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STATE OF WASHINGTON

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NO. 42292-1

COURT OF APPEALS, DIVISION II
OF THE STATE OF WASHINGTON

In re the Detention of:

PAUL ANDREW GEIER,

Appellant,

v.

THE STATE OF WASHINGTON,

Respondent.

BRIEF OF RESPONDENT

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ORIGINAL

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I. ISSUES PRESENTED

- A. **Whether the trial court erred in denying Geier's motion for a mistrial where the State cross-examined Geier's expert on a prior disciplinary action against his license?**
- B. **Whether the trial court was required to engage in a *Bone-Club* analysis prior to sealing the jury questionnaires at the conclusion of the trial where all voir dire proceedings occurred on the record in open court?**

II. STATEMENT OF THE CASE

A. Motion in Limine to Preclude Prior Bad Acts

On the first day of trial, the trial court heard oral argument on the motions in limine (MIL) filed by the parties. 4RP 11, 35-36.¹ The State's MIL #13 was to preclude references to any alleged prior bad acts or crimes of petitioner's witnesses under ER 608, ER 609, and ER 403. CP 666. The MIL requested that the court preclude such testimony until an offer of proof is made outside the presence of the jury. *Id.* The trial court granted this MIL, ruling that it applied to both the State's and Geier's witnesses. CP 563; 4RP 35-36.

¹ For the Court's convenience, the State will use the Verbatim Report of Proceedings (VRPs) citation system used by Appellant as outlined in Brief of Appellant at page 1, footnote 1. The State filed a motion to supplement the record with VRPs of individual voir dire, which are cited as follows: 5(a)RP – 5/24/11 (corrected version); 6(a)RP – 5/25/11.

B. Cross-Examination of Geier's Expert on Disciplinary Action Against His License

On direct examination, Dr. Halon, Geier's expert, testified that he's been a licensed psychologist since 1977. 12RP 958. He also testified in detail about his qualifications and credentials as an expert witness. 12RP 958-69.

On cross-examination, Dr. Halon clarified that his psychology license is in the State of California, not Washington. 13RP 1188. The State then questioned Dr. Halon about whether this license had ever been revoked. 13RP 1188-89. Dr. Halon testified that in 1999, he entered into a stipulated settlement with the State of California. 13RP 1189. The disciplinary order revoked his license, but the revocation was stayed. *Id.*² Dr. Halon testified that the stipulated settlement was based on a complaint filed against him by the California Board of Psychology in 1998. *Id.* When the State asked Dr. Halon whether there were four allegations in the complaint, Geier's counsel objected and asked to be heard outside the presence of the jury. *Id.* The State indicated that the question went to his credibility. *Id.* The court then excused the jurors. 13RP 1189-90.

Outside the presence of the jury, Geier's counsel argued that the State's cross-examination violated MIL #13. 13RP 1190-93. The State

² Dr. Halon actually denied that his license was ever revoked. 13RP 1189. He testified that the stay meant his license was not revoked. *Id.*

disagreed, arguing that the intent of MIL #13 had nothing to do with experts, but rather prior bad acts of witnesses that are referenced in ER 608 and ER 609. 13RP 1191-95. The State argued that the testimony is not a prior bad act under ER 608 or ER 609, but rather goes to Dr. Halon's credibility as an expert witness. *Id.* Geier's counsel asked for a mistrial, arguing that the State should have first made an offer of proof about the testimony. 13RP 1197.

Outside the presence of the jury, the trial court inquired as to the basis of Dr. Halon's disciplinary action and the nature of the allegations. 13RP 1194-95. The State advised that a complaint was filed against Dr. Halon by the Board of Psychology regarding some allegations in 1999. 13RP 1194. Dr. Halon entered into a stipulated settlement and disciplinary order regarding the allegations. *Id.* The Board revoked his license, but stayed the revocation on the condition that he take an ethics course, pay a fine, undergo monitoring by another psychologist, and remain on probation for three years. *Id.* The specific allegations involved: (1) failure to report an act of sexual abuse reported to him by a patient due to his belief that everyone knew about the abuse and he was not required to report it; (2) errors in the coding on some billing issues; and (3) errors in reporting the results of some psychological tests he administered. 13RP 1195-96. The State advised the court that it did not intend to go into

the specifics of the allegations as part of the cross-examination. 13RP 1194-95.

In denying Geier's request for a mistrial, the trial court noted that MIL #13 was never meant to be an "absolute prohibition" against evidence of prior bad acts and that it was following the intended procedure by hearing the offer of proof outside the presence of the jury. 13RP 1203-05. The court ruled that the "licensure missteps" at issue were not prior bad acts. *See* 13RP 1204. The court stated, "It is precisely the type of information that is allowed in order to have the jury fully and fairly evaluate the expert witness." 13RP 1204. The court allowed the State to finish its cross-examination around the licensing issue, noting that if it did not question Dr. Halon on the specific allegations or other information helpful to Geier's case, that Geier could elicit that information on redirect examination. 13RP 1205.

The State continued its cross-examination of Dr. Halon. 13RP 1206-07. Upon questioning by the State, Dr. Halon testified that as a result of the stipulated settlement, he was placed on probation for three years and was required to pay a fine. 13RP 1206. He testified that he had to take an ethics course, which he would have had to take regardless of the settlement, and that his practice was monitored by another psychologist. 13RP 1207. Dr. Halon also testified that his psychology practice has "not

been interrupted for a minute in the 30-something years I've had the license." *Id.* The State did not ask any further questions of Dr. Halon on this issue, and Geier did not ask any questions of Dr. Halon about the issue on redirect examination.

