

COURT OF APPEALS
DIVISION II

NO. 40646-2-II

11 AUG 16 PM 2:07

STATE OF WASHINGTON

BY *cm*
DEPUTY

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

STATE OF WASHINGTON,

Respondent,

v.

MICHAEL HERSH,

Appellant.

ON APPEAL FROM THE
SUPERIOR COURT OF CLARK COUNTY

Before the Honorable Robert L. Harris, Judge

SUPPLEMENTAL BRIEF OF APPELLANT

Peter B. Tiller, WSBA No. 20835
Of Attorneys for Appellant

The Tiller Law Firm
Corner of Rock and Pine
P. O. Box 58
Centralia, WA 98531
(360) 736-9301

TABLE OF CONTENTS

	<u>Page</u>
A. SUPPLEMENTAL ASSIGNMENT OF ERROR.....	1
B. ISSUE PERTAINING TO SUPPLEMENTAL ASSIGNMENT OF ERROR.....	1
C. SUPPLEMENTAL STATEMENT OF THE CASE.....	1
D. ARGUMENT	2
1. <u>MR. HERSH'S CONVICTIONS MUST BE REVERSED BECAUSE THE TRIAL COURT ERRONEOUSLY CLOSED JURY VOIR DIRE WITHOUT CONDUCTING THE REQUISITE INQUIRY UNDER <i>BONE-CLUB</i>. INVIOLATION OF THE CONSTITUTIONAL GUARANTEE OF A PUBLIC TRIAL.....</u>	2
a. The federal and state constitutions provide the accused the right to a public trial and also guarantee public access to court proceedings.	2
b. Washington courts must apply a five-part test before closing any part of jury <i>voir dire</i> from the public.....	4
c. The trial court did not apply the five-part <i>Bone- Club</i> test.....	6
d. Reversal is required	8
E. CONCLUSION.....	8

TABLE OF AUTHORITIES

WASHINGTON CASES **Page**

State v. Bone-Club, 128 Wn.2d 254, 906 P.2d 325 (1995).....1, 3, 4, 5, 6, 7,
State v. Brightman, 155 Wn.2d 506, 122 P.3d 150 (2005).....4, 5, 6, 7
State v. Easterling, 157 Wn.2d 167, 137 P.3d 825 (2006)3, 5, 6, 8
Federated Publications Inc. v. Kurtz, 94 Wn.2d 51, 615 P.
2d 440 (1980).....3
In re Personal Restraint of Orange, 152 Wn.2d 75, 100 P.3d
291 (2004).....3, 4, 6, 7
Seattle Times Co. v. Ishikawa, 97 Wn.2d 30, 640 P.2d 716 (1982).....3, 5
State v. Strode, 167 Wn.2d 222, 217 P.3d 310 (2009).....4, 8

UNITED STATES CASES **Page**

Presley v. Georgia, 588 U.S. __, 130 S. Ct. 721, 724-25, __ L., Ed.
2d __ (2010).....4

CONSTITUTIONAL PROVISIONS **Page**

Wash. Const. art, I, § 1.....3
Wash. Const. art. I, § 6.....3
Wash. Const. art. 1, § 10.....3
Wash. Const. art 1, § 22.....3
U.S. Const. Amend. V2
U.S. Const. Amend. VI.....2

OTHER AUTHORITIES **Page**

Allied Daily Newspapers, 121 Wn.2d at 210-115
Globe Newspaper, 457 U.S. at 603-05.....3
Richmond Newspapers, 4483

A. SUPPLEMENTAL ASSIGNMENT OF ERROR

1. The trial court violated Mr. Hersh's right to an open trial when it *sua sponte* excluded "witnesses" and conducted questioning of a prospective juror outside the presence of others during *voir dire*.

B. ISSUE PERTAINING TO SUPPLEMENTAL ASSIGNMENT OF ERROR

1. The Federal and Washington constitutions guarantee a criminal defendant's right to an open and public trial. a courtroom may be closed to the public only when the trial court performs a weighing test as outlined in *State v. Bone-Club*¹, and finds closure favored. These rights and requirements extend to the jury selection process. Violation of the right to a public trial is presumptively prejudicial. Where the trial court excluded "witnesses" and conducted questioning of juror that excluded other potential jurors but did not conduct a *Bone-Club* analysis, was Mr. Hersh's right to an open trial violated, requiring reversal of his convictions? Supplemental Assignment of Error 1.

C. SUPPLEMENTAL STATEMENT OF THE CASE

Mr. Hersh was charged with premeditated first degree murder (Count 1), and felony murder (Count 2). Clerk's Papers [CP] 473. During *voir dire*,

¹128 Wn.2d 254, 258-59, 906 P.2d 325 (1995),

the trial court excluded witnesses [CP ____], and excluded prospective jurors from the courtroom during the questioning of several prospective jurors, 3/39/10RP 87-109, 113, 185-202. The court did not conduct any analysis. See *Id.*

The selected jury subsequently convicted Mr. Hersh. CP 881, 882, 883.

