived his right to be present during this questioning. A jury was selected and empanelled, and following a two-day trial Duckett was found guilty of rape in the second degree.

On appeal, Division 3 reversed defendant Duckett’s conviction, reasoning that the guaranty of open criminal proceedings extends to ‘the

process of juror selection,’ which ‘is itself a matter of importance, not simply to the adversaries but to the criminal justice system.’ Duckett, 141 Wash.App. at 806-807, see Press-Enter. Co. v. Superior Court, 464 U.S. 501, 505, 104 S.Ct. 819, 78 L.Ed.2d 629 (1984). The Court reasoned that while only a limited portion of voir dire was held outside the courtroom, the trial court was required to engage in a Bone-Club analysis.

As the State Supreme Court recognized in Orange and Easterling, the guaranty of a public trial under our constitution has never been subject to a de minimus exception. Orange, 152 Wash.2d at 812-814; Easterling, 157 Wash.2d at 180-181. Per Division 3, the closure in Duckett was deliberate and the questioning of the prospective jurors concerned their ability to serve; something that, per the Court, cannot be characterized as ministerial in nature or trivial in result. Duckett, 141 Wash.App. at 809.

Ultimately, Division 3 held that the trial court violated defendant Duckett’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. Duckett, 141 Wash.App. at 809; citing Bone-Club, 128 Wash.2d at 261-262.

Most recently, this Court agreed with Division 3’s analysis in Duckett and held in Erickson that the decision to remove individual questioning of prospective jurors outside the courtroom has more than an

inadvertent or trivial impact on the proceedings and instead acts as a closure for the purposes of Bone-Club. Erickson, 183 P.3d at 250.

In Erickson, the defendant was charged with two counts of first degree child rape. Erickson, 183 P.3d at 246. Before trial, the court asked whether the parties wanted to give the prospective jurors a questionnaire before beginning voir dire. Erickson, 183 P.3d at 246-247. After the questionnaire had been given to and completed by the venire, the judicial assistant notified the trial court and counsel that three individuals wanted to be questioned privately. Erickson, 183 P.3d at 247. Later in the proceedings when the trial court asked whether any prospective jurors wanted to be examined privately, four individuals wished to do so. Except for these four prospective jurors, the trial court excused the remainder of the venire and went with counsel and the court reporter to the jury room.

In the jury room, the trial court called each prospective juror in separately and allowed both the prosecution and defense to question each of them. Three of the four prospective jurors described personal experiences with sexual abuse or assault, while the fourth suggested that he knew defense counsel. Following jury selection, a jury was empanelled, the trial occurred, and defendant Erickson was found guilty as charged.

As this Court reasoned, the individual questioning of prospective jurors in a jury room acts as a closure because it is improbable that a member of the public would feel free and welcome to enter a jury room of his or her own accord. Erickson, 183 P.3d at 250. Also, removing the proceedings makes it difficult, if not impossible, for a criminal defendant's family or friends, or any other member of the public, to view the entirety of the jury selection process. Ultimately, it is the responsibility of the courts to take the appropriate steps under Bone-Club to ensure and protect the defendant's and the public's right to open proceedings before any courtroom closure.

In McDonald's case, the State asks this Court to adopt Division 1's rationale from Momah, and find that:

[A] 'door' to a courtroom being closed, which occurs in most proceedings, is not the same as a 'proceeding' in that courtroom being closed to the public. Momah, 141 Wash.App. at 715.

The trial court's invitation to the prospective jurors to take each one into chambers separately to discuss issues they did not feel comfortable talking about in open court did not violate McDonald's public trial rights. Not only was the courtroom itself never closed, but the trial court judge took an additional step to safeguard McDonald's public trial rights by asking, in open court:

Do we have any members of the public that would object to the opportunity of the jurors to step back into chambers to discuss issues that they may be uncomfortable with out here in the open courtroom, or to address matters where they have indicated that they could not otherwise be fair and impartial?
RP Vol. VI, 8: 19-24.

The record does not reflect that McDonald, his attorney, or anyone else objected; the same as occurred in Momah. Applying that Court's reasoning, there is simply no indication in the record with McDonald's case that this individual questioning was for the purpose of excluding either the press or the public. Momah, 141 Wash.App. at 712-713. In fact, McDonald's attorney even agreed to the in-chambers voir dire. RP Vol. VI, 8: 12-19.