C. Jury Questionnaire and Voir Dire

On May 23, 2011, the first day of trial, the parties submitted a joint questionnaire to be completed by the jurors prior to voir dire. CP 703-10; *see* 4RP 51-52, 58; 6RP 140-41. Based on their answers to the questionnaire, some jurors were questioned individually outside the presence of the other jurors. *See* 4RP 59-60, 66.³ Based on the individual questioning, several jurors were excused for cause at Geier's request. 5(a)RP 104-14, 123-31, 139-45; 6(a)RP 174-78.⁴ The courtroom remained open to the public during general and individual voir dire. 4RP 20-21; CP 709. On May 25, 2011, the jury panel was seated and sworn in. 6RP 141-42.

On May 25, 2011, the State called its first witness at trial. *See* 6RP 164-65. On May 31, 2011, the court sua sponte informed counsel that it would have to do a *Bone-Club* analysis if the juror

³ The transcript of individual voir dire is located at 5(a)RP 4-166 and 6(a)RP 169-178.

⁴ Numerous other jurors were excused for cause after indicating they could not be fair and impartial. *See e.g.* 5(a)RP 70-74, 85-90, 131-39, 147-50, 157-62.

questionnaires were subsequently sealed by the court. 8RP 445. The court indicated that after closing arguments, “we could discuss whether or not we have need of a *Bone-Club* hearing or if there were some stipulations that the parties would be willing to make concerning *Bone-Club* factors.” *Id.*⁵ The State indicated it believed the parties were in agreement regarding whether to seal the juror questionnaires and that it had standard *Bone-Club* findings and conclusions and would discuss the issue with Geier’s counsel. 8RP 446.

On June 14, 2011, the parties rested, and the case went to the jury for deliberations. 16RP 1555-56, 1645-47. The jury reached a verdict committing Geier as a sexually violent predator that same day. 16RP 1649-52. After the jury returned its verdict, the parties presented agreed proposed findings of fact and conclusions of law for the court to engage in a *Bone-Club* analysis finding compelling reasons to seal the juror questionnaires and giving anyone present an opportunity to object. 16RP 1654. The trial court adopted the agreed *Bone-Club* analysis, without oral analysis, and signed and filed the findings of fact, conclusions of law, and agreed order to seal the questionnaires. CP 610-12; 16RP 1654-56.

⁵ The court also referenced GR 31.

III. ARGUMENT

A. **The Trial Court Did Not Err In Denying Geier's Motion For A Mistrial Where The State Cross-Examined Geier's Expert About A Prior Disciplinary Action Against His License.**

1. **A trial court's decision to admit evidence should not be overturned on appeal absent manifest abuse of discretion.**

The decision to admit evidence is within the sound discretion of the trial court. *State v. Bourgeois*, 133 Wn.2d 389, 399, 945 P.2d 1120 (1997). An appellate court reviews a trial court's decision as to the admissibility of evidence under an abuse of discretion standard. *In re Detention of West*, 171 Wn.2d 383, 396, 256 P.3d 302 (2011). A trial court abuses its discretion when its decision is manifestly unreasonable or based upon untenable grounds or reasons. *Id.* at 397.

2. **The State is entitled to cross-examine an expert witness about matters affecting his credibility and bias.**

The scope of cross-examination lies within the discretion of the trial court and will not be overturned on appeal absent a manifest abuse of discretion. *State v. Dixon*, 159 Wn.2d 65, 75, 147 P.3d 991 (2006). "Trial courts have broad discretion in determining the scope of cross-examination, particularly with respect to the examination of experts." *In re Detention of Griffith*, 136 Wn. App. 480, 485, 150 P.3d 577 (2006) (citations omitted). The scope of cross-examination usually has little

effect on the outcome of a trial and therefore is usually given great discretion. *State v. Marks*, 90 Wn. App. 980, 984, 955 P.2d 406 (1998).

ER 607 governs the use of impeachment evidence and provides that the credibility of a witness may be attacked by any party. ER 607. A party has the right to cross-examine a witness about matters that affect the person's credibility and bias. *State v. Russell*, 125 Wn.2d 24, 92, 882 P.2d 747 (1994); see also *In re Detention of Law*, 146 Wn. App. 28, 37, 204 P.3d 230 (2008). The scope of such cross-examination is within the discretion of the trial court. *Russell*, 125 Wn.2d at 92.

Evidence is relevant if it has "any tendency" to make the existence of any fact of consequence to the action more or less probable. ER 401. All relevant evidence is admissible. ER 402. Evidence offered to impeach a witness is relevant if it casts doubt on the credibility of the person being impeached and that person's credibility is a fact of consequence to the action. *State v. Allen S.*, 98 Wn. App. 452, 459-60, 989 P.2d 1222 (1999).

Because the credibility of an expert's professional judgment is important to the jury's determinations, cross-examination of expert witnesses on credibility issues is allowed particularly wide latitude. "Generally, the cross-examination of an expert allows for wide-ranging questioning which touches on all matters testified to in chief, or which

tends to test the qualifications, skill, or knowledge of the witness and the accuracy or value of his or her opinion.” George L. Blum, *Propriety Of Questioning Expert Witness Regarding Specific Incidents Or Allegations Of Expert’s Unprofessional Conduct Or Professional Negligence*, 11 A.L.R.5th 1 (originally published in 1993). The scope of cross-examination of an expert is appropriately broad:

The cross-examination of an expert generally allows for more latitude in the questions put to the witness than is permissible in the cross-examination of ordinary opinion witnesses. Routinely, the examination can be wide-ranging, touching on all matters testified to in chief, or tending to test the qualifications, skill, or knowledge of the witness and the accuracy or value of his or her opinion. Just as the bias or prejudice of an expert may be shown on cross-examination as an independent fact even though it protracts the trial by introducing a new issue, the incompetency of a professed expert may also be shown in the same way and for the same reason—that is, because it may demonstrate that otherwise persuasive testimony cannot be relied upon. With respect to the precise limits of examination, however, the circumstances of each case are the controlling factors, and the matter must be left to the discretion of the trial judge.