The Opening brief of appellant was filed December 8, 2010. The State filed its Brief of Respondent on April 27, 2011.

1. **MR. HERSH'S CONVICTIONS MUST BE REVERSED BECAUSE THE TRIAL COURT ERRONEOUSLY CLOSED JURY VOIR DIRE WITHOUT CONDUCTING THE REQUISITE INQUIRY UNDER BONE-CLUB, IN VIOLATION OF THE CONSTITUTIONAL GUARANTEE OF A PUBLIC TRIAL,**

- a. **The federal and state constitutions provide the accused the right to a public trial and also guarantee public access to court proceedings.**

Both the federal and state constitutions guarantee the accused the right to a public trial. The Sixth Amendment provides, "In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial . . ." U.S. Const. amend. VI; see also U.S. Const. amend. V (guaranteeing due process of law). Article I, § 22 of the Washington Constitution guarantees

“[i]n criminal prosecutions, the accused shall have the right to . . . a speedy public trial.” Const. art. I, § 22.

The public also has a vital interest in access to the criminal justice system. The Washington Constitution provides, “Justice in all cases shall be administered openly, and without unnecessary delay.” Const. art. I, § 10; see also U.S. Const. amends. 1, 6. The clear constitutional mandate in article I, §10 entitles the public and the press to openly administered justice. *Seattle Times Co. v. Ishikawa*, 97 Wn.2d 30, 36, 640 P.2d 716 (1982); *Federated Publications Inc. v. Kurtz*, 94 Wn.2d 51, 59-60, 615 P.2d 440 (1980). Public access to the courts is further supported by article I, §5, which establishes the freedom of every person to speak and publish on any topic. *FEDERATED PUBLICATIONS*, 94 Wn.2d at 58.

In the federal constitution, the First Amendment’s guarantees of free speech and a free press also protect the right of the public to attend a trial. *Globe Newspaper*, 457 U.S. at 603-05; *Richmond Newspapers*, 448 U.S. at 580 (plurality).

Although the defendant’s right to a public trial and the public’s right to open access to the court system are different, they serve “complementary and interdependent functions in assuring the fairness of our judicial system.” *State v. Bone-Club*, 128 Wn.2d 254, 259, 906 P.2d 325 (1995).

The right to a public trial includes the right to have public access to jury *voir dire*. *In re Personal Restraint of Orange*, 152 Wn.2d 75, 812, 100 P.3d 291 (2004); accord *State v. Easterling*, 157 Wn.2d 167, 174, 137 P.3d 825 (2006).); *Presley v. Georgia*, 558 U.S. ___, 130 S. Ct. 721, 724-25, ___ L. Ed. 2d ___ (2010) (“Trial courts are obligated to take every reasonable measure to accommodate public attendance at criminal trials[,]” including the *voir dire* of prospective jurors). Even when only a part of jury *voir dire* is improperly closed to the public it can violate a defendant's constitutional public trial right. *Orange*, 152 Wn.2d at 812.

“[A] closed jury selection process harms the defendant by preventing his or her family from contributing their knowledge or insight to jury selection and by preventing the venire from seeing the interested individuals.” *State v. Brightman*, 155 Wn.2d 506, 515, 122 P.3d 150 (2005 (citing *Orange*, 152 Wn.2d at 812)).

“Whether a defendant’s constitutional right to a public trial has been violated is a question of law, subject to a *de novo* review on direct appeal.” *State v. Strode*, 167 Wn.2d 222, 225, 217 P.3d 310 (2009) (citing *Brightman*, 155 Wn.2d at 514).

- b. Washington courts must apply a five-part test before closing any part of jury *voir dire* from the public.**

In *Orange*, the Court held that before a trial judge can close any part of jury *voir dire* from the public it is required to analyze the five factors identified in *Bone-Club*, *supra*. *Orange*, 152 Wn.2d at 806-807, 809; see *Brightman*, 155 Wn.2d at 515-516.

The *Bone-Club* requirements are:

1. The proponent of closure . . . must make some showing [of a compelling interest], and where that need is based on a right other than an accused's right to a fair trial, the proponent must show a "serious and imminent threat" to that right.
2. Anyone present when the closure motion is made must be given an opportunity to object to the closure.
3. The proposed method for curtailing open access must be the least restrictive means available for protecting the threatened interests.
4. The court must weigh the competing interests of the proponent of closure and the public.
5. The order must be no broader in its application or duration than necessary to serve its purpose.

Bone-Club, 128 Wn.2d at 258-59 (quoting *Allied Daily Newspapers*, 121 Wn.2d at 210-11. accord, *Orange*, 152 Wn.2d at 806-07.

The constitutional right to a public trial is not waived by counsel's failure to object. *Easterling*, 157 Wn.2d at 176 n.8 ("explicitly" holding "a defendant does not waive his right to appeal an improper closure by failing to lodge a contemporaneous objection."); *State v. Brightman*, 155 Wn.2d 506, 514-15, 122 P.3d 150 (2005). In additions, the trial court must enter specific findings identifying the interest so that a reviewing court may determine if the closure was proper. *Id.*

c. The trial court did not apply the five-part Bone-Club test before questioning jurors in chambers.

