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Cowlitz Co. Cause No. 07-1-00941-5

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

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**STATE OF WASHINGTON,**

Respondent,

vs.

**SHANNON LEE ABBEY,**

Appellant.

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**BRIEF OF RESPONDENT**

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### **A. ANSWERS TO ASSIGNMENTS OF ERROR**

1. The trial court did not err by taking an oath to be truthful from a juror outside the courtroom without considering the *Bone-Club* factors.
2. The trial court did not deny the public access to Abbey's trial.
3. The trial court did not deprive Abbey of his right to attend his own trial.

### **B. STATEMENT OF THE CASE**

Just before midnight on July 13, 2007, Irina Fedotova was taking a shower in her apartment at 862 8<sup>th</sup> Avenue in Longview. RP 307-09. She stepped out of the shower, grabbed a towel and was about to dry herself off. RP 309-10. She looked in the bathroom mirror at something on her face. *Id.* In the reflection in the mirror, she saw someone looking into the bathroom window behind her. RP 309-12.

Fedotova quietly turned around, grabbed her phone and called 911. Scared, she walked out of the bathroom as quickly as she could. RP 312. She reported to the dispatcher that there was a man looking in her bathroom window and that she thought he might be trying to get into her apartment through her open bedroom window. RP 327-331.

When asked by the dispatcher for a description of the man, Fedotova said that she thought he was wearing a black baseball hat and that she thought he was white. *Id.* Police officers arrived as Fedotova was giving this description so she and the dispatcher ended the call. *Id.*

Officer Shawn Close heard the dispatch regarding the unwanted subject and walked toward the apartment building from where he was, just one block away. RP 340. Close saw a man with a baseball cap walking from the courtyard of the apartment building and called for him to stop. RP 341-42. The man stopped near the sidewalk and was later identified as the appellant Shannon Lee Abbey. RP 342-43. Abbey is a white male who, on this night, had a goatee and wore glasses and a dark-colored hat. RP 341-43, 353.

Officers Tim Deisher and Angela Avery arrived on the scene. RP 345. At that time, Abbey was standing near the sidewalk with Close. Abbey was not in handcuffs. RP 355. Deisher and Avery contacted Fedotova inside her apartment. Fedotova told them someone had looked in her window. Deisher and Avery asked Fedotova for a description of the person looking through her window. Fedotova told the officers that it

was a white male, with a black baseball cap worn backwards, glasses and a goatee. RP 350-52, 362.

Deisher and Avery brought Fedotova out of her apartment, asking her to come with them and telling her that there was someone out front that they wanted her to take a look at. RP 354-56. The officers brought Fedotova outside where she could see Abbey. *Id.* At the scene, Fedotova unequivocally identified Abbey as the man who had looked through her window. RP 355, 364. She later identified Abbey in court as well. RP 323-24.

Deisher and Avery conducted an experiment at the scene. Avery went into Fedotova's bathroom while Deisher stood outside her bathroom window. Avery was able to see Deisher "perfectly", including his bald head, goatee, skin tone and hands up to the window. RP 356-57, 362-63, 369-70.

Abbey told the officers he had been walking home from a gas station and had stopped to urinate outside the victim's window. RP 365. The officers checked for urine marks but did not locate any. RP 368.

Abbey was charged with voyeurism. CP 5. In addition to the testimony of the above facts, the jury also heard testimony that Abbey had

admitted to two police officers on a previous occasion that he looked in windows while fantasizing about women and masturbating. RP 380, 382.

A jury found Abbey guilty as charged. CP 27. Abbey was sentenced under RCW 9.94A.712<sup>1</sup> based upon his previous conviction for rape of a child in the first degree. Abbey's standard range for his minimum sentence under RCW 9.94A.712 was 57 to 60 months in prison. CP 40. However, the trial court sentenced Abbey to an exceptional sentence above the standard range: a minimum sentence of 60 months

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<sup>1</sup> RCW 9.94A.712 states in pertinent part:

(1) An offender who is not a persistent offender shall be sentenced under this section if the offender: .... (b) Has a prior conviction for an offense listed in RCW 9.94A.030(33)(b), and is convicted of any sex offense which was committed after September 1, 2001....

(3)(a) Upon a finding that the offender is subject to sentencing under this section, the court shall impose a sentence to a maximum term and a minimum term.... The maximum term shall consist of the statutory maximum sentence for the offense... the minimum term shall be either within the standard sentencing range for the offense, or outside the standard sentence range pursuant to RCW 9.94A.535, if the offender is otherwise eligible for such a sentence.

(5) When a court sentences a person to the custody of the department under this section, the court shall, in addition to the other terms of the sentence, sentence the offender to community custody under supervision of the department and the authority of the board for any period of time the person is released from total confinement before the expiration of the maximum sentence.