Id. at §2a; see also *Duggins v. International Motor Transit Co.*, 153 Wn. 549, 555, 280 P. 50 (1929) (noting the general rule that wide latitude is permitted in the cross-examination of an expert and that the trial court has wide discretion in admitting or excluding evidence on cross-examination).

In Geier's case, the impeachment evidence was properly admitted as a relevant challenge to the professional judgment and credibility of Dr. Halon. Dr. Halon placed his qualifications, credibility, and professional judgment at issue when he proffered himself as an expert on the issues at trial. The revocation of Dr. Halon's license was probative of these qualities and relevant to his credibility.

Furthermore, Dr. Halon opened the door to questions about his license by testifying about it on direct examination. *See* 12RP 958-69. When a party opens up a subject of inquiry on direct examination, the evidence rules permit cross-examination on that same subject:

It would be a curious rule of evidence which allowed one party to bring up a subject, drop it at a point where it might appear advantageous to him, and then bar the other party from all further inquiries about it. Rules of evidence are designed to aid in establishing the truth. To close the door after receiving only a part of the evidence not only leaves the matter suspended in air at a point markedly advantageous to the party who opened the door, but might well limit the proof to half-truths. Thus, it is a sound general rule that, when a party opens up a subject of inquiry on direct or cross-examination, he contemplates that the rules will permit cross-examination or redirect examination, as the case may be, within the scope of the examination in which the subject matter was first introduced.

State v. Gefeller, 76 Wn.2d 449, 455, 458 P.2d 17 (1969). By eliciting testimony regarding Dr. Halon's credentials and psychology license, Geier opened the door for the State to explore the details of that licensing.

Dr. Halon's qualifications, judgment, and credibility were relevant at trial; consequently, the revocation of his license and the reasons for revocation were probative of these qualities. The State was entitled to cross-examine Dr. Halon about his license and prior disciplinary action so the jury could assess his credibility. *See Russell*, 125 Wn.2d at 92. Jurors were instructed that they were the sole judges of credibility of the witnesses and that they may consider a variety of factors in evaluating an expert's testimony. CP 614-17. It was within the trial court's discretion to allow cross-examination on the licensing issue, and the court did not abuse its discretion in allowing the testimony.

3. Cross-examination regarding a disciplinary action against an expert's license does not involve a prior bad act under ER 608 or ER 609.

The trial court granted the State's MIL #13, which was to "preclude references to any alleged prior bad acts or crimes of Petitioner's witnesses." CP 666; CP 563. The trial court ruled that this MIL also applied to Respondent's witnesses. CP 563. This MIL was explicitly based on ER 608, ER 609, and ER 403. CP 666.

ER 608 governs the impeachment of a witness by evidence of his reputation for truthfulness in the community or specific instances of conduct concerning his character for truthfulness or untruthfulness. ER 608. ER 609 governs impeachment by evidence that the witness has

been convicted of a crime. ER 609. Under ER 403, relevant evidence may still be excluded if its probative value is substantially outweighed by the danger of unfair prejudice. ER 403. The State's MIL #13 was based only on these three evidence rules.

ER 608 involves only evidence concerning a witness' character for truthfulness or untruthfulness. ER 609 involves only evidence of a conviction of a crime. The evidence the State elicited from Dr. Halon on cross-examination did not involve either of these evidence rules.

The fact that Dr. Halon's California license was revoked and stayed as part of a stipulated settlement goes to his credibility as an expert witness. The State was entitled to cross-examine Dr. Halon about the complaint filed against him by the Board of Psychology that resulted in his license revocation and stay. This evidence was admissible under ER 607, which governs the use of impeachment evidence and provides that the credibility of a witness may be attacked by any party. ER 607; *see also Law*, 146 Wn. App. at 37 (referencing ER 607 as the applicable rule allowing impeachment of an expert's credibility).

Furthermore, the probative value of the revocation and sanctions was not substantially outweighed by the danger of unfair prejudice. Evidence is not inadmissibly prejudicial merely because it damages an expert's credibility. *Richmond v. Longo*, 604 A.2d 374, 378 (1992). Geier

offers no analysis of how the evidence was unfairly prejudicial under ER 403. The testimony elicited by the State did not involve Dr. Halon's character for truthfulness or untruthfulness in the community under ER 608, and it did not involve a conviction for a crime under ER 609. Consequently, it was not a violation of the State's motion in limine to question Dr. Halon regarding the disciplinary action against his license.

4. Even assuming the court erred in admitting the evidence, the alleged error was neither prejudicial nor did it deny Geier a fair trial.

A trial court's denial of a motion for a mistrial is reviewed under an abuse of discretion standard. *State v. Rodriguez*, 146 Wn.2d 260, 269, 45 P.3d 541 (2002). An appellate court will find abuse of discretion only when "no reasonable judge would have reached the same conclusion." *Id.* A trial court's denial of a motion for a mistrial will be overturned only when there is a "substantial likelihood" that the error affected the verdict. *Id.* at 269-70. Trial courts should grant a mistrial only when the defendant has been so prejudiced that nothing short of a new trial can insure that the defendant will be tried fairly. *Id.* at 270; *see also State v. Weber*, 99 Wn.2d 158, 165, 659 P.2d 1102 (1983) (A mistrial should be granted only when nothing the trial court could have said or done would have remedied the harm done to the defendant).

An evidentiary error is grounds for reversal only if it results in prejudice. *West*, 171 Wn.2d at 410. An error is prejudicial if, within reasonable probabilities, the error materially affected the outcome of the trial. *Id.* “Something more than a possibility of prejudice must be shown to warrant a new trial.” *State v. Lemieux*, 75 Wn.2d 89, 91, 448 P.2d 943 (1968). Only errors affecting the outcome of the trial will be deemed prejudicial. *State v. Johnson*, 124 Wn.2d 57, 76, 873 P.2d 514 (1994).