The court may not conduct *voir dire* in private without first discussing the need to do so on the record and weighing the necessary *Bone-Club* factors. *Easterling*, 157 Wn.2d at 175; *Orange*, 152 Wn.2d at 804. courts have repeatedly overturned convictions when a trial court has closed only a portion of a trial. In *Brightman*, the trial court *sua sponte* told counsel that for reasons of security "we can't have any observers while we are selecting the jury." *Brightman*, 155 Wn.2d at 511. The court, however, failed to analyze the five *Bone-Club* factors. The *Brightman* Court held that because the record lacked "any hint that the trial court considered *Brightman's* public trial right as required by Bone-Club, we cannot determine whether the closure was warranted." *Id.* at 518. The Court remanded for a new trial. *Id.* In that case, the State argued *Brightman* failed to prove the trial court in fact closed the courtroom during jury selection and if it was closed, the closure was *de minimis*. *Brightman*, 155 Wn.2d at 515-517. The Court, however, rejected the State's arguments, ruling that "once the plain language of the trial court's ruling imposes a closure, the burden is on the State to overcome the strong presumption that the courtroom was closed." *Id.* at 516. The *Brightman*

Court also found that where jury selection or a part of the jury selection is closed, the closure is not de minimis. Id. at 517.

In Orange , the same issue was raised in a personal restraint petition. In 1995 Orange was tried for murder, attempted murder and assault. Orange , 152 Wn.2d at 799. During a part of the jury selection process the trial court closed the courtroom. Orange was convicted and appealed but did not raise the closed jury selection issue. Id. at 814. Orange subsequently filed a personal restraint petition in 2001, six years after his trial. Orange , 152 Wn.2d at 803. Our Supreme Court granted discretionary review and ordered a reference hearing. Id. The Orange Court held the trial court's failure to analyze the five Bone-Club factors before ordering the courtroom closed violated Orange's right to a public trial. Id. at 812.

The Orange Court also held the constitutional violation was presumptively prejudicial and would have resulted in a new trial had the issue been raised in Orange's direct appeal. Orange , 152 Wn.2d at 814 (citing Bone-Club , 128 Wn.2d at 261-262). It reasoned that because there was no legitimate tactical or strategic reason for appellate counsel's failure to raise the issue, Orange was denied his right to effective assistance of counsel on appeal and was entitled to a new trial, the same remedy he would have received had counsel raised the issue on appeal. Id. at 814. Because the trial

court failed to analyze the Bone-Club factors before excluding the public from at least a majority of the jury voir dire, under the rule in *Orange and Brightman*.

d. Reversal is required.

the remedy for a violation of the public's right of access is remand for a new trial. Closure of the courtroom during voir

dire "is a structural error that cannot be considered harmless."

State v. Strode, 167 Wn.2d 222, 223, 217 P.3d 310 (2009); accord *State v.*

Easterling, 157 Wn.2d 167, 181, 137 P.3d 825 (2006)

("The denial of the constitutional right to a public trial is one of the limited classes of fundamental rights not subject to harmless error analysis."). Consequently, the remedy for a violation of the right to

public access is to reverse the conviction. *Easterling*, 157 Wn.2d at 179-80.

The trial court's error in excluding witnesses and conducting private *voir dire* requires reversal of Mr. Hersh's convictions.

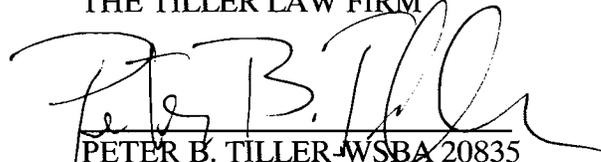
E. CONCLUSION

This Court should reverse Mr. Hersh's convictions for a violation

of the right to a public trial.

DATED: August 15, 2011.

Respectfully submitted,
THE TILLER LAW FIRM

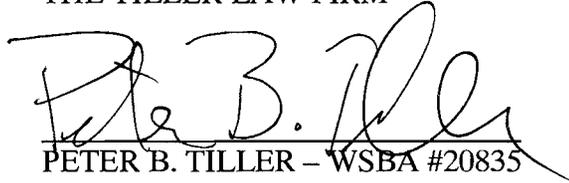


PETER B. TILLER-WSBA 20835
Of Attorneys for Michael Hersh

Michael Allen Hersh
DOC #660056
Clallam Bay Corrections Center
1830 Eagle Crest Way
Clallam Bay, WA 98326-9723

Dated: August 15 2011.

THE TILLER LAW FIRM



PETER B. TILLER – WSBA #20835
Of Attorneys for Appellant

CERTIFICATE OF
MAILING

2

THE TILLER LAW FIRM
ATTORNEYS AT LAW
ROCK & PINE – P.O. BOX 58
CENTRALIA, WASHINGTON 98531
TELEPHONE (360) 736-9301
FACSIMILE (360) 736-5828