Rape of a child in the first degree is listed in RCW 9.94A.030(33)(b).

under RCW 9.94A.712. CP 40, 47. Abbey filed a timely notice of appeal. CP 51.

Abbey's appeal assigns error to a portion of the selection of the jury at his trial. After seating the potential jurors in the jury box, the trial judge asked the potential jurors to stand and then directed the court clerk to give the oath to the potential jurors. RP 113. The clerk read the following oath: "Do each of you solemnly swear to truthfully answer all questions asked of you by the Court or Counsel relating to your qualifications and acting as jurors in this trial? If you agree, please answer I do." *Id.* The potential jurors answered affirmatively in unison. *Id.* The judge asked the jurors to be seated and then said, "Mr. Munn, Counsel, will you step out in the hallway with me?" *Id.*

The judge, the prosecutor, defense attorney and one of the potential jurors, John Munn, stepped into the hallway adjacent to the courtroom. *Id.* The judge said, "Mr. Munn, I noticed that you didn't raise your hand or you didn't promise to tell the truth?" *Id.* Munn and the judge then had a conversation regarding Munn's belief that his religion does not allow him to judge another human. RP 113-16. The judge told Munn that the oath was to simply tell the truth and that he was not yet seated as a juror in

the case. *Id.* Munn told the judge that he would tell the truth. *Id.* The judge told Munn to raise his hand and asked him if he promised to tell the truth. RP 116. Munn so promised. *Id.* The judge told Munn to have a seat, and Munn returned to the courtroom. *Id.*

The judge, prosecutor and defense attorney remained in the hallway. *Id.* The defense attorney then asked that all further questioning of Munn occur in the hallway. *Id.* The prosecutor said that she would prefer that any questioning of jurors not happen in the hallway. RP 117. The judge said none of the juror questioning would take place in the hallway. *Id.* The judge, prosecutor and defense attorney went back into the courtroom, and, after introductory instructions, voir dire commenced. RP 117-20.

When the judge asked the panel whether anyone knew Officer Close, Munn said that he had met Close after Close responded to a vandalism complaint on Munn's property. RP 123. Munn said he is "on [Close's] side" and that he "like[d] him as an officer." *Id.* Later, the judge asked the panel whether any of them or any of their family members had experience with a case similar to the one at hand. RP 124. Munn said that his wife had. RP 126. Later, the judge asked the panel whether

any of them would be unable to assure him that they would follow the court's instructions. RP 129. Munn appears to have answered affirmatively. *Id.*

No questions were ever asked of Munn during voir dire. RP 120-237. After voir dire, the defense attorney challenged Munn as a juror for cause. RP 164. The prosecutor said she had no objection. *Id.* The judge granted the defense attorney's request and excused Munn from the jury for cause. RP 164, 177, 179.

### C. ARGUMENT

The Sixth Amendment to the United States Constitution<sup>2</sup> and article 1, section 22 of the Washington Constitution<sup>3</sup> guarantee criminal defendants the right to a public trial. *State v. Russell*, 141 Wn.App. 733, 737-38, 172 P.3d 361 (2007), *review denied*, 164 Wn.2d 1020 (2008). Additionally, article I, section 10 of the Washington Constitution<sup>4</sup> states, "Justice in all cases shall be administered openly," giving the public, in addition to the defendant, a right to open proceedings. *Seattle Times Co. v. Ishikawa*, 97 Wn.2d 30, 36, 640 P.2d 716 (1982).

Because the issue of whether a defendant's right to a public trial has been violated is a question of law, it is reviewed de novo. *State v. Brightman*, 155 Wn.2d 506, 514, 122 P.3d 150 (2005). Prejudice is presumed where the court proceedings violate this right. *State v. Bone-*

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<sup>2</sup> The Sixth Amendment provides in pertinent part: "In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial."

<sup>3</sup> Section 22 provides in pertinent part: "In criminal prosecutions the accused shall have the right ... to have a speedy public trial by an impartial jury of the county in which the offense is charged to have been committed and the right to appeal in all cases[.]"

<sup>4</sup> Article I, section 10 of the Washington Constitution gives the public and the press a right to open and accessible court proceedings. Section 10 provides: "Justice in all cases shall be administered openly, and without unnecessary delay." In *State v. Bone-Club, infra*, our Supreme Court held that the same closure standards apply for both section 10 and section 22 rights.

*Club*, 128 Wn.2d 254, 257, 906 P.2d 325 (1995). Jury selection proceedings fall "within the ambit of the right to a public trial." *State v. Erickson*, 146 Wn. App. 200, 208, 189 P.3d 245 (2008) (citing *Brightman*, 155 Wn.2d at 511, 515, 122 P.3d 150; *Bone-Club*, 128 Wn.2d at 259-60, 906 P.2d 325). Therefore, *Bone-Club* requires a finding of necessity on the record before closure of jury selection proceedings. *Erickson*, 146 Wn. App. at 208, 189 P.3d 245. The remedy for a trial court's failure to conduct a *Bone-Club* analysis before a full closure of the jury selection proceedings is to reverse and remand for a new trial. *In Re Pers. Restraint of Orange*, 152 Wn.2d 795, 814, 100 P.3d 291 (2004).