The trial court has wide discretion to cure trial irregularities. *State v. Post*, 118 Wn.2d 596, 620, 826 P.2d 172 (1992). In determining whether a trial irregularity warrants a new trial, the court may consider: (1) the seriousness of the irregularity; (2) whether it involved cumulative evidence; and (3) whether the irregularity could be cured by an instruction to disregard the remark. *Johnson*, 124 Wn.2d at 76; *In re Detention of Smith*, 130 Wn. App. 104, 113, 122 P.3d 736 (2005). The appropriate inquiry is whether the testimony, when viewed against the backdrop of all the evidence, so tainted the entire trial that the person did not receive a fair trial. *Post*, 118 Wn.2d at 620; *Weber*, 99 Wn.2d at 164.

It is well settled that a litigant is entitled to a fair trial but not a perfect one. *In re Elmore*, 162 Wn.2d 236, 267, 172 P.3d 335 (2007) citing *Brown v. U.S.*, 411 U.S. 223, 231-32, 93 S. Ct. 1565, 36 L. Ed. 2d 208 (1973). A defendant is entitled to a trial free from prejudicial

error, not one that is totally error free. *State v. Evans*, 96 Wn.2d 1, 5, 633 P.2d 83 (1981). The appropriate inquiry is directed at the effect of the testimony, and the judge should not consider whether the testimony was deliberate or inadvertent. *Weber*, 99 Wn.2d at 163-64. Rather, the appropriate inquiry is whether the testimony prejudiced the jury, thereby denying the defendant the right to a fair trial. *Id.* at 164-65.

The trial court did not abuse its discretion in denying Geier's request for a mistrial. Geier has not shown that "no reasonable judge would have reached the same conclusion" or that there is a "substantial likelihood" that any alleged error affected the verdict. *See Rodriguez*, 146 Wn.2d at 269-70. Even assuming it was error to allow cross-examination of Dr. Halon on the licensing issue, Geier has not established that this one line of questioning constitutes prejudicial error or that it deprived him of a fair trial.⁶

⁶ Geier points out in his brief that when defense counsel requested a mistrial, they referenced an email they sent to the State inquiring "whether it was going to use any information against Dr. Halon" and that the State "did not interpret the e-mail as a request for further information about Dr. Halon." *See* Brief of Appellant at 11-12 *citing* 13RP 1199-1201. At trial, the State disputed receiving any such request from counsel, either through interrogatories or an email. 13RP 1199-1200. Rather, the State indicated the email from defense counsel was to advise the State that they had actually learned of the licensing issue and consequently wanted to obtain a different expert. 13RP 1198-1201. Defense counsel then agreed that the State's account was correct, but they assumed it would not be an issue at trial. 13RP 1201-02. The court indicated it wanted the email to be part of the record. 13RP 1201, 1204-06; 14RP 1225. The State subsequently found the email referenced by the parties and filed it with the court. CP 637-40; CP 701. The email indicates that Geier's counsel knew of the disciplinary action involving Dr. Halon several months prior to trial. *See* CP 640.

The trial court had broad discretion in determining the scope of cross-examination of Dr. Halon. *See Griffith*, 136 Wn. App. at 485. It was not error for the trial court to allow cross-examination of Dr. Halon regarding an issue affecting his credibility as an expert witness. *See Law*, 146 Wn. App. at 37; *see also State v. Allen S.*, 98 Wn. App. at 459-60. Geier has not shown how allowing this testimony prejudiced his right to a fair trial. Geier's trial lasted more than three weeks and he had a full opportunity to present his defense. Dr. Halon pointed out that his license was never actually revoked and that his psychology practice has "not been interrupted for a minute in the 30-something years I've had the license." 13RP 1189, 1207. Brief questioning regarding the credibility of Dr. Halon involving one disciplinary action approximately twelve years prior did not undermine the fairness of the trial.

The State did not violate the motion in limine, and even if it had, any potential error was cured by the court having a hearing outside the presence of the jury as soon as an objection was made. Geier did not object when the State asked Dr. Halon if his license had been previously revoked. 13RP 1188-89. He did not object when the State asked Dr. Halon about entering into a stipulated disciplinary order with the State of California in 1999. 13RP 1189. He also did not object when the State asked Dr. Halon whether the settlement was based on a complaint filed

against him by the California Board of Psychology. *Id.* Geier made no objections to this entire line of questioning. It wasn't until the State asked Dr. Halon whether there were four allegations contained in the complaint that Geier objected. *Id.* Geier objected *before* Dr. Halon answered the question and then immediately asked to be heard outside the presence of the jury. 13RP 1189-90. The court granted his request. *Id.* The court then heard argument at length from both parties outside the presence of the jury and subsequently allowed the State to continue its line of questioning on the issue. 13RP 1190-1207.

As the record makes clear, as soon as Geier objected to a question posed by the State, the court held a hearing outside the presence of the jury and before Dr. Halon answered the question. *See* 13RP 1189-90. Thus, there was no "prejudicial evidence" elicited, as Geier claims, before the court heard argument on its admissibility outside the presence of the jury. *See* Brief of Appellant, at 9. The court allowed the State to continue questioning Dr. Halon on the licensing issue because it is "precisely the type of information that is allowed in order to have the jury fully and fairly evaluate the expert witness." *See* 13RP 1204. Thus, there was no prejudicial error and the trial court properly denied Geier's request for a mistrial.