Had anyone objected to in chambers voir dire, especially when the trial court judge opened the question up to the entire courtroom, then McDonald might have a viable issue on appeal. Because he failed to object, his argument, to adopt the rationale from the dissent in Erickson, constitutes invited error. Erickson, 189 P.3d at 251-253. McDonald's argument that he did not receive a public trial amounts to him trying to benefit from an error that he caused and/or should have prevented.

Put another way, in chambers voir dire in sexual abuse cases gives a defendant a tactical advantage and is crucial to protect his constitutional right to fully participate in seeking an unbiased and unprejudiced jury.

This same rationale applies to McDonald's case where he was charged with vehicular homicide; an offense that is certainly no less serious than the sex crimes that were charged in Momah, Erickson and Duckett. Prospective jurors would feel just as uncomfortable discussing their personal concerns about sex crimes as they would those involving homicide.

Had McDonald objected to the in chambers voir dire, none of the parties would likely have discovered that several prospective jurors had a personal bias against alcohol, its impact on behavior, or drinking and driving; knowledge that could have put McDonald at a serious disadvantage. Because McDonald was present during in chambers voir dire with counsel, he benefited because it allowed him to help select an impartial jury.

During the in chambers voir dire, it was discovered that prospective juror No. 23 had a father who was killed in a traffic accident and that the incident still bothered him. RP Vol.V, 13: 1-10. As this prospective juror stated:

Quite a few years ago my dad was downtown and they came out of the 40 et 8 and he walked around his car to get into it. A drunk came down the street and run over him and he died about three weeks later. And the prosecuting attorney would not prosecute it because there were no witnesses and they said he might have fell in front of the car. And I still think about it once in awhile. It's been

many years, but I still think about that once in awhile. [Brief inaudible]. I don't know if the guy was guilty or not, but there was nothing never done about it. That does bother me. RP Vol. V, 13: 1-10.

Similarly, prospective juror No. 31 related that:

My brother was killed by a drunk driver his last day of student teaching. The plaintiff got off on some kind of weird technicality [inaudible] behind the wheel drinking and killing somebody [inaudible] but there is no impartiality. RP Vol.V, 15: 4-8.

Prospective juror No. 42 related that she had “lost a son-in-law and a grandson from alcohol driving,” while No. 52 said that she came “from a long line of abusive alcoholics, including my father, my grandpa and my brother and several uncles on both sides of the family.” RP Vol.V, 17: 25; 18: 1; 20: 23-25. All of these responses contain personal information that would have been unlikely to surface had this voir dire occurred in open court and McDonald benefited from it. Accordingly, McDonald received a public trial and no error occurred.

2. McDONALD’S SPEEDY TRIAL RIGHTS WERE NOT VIOLATED UNDER CrR 3.3 BECAUSE HIS TRIAL COMMENCED IN A TIMELY FASHION.

McDonald’s speedy trial rights were not violated under CrR 3.3 because his trial commenced in a timely fashion.

The new version of CrR 3.3, the speedy trial rule, went into effect on September 1, 2003. State v. Johnson, 132 Wash.App. 400, 411, 132

P.2d 737 (2006). The decision to grant or deny a motion for continuance rests within the sound discretion of the trial court. State v. Downing, 151 Wash.2d 265, 272, 87 P.3d 1169 (2004). The trial court’s decision to grant or deny a motion for continuance will not be disturbed unless the appellant or petitioner makes “a clear showing...[that the trial court’s] discretion [is] manifestly unreasonable, or exercised on untenable grounds, or for untenable reasons.

Allowing counsel time to prepare for trial is a valid basis for continuance. State v. Campbell, 103 Wash.2d 1, 15, 691 P.2d 929 (1984). Scheduling conflicts may be considered in granting continuances. State v. Heredia-Juarez, 119 Wash.App. 150, 153-155, 79 P.3d 987 (2003). A prosecutor’s responsibly scheduled vacation is a valid basis for granting a continuance. Heredia-Juarez, 119 Wash.App. at 153.

The following perio[d] shall be excluded in computing the time for trial: Unavoidable or unforeseen circumstances affecting the time for trial beyond the control of the court or of the parties. CrR 3.3(e)(8). This exclusion also applies to the cure period of section (g). The court may continue [a] case beyond the limits specified in section (b) on motion of the court or a party made within five days after the time for trial has expired. CrR 3.3(g).