**1. THE PLAIN LANGUAGE USED BY THE TRIAL COURT DEMONSTRATES THERE WAS NOT A FULL CLOSURE OF THE PROCEEDINGS.**

To determine whether the trial court violated Abbey's right to a public trial, it must first be determined whether the trial court's action amounted to a closure excluding the public. To determine whether the trial court excluded the public, it is necessary to evaluate the nature of the "closure". *Orange*, 152 Wn.2d at 807-08, 100 P.3d 291. To do so, reviewing courts look to the plain language of the request for closure, if any, and the "closure" order to determine whether closure occurred (thus triggering the requirement of a *Bone-Club* analysis).<sup>5</sup>

This plain language analysis was applied in *State v. Momah*, 141 Wn.App. 705, 171 P.3d 1064 (2007), *review granted in part* 163 Wn.2d 1012, 180 P.3d 1291. In *Momah*, the trial court, the parties, and the court reporter "moved into chambers adjoining the presiding courtroom."

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<sup>5</sup> *Orange*, 152 Wn.2d at 808, 100 P.3d 291; *Bone-Club*, 128 Wn.2d at 261, 906 P.2d 325; *Brightman*, 155 Wn.2d at 516, 122 P.3d 150; *see also Orange*, 152 Wn.2d at 823, 100 P.3d 291 (Madsen, J., concurring) ("[I]n order to determine whether a trial closure violates the constitutional standard applicable to the open trial guaranty, a reviewing court must consider ... the language of the closure ruling..."); *United States v. Shryock*, 342 F.3d 948, 974 (9th Cir. 2003) ("The denial of a defendant's Sixth Amendment right to a public trial requires some affirmative act by the trial court meant to exclude persons from the courtroom.") (quoting *United States v. Al-Smadi*, 15 F.3d 153, 155 (10th Cir. 1994)).

*Id.* at 710. The trial court stated on the record: “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...” *Id.* at 710. The trial court then questioned other jurors in chambers following questioning of juror 36. *Id.* at 711. The record did not reflect whether the door to chambers was closed or not during the questioning of the other jurors. *Id.* at 710.

In rejecting Momah's challenge to this procedure on appeal, the *Momah* court held that a *Bone-Club* analysis was not required because the trial court made no specific order closing the courtroom and, therefore, no closure occurred. *Momah*, 141 Wn.App. at 711-14, 171 P.3d 1064. Furthermore, it reasoned that the trial court did not close the courtroom because “there is nothing in the record to indicate that any member of the public ... or the press was excluded from voir dire.” *Id.* at 712. It also relied on the fact that Momah's counsel requested the individual questioning because of “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.” *Id.* at 711-12.

In Abbey's case, the trial court simply never ordered that the proceeding be closed to any spectators. Looking to the plain language used by the trial court, it is apparent that no statement or order by the trial court triggered application of the *Bone-Club* factors or shifted the burden to the State to prove that the proceeding was open. The trial judge instead stated, "Mr. Munn, Counsel, will you step out in the hallway with me?" RP 113. Because the plain language used by the trial court reflects that there was no full closure of the proceedings, a *Bone-Club* analysis was not required, and Abbey's conviction should be affirmed.

Abbey cites *Bone-Club* for his contention that the courtroom was closed. In *Bone-Club*, the State requested closure of the courtroom during an undercover police officer's testimony at the pretrial suppression hearing. The trial court cleared the entire courtroom for the officer's testimony during the pretrial suppression hearing. *Bone-Club*, 128 Wn.2d 254, at 256-57, 906 P.2d 325. The defendant was not given an opportunity to object to the closure. *Id.* at 257. The Washington Supreme Court found that "the temporary, full closure of [the] pretrial suppression hearing" was a violation of the defendant's right under article I, section 22 of the Washington Constitution. *Bone-Club*, 128 Wn.2d at

256-57, 906 P.2d 325. The Court further found that the defendant's "failure to object contemporaneously did not effect a waiver" and that the closure requirements are triggered by the motion to close, not by a defendant's objection. *Id.* at 257, 261. However, in Abbey's case, unlike in *Bone-Club*, there was no motion or request to close the courtroom and no order closing the courtroom was ever made.