B. The Trial Court Did Not Err By Sealing Juror Questionnaires at the Conclusion of the Trial.

1. A trial court should engage in a *Bone-Club* analysis prior to a courtroom closure.

Article 1, section 10 of the Washington Constitution states that “[j]ustice in all cases shall be administered openly, and without unnecessary delay.” This provision entitles the public to openly administered justice. *Seattle Times Co. v. Ishikawa*, 97 Wn.2d 30, 36, 640 P.2d 716 (1982). The requirement of a public trial is for the benefit of the accused. *Waller v. Georgia*, 467 U.S. 39, 46, 104 S. Ct. 2210, 81 L. Ed. 2d 31 (1984). “The public trial right serves to ensure a fair trial, to remind the officers of the court of the importance of their functions, to encourage witnesses to come forward, and to discourage perjury.” *State v. Brightman*, 155 Wn.2d 506, 514, 122 P.3d 150 (2005).

In order to protect the right to a public trial, a trial court must weigh five factors before closing a courtroom in a criminal trial. *State v. Bone-Club*, 128 Wn.2d 254, 258-59, 906 P.2d 325 (1995);⁷

⁷ The five factors are:

1. The proponent of the 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.

see also Ishikawa, 97 Wn.2d at 37-39. This five-part analysis protects both the public’s right under article I, section 10 and the defendant’s right under article I, section 22.⁸ *State v. Tarhan*, 159 Wn. App. 819, 825, 246 P.3d 580, *review granted*, *State v. Beskurt*, 172 Wn.2d 1013, 259 P.3d 1109 (2011). “Article I, sections 10 and 22 serve complementary and interdependent functions in assuring fairness of our judicial system[.]” *State v. Momah*, 167 Wn.2d 140, 148, 217 P.3d 321 (2009).

The right to a public trial also extends to jury selection. *Id.* However, the right to a public trial is not absolute. *Id.* The presumption in favor of openness may be overcome by an overriding interest based on findings that closure is essential to preserve higher values and narrowly tailored to serve that interest. *Id.* Thus, a trial court may close a courtroom under certain circumstances. *Id.* Whether the right to a public trial has been violated is a question of law subject to de novo review. *Id.* at 147.

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.

⁸ Article I, section 22 of the Washington Constitution provides that “[i]n criminal prosecutions the accused shall have the right ... to have a speedy trial by an impartial jury....”

2. The trial court was not required to engage in a *Bone-Club* analysis because sealing juror questionnaires after trial does not constitute a courtroom closure.

This Court has held that a trial court's sealing of confidential juror questionnaires after voir dire does not constitute a courtroom closure and, therefore, no *Bone-Club* analysis is required. *State v. Smith*, 162 Wn. App. 833, 848, 262 P.3d 72 (2011), review denied, 173 Wn.2d 1007, 271 P.3d 248 (2012).

In *Smith*, the parties agreed to use a joint juror questionnaire and the entire voir dire occurred on the record in open court. *Smith*, 162 Wn. App. at 840-41. When individual jurors wanted to discuss specific issues privately, the trial court and counsel questioned them on the record in open court. *Id.* at 841. The trial court neither closed the courtroom nor excluded the public at any time. *Id.* After the parties completed voir dire, the trial court sealed the questionnaires. *Id.* This Court held that sealing juror questionnaires after voir dire is neither "structural error" nor does it render the trial fundamentally unfair. *Id.* at 847; see also *In re Pers. Restraint of Stockwell*, 160 Wn. App. 172, 180-81, 248 P.3d 576 (2011) (trial court's failure to consider *Bone-Club* factors prior to sealing juror questionnaires was not structural error).

In *Smith*, this Court noted that the defendant actively participated in voir dire and used the questionnaires to his advantage by identifying

and engaging with jurors who wanted to be questioned individually. *Smith*, 162 Wn. App. at 847. Sealing juror questionnaires after voir dire did not affect the public's right to open information because the defendants used the content of the questionnaires to question the jurors in open court where the public could observe. *Id.* "Under these circumstances, there was no courtroom closure and, therefore, no need for the trial court to consider the *Bone-Club* factors." *Id.* at 848.⁹

In *Stockwell*, Stockwell filed a personal restraint petition, arguing that the trial court violated his right to a public trial by sealing the juror questionnaires. *Stockwell*, 160 Wn. App. at 175-77. This Court concluded that sealing juror questionnaires after voir dire was not structural error and did not render the trial fundamentally unfair. *Id.* at 180-81. This Court noted that Stockwell stipulated to using the questionnaires and did not object to sealing them, that he actively participated in voir dire and used the questionnaires to identify which jurors to question individually, that he

⁹ This Court specifically declined to follow *State v. Coleman*, 151 Wn. App. 614, 214 P.3d 158 (2009), in which Division One held that the trial court was required to conduct a *Bone-Club* analysis before sealing juror questionnaires that contained information about the jurors' sexual history. *Smith*, 162 Wn. App. at 848 n.9. This Court found Judge Van Deren's concurring opinion in *Stockwell*, 160 Wn. App. at 182 more persuasive. *Smith*, 162 Wn. App. at 848 n.9. The *Stockwell* concurrence indicated that the dispositive point is that "the content of the questionnaires was used in open court, where the public could observe. Accordingly, no part of voir dire was closed to the public. Under these circumstances, I do not believe there is a closure triggering the requirement of a *Bone-Club/Waller* analysis." *Stockwell*, 160 Wn. App. at 183-84 (Van Deren J., concurring).

benefitted from sealing the questionnaires, and that the parties questioned the jurors in open court. *Id.* In addition, the questionnaire's promise of confidentiality made it more likely jurors would candidly reveal critical information for Stockwell to use in challenging a juror for cause. *Id.* at 180.