Such a continuance may be granted only once in the case upon finding on the record or in writing that the defendant will not be substantially prejudiced in the presentation of his or her defense. The period of delay shall be for no more than 14 days for a defendant detained in jail...from the date that the continuance is granted. If any period of time is excluded pursuant to subsection (e), the allowable time for trial shall not expire earlier than 30 days after the end of that excluded period. CrR 3.3(b)(5).

In McDonald's case, the written record shows that his trial commenced well within the 30 days allowed under CrR 3.3(b)(5) after the excluded period ended on December 7, 2007. CP 41. That court appointed counsel for McDonald was still interviewing witnesses as late as November 28, 2007 also shows that defense needed more time to prepare its case. RP Vol. I, 6: 3-13; CP 37.

Because the deputy prosecutor handling his case was in trial on November 28, McDonald's trial status remained in an excluded period due to an unavoidable circumstance; namely, that the prosecutor on McDonald could not simply reassign his vehicular homicide case and expect that deputy to be prepared to go to trial immediately. The trial court therefore correctly reasoned that, "[w]hen you have a single deputy prosecutor that has multiple cases, he can only try them one at a time." RP Vol. I, 8: 19-

21. The court ensured that McDonald's case was brought to trial in a timely manner under CrR 3.3 and no error occurred.

F. CONCLUSION

The State respectfully requests that the judgment and sentence of the trial court be affirmed.

Dated this 2nd day of SEPTEMBER, 2008

Respectfully submitted by:



Edward P. Lombardo, WSBA #34591
Deputy Prosecuting Attorney for Respondent
Gary P. Bureson, Prosecuting Attorney
Mason County, WA

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

STATE OF WASHINGTON,)
)
 Respondent,) No. 37244-4-II
)
 vs.) DECLARATION OF
) FILING/MAILING
) PROOF OF SERVICE
 DOUGLAS D. McDONALD,)
)
 Appellant,)
 _____)

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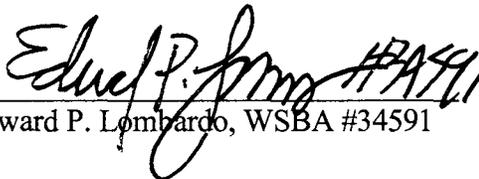
I, EDWARD P. LOMBARDO, declare and state as follows:

On SEPTEMBER 2, 2008, I deposited in the U.S. Mail, postage properly prepaid, the documents related to the above cause number and to which this declaration is attached, BRIEF OF RESPONDENT, to:

Gregory C. Link, Attorney at Law
Washington Appellate Project
1511 Third Avenue, Suite 701
Seattle, WA 98101

I, EDWARD P. LOMBARDO, declare under penalty of perjury of the laws of the State of Washington that the foregoing information is true and correct.

Dated this 2ND day of SEPTEMBER, 2008, at Shelton, Washington.


Edward P. Lombardo, WSBA #34591

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

STATE OF WASHINGTON,)	
)	No. 37244-4-II
Respondent,)	
)	DECLARATION OF
vs.)	FILING/MAILING
)	PROOF OF SERVICE
DOUGLAS D. McDONALD,)	
)	
Appellant,)	
_____)	

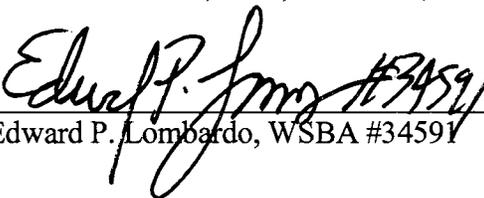
I, EDWARD P. LOMBARDO, declare and state as follows:

On WEDNESDAY, SEPTEMBER 3, 2008, I deposited in the U.S. Mail, postage properly prepaid, the documents related to the above cause number and to which this declaration is attached, CORRECTED FIRST PAGE, TABLE OF CONTENTS "i," to:

Gregory C. Link, Attorney at Law
 Washington Appellate Project
 1511 Third Avenue, Suite 701
 Seattle, WA 98101

I, EDWARD P. LOMBARDO, declare under penalty of perjury of the laws of the State of Washington that the foregoing information is true and correct.

Dated this 3RD day of SEPTEMBER, 2008, at Shelton, Washington.


 Edward P. Lombardo, WSBA #34591

Mason County Prosecutor's Office
 521 N. Fourth Street, P.O. Box 639
 Shelton, WA 98584
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 Fax (360) 427-7754

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