Abbey also cites *Orange* in support of his closure claim. In *Orange*, the trial court questioned all members of the venire in chambers on their answers to eight particular juror questionnaire questions. *Orange*, 152 Wn.2d at 801, 100 P.3d 291. The trial court also prohibited the defendant's and the victim's families from watching the courtroom voir dire because of space constraints in the courtroom, stating, "I am ruling no family members, no spectators will be permitted in this courtroom during the selection of the jury because of the limitation of space, security, etcetera [sic]. That's my ruling." *Orange*, 152 Wn.2d at 802, 100 P.3d 291 (emphasis omitted).

The Washington Supreme Court held that the trial court "ordered a permanent, full closure of voir dire," thereby exceeding the *Bone-Club* threshold of "a temporary, full closure." *Orange*, 152 Wn.2d at 807-08,

100 P.3d 291. The court found that, because there had been a closure and because the trial court failed to conduct the *Bone-Club* analysis, Orange's constitutional right to a public trial had been violated. *Orange*, 152 Wn.2d at 811, 100 P.3d 291. In Abbey's case, there was no temporary, full closure as in *Bone-Club*, nor a "permanent, full closure" as in *Orange*. As such, Abbey's conviction should be affirmed.

A recent case addresses the issue of questioning of a juror in chambers. *State v. Wise*, -- P.3d --, 2008 WL 5546970 (Wash.App. Div. 2). In *Wise*, at a prospective juror's request, a portion of voir dire questioning took place in chambers. *Wise*, at ¶ 2, 17. Neither party requested the chambers questioning or objected to the process. *Id.* The *Wise* court found that a review of the record demonstrated that neither party was prejudiced by the process. *Id.*, at ¶ 17. The *Wise* court noted that both parties in fact appeared to have benefited from the prospective jurors' candid answers because some of the answers would have tainted the entire venire if stated in open court. *Id.* The *Wise* court notes the trial court individually questioned only 10 potential jurors in chambers, while the rest of the jury remained in the courtroom. *Id.* The trial court did not order a closure of the courtroom itself, and the *Wise* court

presumed the courtroom and the proceedings conducted there remained open. *Id.* As the *Wise* court noted, the court reporter was present in chambers during questioning, as were all parties. *Id.* Additionally, the *Wise* court noted that the record contained a full transcript of the proceedings. *Id.* The *Wise* court found that the closure, if any, was temporary and partial, below the “temporary, full closure” threshold of *Bone-Club*. *Wise*, at ¶ 17; see also *State v. Gregory*, 158 Wn.2d 759, 815-16, 147 P.3d 1201 (2006). The *Wise* court held that the trial court was not required to sua sponte conduct a *Bone-Club* analysis prior to this temporary relocation of voir dire to chambers for the purpose of asking prospective jurors sensitive questions. *Wise*, at ¶ 17.

In Abbey’s case, a brief portion of the trial -- prior to voir dire -- took place in a hallway outside the courtroom. Neither party requested the hallway questioning or objected to the process. A review of the record reveals that this process did not prejudice either party. The judge in Abbey’s case spoke to the individual potential juror in the hallway, while the rest of the potential jurors remained in the courtroom. The judge did not order a closure of the courtroom itself; the proceedings conducted there remained open. The record contains a full transcript of

the hallway discussion. As in *Wise*, the closure, if any, was temporary and partial, below the “temporary, full closure” threshold of *Bone-Club*. The judge in Abbey’s case was not required to sua sponte conduct a *Bone-Club* analysis prior to this temporary relocation of an individual discussion with and swearing-in of a potential juror to the hallway. Therefore, Abbey’s conviction should be affirmed.

**2. ABBEY DOES NOT HAVE A RIGHT TO HAVE THE PUBLIC PRESENT DURING A MINISTERIAL MATTER; THEREFORE, THERE WAS NO *BONE-CLUB* VIOLATION.**

A defendant does not have a right to a public hearing on purely ministerial issues. *State v. Sadler*, 147 Wn. App. 97, 114, 193 P.3d 1108 (2008); see also *State v. Rivera*, 108 Wn.App. 645, 653, 32 P.3d 292 (2001). The swearing of jurors is a ministerial act. See *Com. v. Thomas*, 31 Erie C.L.J. 95 (Pa.O. & T. 1948). In fact, unlike the oath taken to empanel the jury once it has been chosen<sup>6</sup>, the initial oath asked of the jurors before voir dire in Abbey's case is not required by statute or court rule but is certainly favored by case law. *State v. Tharp*, 42 Wn.2d 494, 499, 256 P.2d 482 (1953). Because this portion of the proceedings was a ministerial matter, there is no constitutional right to have the public present. Therefore, *Bone-Club* does not apply, and Abbey's conviction should be affirmed.

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<sup>6</sup> CrR 6.6 reads as follows: "A jury shall be sworn or affirmed well and truly to try the issue between the State and the defendant, according to the evidence and instructions by the court."