Conducting voir dire in open court, with only other jurors excluded, does not constitute a courtroom closure. *State v. Price*, 154 Wn. App. 480, 487, 228 P.3d 1276 (2009), *review denied*, 169 Wn.2d 1021, 238 P.3d 504 (2010), *cert. denied*, *Price v. Washington*, 131 S. Ct. 1818, 179 L. Ed. 2d 776 (2011); *see also State v. Erickson*, 146 Wn. App. 200, 206 n.2, 189 P.3d 245 (2008) (questioning individual jurors in open court separate from other prospective jurors is not a courtroom closure and it secures the right to a public trial). If there is no courtroom closure, the right to a public trial is not implicated, and no *Bone-Club* inquiry is required. *Price*, 154 Wn. App. at 486-89.

In *Erickson*, this Court held that it was error to conduct part of voir dire in the jury room without first conducting a *Bone-Club* analysis. *Erickson*, 146 Wn. App. at 211. This Court noted that "the better practice is to question individual jurors regarding sensitive topics separate from the rest of the prospective jurors, but within the courtroom." *Id.* at 211, n.8. "Such an approach is not a closure of the courtroom and thus requires no

Bone-Club analysis.” *Id.*; see also *State v. Vega*, 144 Wn. App. 914, 184 P.3d 677 (2008), *review denied*, 165 Wn.2d 1024, 203 P.3d 381 (2009). In *Vega*, the Court held that a weighing of *Bone-Club* factors is not required when a judge questions jurors in open court apart from the other jurors because (1) jurors become officers of the court when they are sworn in and are not members of the public; and (2) questioning individual jurors apart from other jurors about matters that may taint the other jurors serves to preserve a fair trial. *Vega*, 144 Wn. App. at 915-17.

Under the facts of Geier’s case, there was no closure triggering the requirement of a *Bone-Club* analysis. This case is similar to *Smith*, where this Court held that no *Bone-Club* analysis was required prior to sealing the questionnaires after voir dire. See *Smith*, 162 Wn. App. at 846-48. In Geier’s case, all portions of voir dire occurred on the record in open court, and the trial court did not seal the questionnaires until after the trial concluded. See 4RP 20-21; CP 709; CP 610-12. Moreover, similar to *Smith* and *Stockwell*, Geier actively participated in voir dire and used the questionnaires to his advantage by questioning jurors individually and excusing numerous jurors for cause. See 5(a)RP 104-14, 123-31, 139-45; 6(a)RP 174-78.

Sealing the questionnaires at the conclusion of trial did not affect the public’s right to open information because Geier used the content of

the questionnaires to question jurors in open court where the public could observe. *See Smith*, 162 Wn. App. at 847. The questionnaire was simply used as a screening device to identify jurors who might prefer to be questioned individually outside the presence of the other jurors. *See CP 703-10*. The questionnaire, in and of itself, did not determine whether a person would serve on the panel or be excused. Rather, the questionnaire triggered additional questioning by the parties, all of which occurred in open court. *See 5(a)RP 4-166; 6(a)RP 169-178*.

Thus, given the limited scope of the questionnaire and the limited manner in which it was used at trial, sealing the questionnaire at the conclusion of trial did not violate the public right to trial. The public was free to attend any and all portions of the jury selection process. The court made this clear when a spectator in the courtroom inquired how long voir dire would take because they didn't need to be present for that portion of the trial. 4RP 20-21. The court told the spectator, "Well, it's up to you. The courtroom is open. I want to make sure that I don't exclude anybody who wants to be here." *Id.* The dispositive point is that the content of the questionnaires was used in open court, where the public could observe. *See Stockwell*, 160 Wn. App. at 183-84 (Van Deren, J., concurring). Accordingly, no part of voir dire was closed to the public and a *Bone-Club* analysis was not required.

3. **Even if this Court finds a *Bone-Club* analysis should have been conducted prior to sealing the juror questionnaires, the appropriate remedy is to remand to the trial court for a *Bone-Club* analysis.**

If an appellate court determines that a person's right to a fair public trial has been violated, it devises an appropriate remedy to that violation. *Momah*, 167 Wn.2d at 149. A case should be remanded for a new trial only when an error is structural in nature. *Id.* at 155. Not all violations of the right to a public trial result in structural error requiring a new trial. *Id.* at 150. The remedy must be appropriate to the violation. *Id.* at 156; *see also Waller v. Georgia*, 467 U.S. at 50. A new trial should only be required in cases where the closure rendered the trial fundamentally unfair. *See Momah*, 167 Wn.2d at 150.

In *Waller v. Georgia*, the trial court closed the courtroom for a suppression hearing over the defendant's objection and, on review, the Supreme Court held that the defendant was entitled to a new suppression hearing, but not a new trial. *Waller*, 467 U.S. at 42, 50. The Court reasoned that the remedy should be appropriate to the violation, and automatically granting a new trial would be "a windfall for the defendant, and not in the public interest." *Id.* at 50. In *Waller*, the Court did not conclusively presume prejudice and automatically grant a new trial, but

rather required a showing that the defendant's case was actually rendered unfair by the closure. *Momah*, 167 Wn.2d at 150.

In *Momah*, our Supreme Court held that the trial court's closure of a portion of voir dire to safeguard the defendant's right to an impartial jury was not structural error requiring a new trial. *Momah*, 167 Wn.2d at 155-56, *cert. denied*, *Momah v. Washington*, 131 S. Ct. 160, 178 L. Ed. 2d 40 (2010). In *Momah*, Momah's counsel agreed to private questioning of jurors and was granted the expansion of in-chambers questioning over concerns of contaminating the jury pool. *Id.* at 146, 155. In finding that this was not structural error, the Court explained that "Momah affirmatively assented to the closure, argued for its expansion, had the opportunity to object but did not, actively participated in it, and benefitted from it." *Id.* at 151.