**3. ANY VIOLATION OF *BONE-CLUB* WAS DE MINIMIS AND SHOULD NOT RESULT IN VACATION OF ABBEY'S CONVICTION AND REMAND FOR A NEW TRIAL.**

The Washington Supreme Court observed in *Brightman, supra*, that "a trivial closure does not necessarily violate a defendant's public trial right." *Brightman*, 155 Wn.2d 506, at 517, 122 P.3d 150. This observation is supported by the recognition of many courts that a de minimis closure standard applies when a trial closure is too trivial to implicate the constitutional right to a public trial, permitting the avoidance of a constitutionally unnecessary retrial. See, e.g., *United States v. Ivester*, 316 F.3d 955, 960 (9th Cir. 2003); see also *State v. Easterling*, 157 Wn.2d 167, 183, 137 P.3d 825 (2006) (Madsen, J., concurring) (collecting cases).

Courts that have denied requests for a new trial based upon brief closures have done so after inquiring whether the closure has infringed the "values that the Supreme Court has said are advanced by the public trial guarantee: '1) to ensure a fair trial; 2) to remind the prosecutor and judge of their responsibility to the accused and the importance of their functions; 3) to encourage witnesses to come forward; and 4) to discourage perjury.'" *Carson v. Fischer*, 421 F.3d 83, 93 (2d Cir. 2005) (quoting *Peterson v.*

*Williams*, 85 F.3d 39, 43 (2d Cir. 1996) (citing *Waller v. Georgia*, 467 U.S. 39, 46-47, 104 S. Ct. 2210, 81 L. Ed. 2d 31 (1984))).

The “closure” that Abbey is alleging did not adversely impact these core values. Instead, the alleged “closure” allowed the court to ensure a fair trial by obtaining an oath to tell the truth from one hesitant potential juror. Granting a new trial for a “closure” that comprised fewer than three of the nearly 450-page verbatim report of proceedings would unnecessarily punish the public. See, e.g., *Brown v. Kuhlmann*, 142 F.3d 529 (2nd Cir. 1998) (habeas petition asserting a violation of public trial denied on the grounds that it would award a windfall to a defendant who made no effort to dissuade the trial judge from making the closure and where the testimony during the limited closure was transcribed and cumulative to other evidence.).

Bearing in mind the benefits that the public trial right is meant to guarantee -- ensuring a fair trial for the defendant, reminding the prosecutor and judge of their responsibilities in the defendant's trial, encouraging witnesses to come forward, and discouraging perjury -- it is evident that the fairness of Abbey's trial was unaffected by the claimed closure of the courtroom. None of the parties in Abbey's case asked any

questions of Munn during voir dire once he finally took the oath to be truthful. After voir dire, Abbey challenged Munn for cause without objection from the State, and the court granted the challenge and excused Munn. The claimed exclusion of the public from the oath did not jeopardize Abbey's right to a fair trial.<sup>7</sup> Therefore, his conviction should be affirmed.

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<sup>7</sup> In at least one case in which the second oath to empanel the chosen jurors, requiring that the verdict be predicated on the law and the evidence presented at the trial but omitting the then statutory words “well and truly to try the issue between the state and the defendant, according to the evidence,” the Washington Supreme Court required the defendant to show prejudice caused by the alleged failure to properly administer the oath. The defendant could not, and the Court held that it was not reversible error. *State v. Shelby*, 69 Wn.2d 295, 301, 418 P.2d 246 (1966); former RCW 10.49.100 (repealed by Laws 1984, ch. 76, § 30).

**4. ABBEY WAIVED ANY RIGHT TO RAISE THE *BONE-CLUB* ISSUE ON APPEAL.**

The Washington Supreme Court has held that a defendant does not waive his right to appeal the closure of the courtroom by failing to lodge a contemporaneous objection. *Bone-Club*, 128 Wn.2d at 257, 906 P.2d 325 (citing *State v. Marsh*, 126 Wn. 142, 146-47, 217 P. 705 (1923)). This approach to preservation of error is unusual; the majority of jurisdictions consider a defendant's silence to constitute a waiver. See *State v. Butterfield*, 784 P.2d 153, 155-57 (Utah 1989) (examining range of positions of various state and federal courts); see also *Waller*, 467 U.S. at 47 (recognizing that courts should abstain from closing the courtroom “over the objections of the accused” unless several rigorous criteria are met).

Although the State maintains that there was no courtroom closure in Abbey’s case, if this court finds that there was a closure, the State respectfully asks this court to consider the issue of waiver. A defendant and his attorney should not be entitled to permit a potential structural error to occur, and proceed through trial, comforted by the fact that their tacit consent to closure of the courtroom will not be held against the

defendant should he be convicted, when he seeks automatic reversal on appeal. As United States Supreme Court Justice Frankfurter observed,

Due regard generally for the public nature of the judicial process does not require disregard of the solid demands of the fair administration of justice in favor of a party who, at the appropriate time and acting under advice of counsel, saw no disregard of a right, but raises an abstract claim only as an afterthought on appeal.

*Levine v. United States*, 362 U.S. 610, 619-20, 80 S. Ct. 1038, 4 L. Ed. 2d 989 (1960) (a case involving the closure of a criminal contempt proceeding where there were no signs whatsoever that the court abused the closure to the defendant's disadvantage).

The Washington Supreme Court has thus far treated denial of public trial right for full, temporary courtroom closures (which did not occur here) as if it were structural error, i.e., not subject to harmless error analysis and not requiring the defendant to timely object to preserve the issue for appeal. However, such treatment is inconsistent with controlling Sixth Amendment jury selection authority. See *Batson v. Kentucky*, 476 U.S. 79, 106 S.Ct. 1712, 90 L.Ed.2d 69 (1986). It is the State's position that the administration of the oath to one potential juror on the record, in a hallway adjacent to the courtroom, with all counsel present -- such as presented in this case -- is not a structural error that

undermines the integrity of the verdict rendered by a fair and impartial jury. Accordingly, a timely objection to the oath being administered in the hallway is required to preserve the issue for appeal and, absent a showing of prejudice, retrial before another fair and impartial jury is not required. *Cf. Waller, supra* (full closure of suppression hearing on State's motion to close was structural error).

“Structural errors are those which create ‘defect[s] affecting the framework within which the trial proceeds, rather than simply an error in the trial process itself.’” *In re Det. of Kistenmacher*, 163 Wn.2d 166, 185, 178 P.3d 949 (2008) (Sanders, J., concurring in part, dissenting in part) (quoting *Neder v. United States*, 527 U.S. 1, 8, 119 S.Ct. 1827, 144 L.Ed.2d 35 (1999)). “ ‘Structural errors ... are not subject to harmless error review.’” *Kistenmacher*, 163 Wn.2d at 185 (quoting *State v. Frost*, 160 Wn.2d 765, 779, 161 P.3d 361 (2007), *cert. denied*, 128 S.Ct. 1070 (2008)). Examples of structural errors include the absence of counsel for a criminal defendant, a judge who is not impartial, unlawful exclusion of members of the defendant's race from a grand jury, the right to self-representation at trial, and admission of a defendant's coerced statements or confessions. *See State v. L.B.*, 132 Wn.App. 948, 954 n.2, 135 P.3d

508 (2006) (citing *Arizona v. Fulminante*, 499 U.S. 279, 111 S.Ct. 1246, 113 L.Ed.2d 302 (1991)). As the United States Supreme Court recently reiterated:

“[M]ost constitutional errors can be harmless.... [I]f the defendant had counsel and was tried by an impartial adjudicator, there is a strong presumption that any other [constitutional] errors that may have occurred are subject to harmless-error analysis.... Only in rare cases has this Court held that an error is structural, and thus requires automatic reversal. In such cases, the error ‘necessarily’ render[s] a criminal trial fundamentally unfair or an unreliable vehicle for determining guilt or innocence.”

*Washington v. Recuenco*, 548 U.S. 212, 219, 126 S.Ct. 2546, 165 L.Ed.2d 466 (2006) (footnotes omitted) (quoting *Neder*, 527 U.S. at 8, 9).

In the context of jury selection, the right to a public trial is not structural error unless the defendant makes a prima facie showing of the alleged jury selection defect at trial and the trial court fails to correct the discriminatory jury selection process. *Batson*, 476 U.S. 79; *State v. Hicks*, 163 Wn.2d 477, 181 P.3d 831, *cert. denied*, 129 S.Ct. 278 (2008). Although *Batson* errors are structural, absent a showing of prejudice they cannot be raised for the first time on appeal. To preserve the issue, the defendant must present the trial court with a prima facie showing that the prosecution is unlawfully excluding prospective jurors on the basis of race or gender and the State must then be given an opportunity to rebut

the allegations. *Batson*, 476 U.S. at 93-94; *United States v. Gordon*, 974 F.2d 97, 100 (8th Cir., 1992); *State v. Wright*, 78 Wn.App. 93, 896 P.2d 713, *review denied*, 127 Wn.2d 1024 (1995).

As in the *Batson* context, when no prejudice appears on the record, it is proper to require a defendant or a representative of the public, such as a citizen or a newspaper, to bring an alleged Sixth Amendment public trial right violation to the trial court's attention for immediate correction. Applying *Bone-Club*, as Abbey urges, to vacate the verdict of an impartial jury simply because, without objection, the trial court swore one potential juror in just outside the courtroom, on the record, is inconsistent with the handling of other, arguably more serious, challenges to the integrity of the jury selection process.