The choices a party makes at trial may impact his ability to seek relief from an alleged error or may affect the remedy he receives. *Id.* at 153. The Court presumed Momah made tactical choices to achieve what he perceived to be the fairest result. *Id.* at 155. The *Momah* Court applied the basic premise of the invited error doctrine to determine what, if any, relief should be granted. *Id.* at 154.¹⁰ The Court noted numerous

¹⁰ Courts have used the invited error doctrine to analyze the impact a party's tactical choices have on an alleged error. The basic premise of the doctrine is that a party who sets up an error at trial cannot claim that action as error on appeal in order to receive

actions by Momah’s counsel that promoted and safeguarded his right to an impartial jury, including his deliberate choice to pursue in-chambers voir dire to avoid contaminating the jury pool and his ability to exercise numerous challenges for cause and remove biased jurors from the venire due to the closure. *Id.* at 155. The Court concluded that the closure did not prejudice Momah and affirmed his conviction. *Id.* at 156.

However, on the same day it filed *Momah*, the Supreme Court filed *State v. Strode*, 167 Wn.2d 222, 217 P.3d 310 (2009), in which it reversed Strode’s conviction with the plurality reasoning that the court’s closure of voir dire was a structural error that violated the defendant’s right to a public trial. In *Strode*, several jurors were questioned privately in chambers without the court first performing a *Bone-Club* analysis. *Id.* at 224. A plurality concluded that prejudice is presumed by the trial court’s failure to engage in a *Bone-Club* analysis prior to the closure. *See id.* at 231.¹¹

a new trial. The doctrine was designed in part to prevent a party from misleading the trial court and receiving a windfall by doing so. *Momah*, 167 Wn.2d at 153.

¹¹ Two of the justices concurred in the result, explaining that Strode did not actively participate in the closure to the same extent that Momah had. *Id.* at 231-36 (Fairhurst J., concurring). However, the concurrence disagreed with the lead opinion to the extent that it appeared to conflate the rights of the defendant and the public. “A defendant should not be able to assert the right of the public or the press in order to overturn his conviction when his own right to a public trial has been safeguarded as required under *Bone-Club* or has been waived.” *Id.* at 236. “As the various opinions and shifting alignments in *Momah* and *Strode* demonstrate, a majority of our Supreme Court is apparently unwilling at this time to allow a defendant to assert the public’s ‘open’ justice rights.” *Stockwell*, 160 Wn. App. at 181.

Several months after *Momah* and *Strode*, the United States Supreme Court decided *Presley v. Georgia*, 130 S. Ct. 721, 175 L. Ed. 2d 675 (2010). In *Presley*, the Court found that the defendant's right to a public trial was violated when the trial court excluded a member of the public from voir dire without first considering alternatives to closure. *Presley*, 130 S. Ct. at 722-25.

Two different panels of this Court have concluded that *Momah* and *Strode* are no longer controlling authority in light of *Presley v. Georgia*. See *State v. Leyerle*, 158 Wn. App. 474, 482, 242 P.3d 921 (2010); *State v. Paumier*, 155 Wn. App. 673, 685, 230 P.3d 212, review granted, 169 Wn.2d 1017, 236 P.3d 206 (2010). However, a third panel disagreed, noting that *Presley* did not consider whether an erroneous court closure necessarily results in structural error, particularly where the defendant did not object to the alleged closure, participated in it, and subsequently sought to use the closure to collaterally attack his conviction. See *Stockwell*, 160 Wn. App. at 180 n.4. Thus, this panel applied *Momah* and *Strode* to consider whether the alleged error warranted reversal. *Id.*¹²

¹² One possible explanation for the different remedies in *Momah* and *Strode* is that the record in *Strode* lacked any hint that the trial court considered the defendant's public trial right before questioning jurors in chambers. See *Strode*, 167 Wn.2d at 228-30. However, in *Momah*, the trial court recognized the competing article I, section 22 interests and closed part of voir dire in order to safeguard the defendant's right to an impartial jury. See *Momah*, 167 Wn.2d at 156.

When an error is not structural, reversal is not the proper remedy. *See State v. Coleman*, 151 Wn. App. 614, 623-24, 214 P.3d 158 (2009). The proper remedy for an error in sealing questionnaires and violating the public's right to open court records is to remand for reconsideration of the sealing order based on the *Bone-Club* factors. *Id.* The *Coleman* Court explained:

The questionnaires were used only for selection of the jury, which proceeded in open court. The questionnaires were not sealed until several days after the jury was seated and sworn. Unlike answers given verbally in closed courtrooms, there is nothing to indicate that the questionnaires were not available for public inspection during the jury selection process. Thus, the subsequent sealing order had no effect on Coleman's public trial right, and did not create defect[s] affecting the framework within which the trial proceeds.

Id. at 624 (quotations and citations omitted).

In *Tarhan*, at the conclusion of voir dire, the trial court sealed the juror questionnaires used in voir dire without first conducting a *Bone-Club* analysis. *Tarhan*, 159 Wn. App. at 822. The Court held that this did not violate Tarhan's right to a public trial, but remanded for a *Bone-Club* analysis and reconsideration of the sealing order. *Id.* Noting substantially similar facts to those in *Coleman*, the Court reasoned that Tarhan failed to point to any part of his record in which the jury selection was not held in open court. *Id.* at 829. "More importantly, he fails to point to anything in

this record to show that the completed questionnaires were used for anything other than jury selection, which proceeded in open court.” *Id.* The Court also explained that the trial court entered the sealing order six days *after* the parties accepted the jury and that Tarhan failed in his burden to show that the questionnaires were unavailable for public inspection during jury selection. *Id.* at 829-31.

Geier’s case is materially indistinguishable from *Coleman* and *Tarhan*. Under *Coleman* and *Tarhan*, Geier must show that the juror questionnaires were not available for public inspection prior to the June 14th sealing order. He has not. The questionnaires were not sealed until several weeks after the jury was selected and sworn in. CP 610-12; 16RP 1654. The questionnaires were used only for jury selection, which occurred in open court. There is nothing in the record to indicate the questionnaires were not part of the open public proceedings during the three-day jury selection process between May 23rd and May 25th or prior to their sealing *after trial* on June 14th. There is also nothing to indicate that the questionnaires were not available for public inspection during the entire trial.