Indeed, in the *Batson* context, a trial court judge may require the prosecutor to answer the issue of discriminatory jury selection on its own motion only if the facts appearing in the record support a prima facie case of discrimination. *State v. Evans*, 100 Wn.App. 757, 767, 998 P.2d 373 (2000). However, even a *Batson* query is a discretionary decision for the trial court judge and is not required because, with the benefit of hindsight, an appellate court discovers potential error. *Evans*, 100 Wn.App. at 767.

Allowing the defendant to idly sit by while a potential juror is sworn in a hallway outside the courtroom and then, on appeal, claim an error for an alleged jury selection challenge, imposes additional duties on the trial court that run counter to case law governing other jury selection issues.

In Abbey's case, no one challenged the process of swearing in the panel of potential jurors or raised the issue of the right to public trial to the trial court. No party made a motion to close the courtroom, and the judge did not sua sponte move to close the courtroom. Thus, the record in Abbey's case lacks two elements that would trigger the structural error doctrine in other jury selection matters. First, there was no timely prima facie showing by a party that the court was closing. Second, the trial court did not have before it a closure motion. Such a closure motion triggers the trial court's duty to conduct the *Bone-Club* analysis and triggers the parties' duty to timely object to closure. Accordingly, the trial court's error (if any) in failing to conduct a *Bone-Club* analysis on the record may be harmless, and Abbey is entitled to a new trial only if the process of the administration of Munn's oath to be truthful during voir dire prejudiced Abbey's right to a fair and impartial jury. Abbey has not shown that he was prejudiced by the oath in this case, and the constitution

does not require that we vacate the jury's verdict and remand for a new trial.<sup>8</sup>

A defendant may waive certain constitutional rights through his conduct without ever expressly waiving them on the record. See *State v. Thomas*, 128 Wn.2d 553, 559, 910 P.2d 475 (1996). In *Thomas*, the Washington Supreme Court determined that a defendant may waive his right to testify through his conduct; there is no requirement that “the trial court ... obtain an on-the-record waiver of the right.” *Thomas*, 128 Wn.2d 553 at 559, 910 P.2d 475.

The court explained that, while certain fundamental constitutional rights-including the right to testify-must be waived “knowingly, voluntarily, and intelligently,” there is no requirement that such rights be waived on the record. *Id.* at 558-59, 910 P.2d 475. The court also found no requirement that trial courts “inform a defendant of [his testimonial]

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<sup>8</sup> The State acknowledges the Supreme Court’s ruling in *Brightman*, where neither party requested the closure. *Brightman*, 155 Wn.2d at 511, 122 P.3d 150. The trial court closed the courtroom to spectators during voir dire, stating, “In terms of observers and witnesses, we can’t have any observers while we are selecting the jury, so if you would tell the friends, relatives, and acquaintances of the victim and defendant that the first two or three days for selecting the jury the courtroom is packed with jurors, they can’t observe that.” *Id.* at 511. The Court held that “the defendant’s failure to object at trial to the courtroom closure ‘did not effect a waiver,’” *Id.* at 514, and that “once the plain language of the trial court’s ruling imposes a closure,” there is a “strong presumption that the courtroom was closed.” *Id.* at 516.

right.” *Id.* (citing various federal court decisions holding the same).

In Abbey’s case, Abbey should be found to have similarly waived his right to have the initial oath of each potential juror before voir dire administered in open court, even without an express explanation of the public trial right by the trial court. This is because not only did Abbey not object at trial, but because his attorney even asked the court to conduct any voir dire of the potential juror at issue outside the courtroom. Indeed, Abbey successfully requested that the potential juror at issue be excused for cause. Therefore, if this court finds that a closure occurred, Abbey waived his right to have the potential juror at issue take the initial oath in public and cannot now be heard to complain that his constitutional right to an open trial was prejudicially violated as a result.

As previously discussed, a criminal defendant’s right to a public trial is based in large part on article 1, section 22 of the Washington Constitution. Section 22 provides in pertinent part, “In criminal prosecutions the accused shall have the right ... to have a speedy public trial by an impartial jury of the county in which the offense is charged to have been committed and the right to appeal in all cases[.]” The right to a speedy trial may be waived. *State v. Valdobinos*, 122 Wn.2d 270, 274,

858 P.2d 199 (1993). Such waivers may even be implied. *Id.*; see also *State v. Vicuna*, 119 Wn.App. 26, 34, 79 P.3d 1 (2003); *State v. Franulovich*, 18 Wn.App. 290, 293, 567 P.2d 264 (1977), *review denied*, 90 Wn.2d 1001 (1978). Because the right to a speedy trial, also guaranteed by section 22, can be impliedly waived, it follows that the right to a public trial can be impliedly waived. An implied waiver of the right to a public trial should also be recognized.

In Abbey's case, the portion of the trial that took place outside the courtroom was the initial oath by the potential jurors to be truthful during voir dire. In at least one case, the Washington Supreme Court has held that a defendant may implicitly waive his right to have that oath given at all. In *Tharp*, the defendant asked for a new trial based upon his claim that, through inadvertence, no oath was administered to his prospective jurors before voir dire. *Tharp*, 42 Wn.2d at 499, 499, 256 P.2d 482. Defense counsel was aware of the omission but did not call it to the trial court's attention until after the verdict was received. *Id.* The Washington Supreme Court stated, "While there is no statute requiring it, an oath should be administered to prospective jurors before their voir dire examination." *Id.* The Court noted that the defendant did "not claim or

show that the omission of the oath permitted a disqualified person to serve on the jury that convicted him, or that its omission prejudiced him in any other way.” *Id.* at 500.

In affirming Tharp’s conviction, the Court held that a defendant’s announcement that he accepted the jury is a “final waiver” of his right to examine or challenge prospective jurors. *Id.* at 500-01. The Court held that a defendant waives that error if not raised at trial:

Being a matter of procedure, the omission of the voir dire oath was, at most, a trial error. If he intended to rely upon it on appeal, defendant should have urged it to the trial court as soon as he discovered it... Defendant’s failure to submit it to the trial court timely, bars our consideration of it as possible error. Otherwise, he could take advantage of any error which he, in fact, invited by permitting it to inhere in his trial unchallenged until after the verdict.

*Id.* at 500.

If a defendant can impliedly waive the right to have the potential jurors administered an oath to be truthful, surely he can impliedly waive the right to have the oath for a single potential juror given in public. If this court finds that a closure occurred, Abbey should be deemed to have waived the right to have the oath administered in public and should not be able to raise the issue on appeal.

## 5. ABBEY LACKS STANDING TO DEFEND PUBLIC'S RIGHT

Abbey also argues that the trial court violated article I, section 10 of the Washington Constitution, which protects the public's right to open proceedings. However, Abbey cannot appeal on the grounds of the public's right to an open trial because he lacks standing.

The standing doctrine generally prohibits a party from defending the rights of another person. *Haberman v. Wash. Pub. Power Supply Sys.*, 109 Wn.2d 107, 138, 744 P.2d 1032, 750 P.2d 254 (1987), *dismissed*, 488 U.S. 805 (1988). Article I, section 10 of the Washington Constitution gives the *public* the right to the open administration of justice. Wash. Const. art. I, § 10; *Bone-Club*, 128 Wn.2d at 259, 906 P.2d 325.

Article III of the federal constitution requires that any litigant possess standing. *Arizonans for Official English v. Arizona*, 520 U.S. 43, 64, 117 S.Ct. 1055, 137 L.Ed.2d 170 (1997). Standing requires “(1) that the plaintiff have suffered an ‘injury in fact’ ...; (2) that there be a causal connection between the injury and the conduct complained of ...; and (3) that it be likely, as opposed to merely speculative, that the injury will be redressed by a favorable decision.” *Bennett v. Spear*, 520 U.S. 154, 167,

117 S.Ct. 1154, 137 L.Ed.2d 281 (1997) (citing *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 560-61, 112 S.Ct. 2130, 119 L.Ed.2d 351 (1992)).

There is a “general prohibition on a litigant's raising another person's legal rights.” *Allen v. Wright*, 468 U.S. 737, 751, 104 S.Ct. 3315, 82 L.Ed.2d 556 (1984). “[E]ven when the plaintiff has alleged injury sufficient to meet the ‘case or controversy’ requirement, [the U.S. Supreme Court] has held that the plaintiff generally must assert his own legal rights and interests, and cannot rest his claim to relief on the legal rights or interests of third parties.”

Abbey does not have standing to assert the public’s right to a public trial under article I, section 10 of the Washington Constitution. Therefore, his conviction should be affirmed.<sup>9</sup>

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<sup>9</sup> Abbey also made the following assignment of error: “The trial court erred when it excluded Abbey from the hallway discussion with the juror. It deprived Abbey of his right to attend his own trial.” BRIEF OF APPELLANT 4 (assignment of error 3). However, Abbey cites no authority for this assignment of error. Assignments of error need not be considered on appeal where no authority is cited to support them. *State v. Stepp*, 18 Wn.App. 304, 312, 569 P.2d 1169 (1977).

#### D. CONCLUSION

A review of the record which contains verbatim a transcript of the entire jury selection process, whether conducted in the courtroom or in a hallway outside the courtroom, does not support Abbey's claim that his constitutional right to a public trial was violated, prejudicing his right to a fair trial and requiring that he be afforded a new trial on that basis. For the reasons argued above, Abbey's conviction should be affirmed.

Respectfully submitted this 3<sup>rd</sup> day of February, 2009.

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