In Geier’s case, the trial court clearly recognized the right to public trial issue at the beginning of trial when it sua sponte informed counsel that it would have to do a *Bone-Club* analysis if the juror questionnaires

were subsequently sealed. *See* 8RP 445. The court indicated that after closing arguments “we could discuss whether or not we have need of a *Bone-Club* hearing or if there were some stipulations that the parties would be willing to make concerning *Bone-Club* factors.” *Id.* At the conclusion of trial, the parties presented agreed findings to the court regarding the *Bone-Club* factors, which the court then adopted. 16RP 1654-56; CP 610-12. Unlike *Strode* where the record lacked any hint that the trial court considered the defendant’s public trial right, the trial court in Geier’s trial clearly recognized the public trial right at issue and entered specific findings of fact and conclusions of law regarding the *Bone-Club* analysis before sealing the questionnaires. *See* CP 610-12. Thus, the court did engage in a *Bone-Club* analysis and there was no error.

However, if this Court concludes that a verbal *Bone-Club* analysis was required prior to sealing the questionnaires, in addition to the written findings of fact and conclusions of law regarding the *Bone-Club* analysis, the proper remedy is to remand for reconsideration of the sealing order. *See Coleman*, 151 Wn. App. at 623-24. The remedy must be appropriate to the violation. *Waller v. Georgia*, 467 U.S. at 50. Geier should receive a new trial only if his trial was fundamentally unfair. *See Momah*, 167 Wn.2d at 155-56. The questionnaires were not sealed at any point during Geier’s trial. It wasn’t until *after* the jury returned its verdict on

June 14th that the questionnaires were sealed. CP 610-12; CP 631; 16RP 1654-56. Automatically granting Geier a new trial under these circumstances would create a windfall for Geier and not be in the public interest. *See Waller v. Georgia*, 467 U.S. at 50.

Moreover, Geier agreed to sealing the questionnaires and benefitted from the voir dire process. Similar to the defendant in *Momah*, Geier made tactical choices to achieve what he perceived to be the fairest result. *See Momah*, 167 Wn.2d at 155. He used the questionnaires to identify individuals who may not be fair and impartial and excused numerous jurors for cause. *See* 5(a)RP 104-14, 123-31, 139-45; 6(a)RP 174-78. Geier has not shown any possible prejudice to him resulting from an order sealing questionnaires after his trial concluded and reversal is not the appropriate remedy. *See Coleman*, 151 Wn. App. at 624.

4. The State does not oppose Geier's request that this Court stay its decision on this issue pending the Supreme Court's decision addressing the right to public trial issue.

Geier requests that this Court stay its decision on this issue pending the Washington Supreme Court's decision in *State v. Tarhan*. *See* Brief of Appellant, at 14-16. There are two cases pending before our Supreme Court that involve the right to a public trial. *State v. Tarhan*,

159 Wn. App. 819, *review granted*, *State v. Beskurt*, 172 Wn.2d 1013, 259 P.3d 1109 (2011); *State v. Paumier*, 155 Wn. App. 673, *review granted*, 169 Wn.2d 1017, 236 P.3d 206 (2010).¹³

In *Paumier*, the trial court allowed potential jurors who preferred private questioning to be questioned in chambers. *Paumier*, 155 Wn. App. at 676. This Court held that conducting a portion of jury selection in chambers violated Paumier's right to a public trial and reversed his convictions. *Id.* at 677, 686. In *Tarhan*, the trial court sealed the juror questionnaires used in voir dire at the conclusion of voir dire without first conducting a *Bone-Club* analysis. *Tarhan*, 159 Wn. App. at 822. Division I held that this did not violate Tarhan's right to a public trial, but remanded for a *Bone-Club* hearing. *Id.* The Washington Supreme Court subsequently granted review of both *Paumier* and *Tarhan* and decisions are currently pending.

The State does not object to Geier's request that this Court stay its decision on this issue pending a decision by the Washington Supreme Court.¹⁴ Although *Tarhan* is more on point with the facts of this case, given that there are two decisions pending before the Supreme Court on

¹³ The Washington Supreme Court granted review in *Tarhan* on September 8, 2011 and in *Paumier* on August 6, 2010.

¹⁴ In *Leyerle*, this Court ordered proceedings stayed pending our Supreme Court's decisions in *Strode* and *Momah* and then ordered the parties to provide supplemental briefing once decisions were issued. *Leyerle*, 158 Wn. App. at 478 n3.

the right to public trial issue, if the Court grants Geier's request to stay the appeal, the State requests the stay remain until the Supreme Court issues decisions on both *Tarhan* and *Paumier*.

IV. CONCLUSION

For the foregoing reasons, the State requests that this Court affirm the civil commitment of Geier as a sexually violent predator.

RESPECTFULLY SUBMITTED this 21st day of May, 2012.



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NO. 42292-1

WASHINGTON STATE COURT OF APPEALS, DIVISION II

In re the Detention of:

PAUL ANDREW GEIER

Appellant,

v.

THE STATE OF WASHINGTON,

Respondent.

DECLARATION OF SERVICE

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STATE OF WASHINGTON

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DIVISION II

I, Kelly Hadsell, declare as follows:

On this 21st day of May, 2012, I deposited in the United States mail true and correct cop(ies) of Brief of Respondent and Declaration of Service, postage affixed, addressed as follows:

Valerie Marushige
23619 55th Pl S
Kent, WA 98032-3307

I declare under penalty of perjury under the laws of the State of Washington that the foregoing is true and correct.

DATED this 21st day of May, 2012, at Seattle, Washington.


KELLY HADSELL

ORIGINAL