

NO. 42427-4

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

STATE OF WASHINGTON, RESPONDENT

v.

OLUJIMI A. BLAKENEY, APPELLANT

Appeal from the Superior Court of Pierce County
The Honorable Edmund Murphy

No. 10-1-03138-5

RESPONDENT'S BRIEF

MARK LINDQUIST
Prosecuting Attorney

By
JASON RUYF
Deputy Prosecuting Attorney
WSB # 38725

930 Tacoma Avenue South
Room 946
Tacoma, WA 98402
PH: (253) 798-7400

Table of Contents

A. ISSUES PERTAINING TO APPELLANT'S ASSIGNMENTS OF ERROR. 1

 1. Should defendant’s claim that juror questionnaires were improperly sealed without a *Bone-Club* analysis be rejected when he failed to perfect the record and this Court has held the sealing of questionnaires is not a courtroom closure guided by *Bone-Club*?..... 1

 2. Is defendant incapable of showing the trial court abused its discretion by permitting the State to adduce evidence that rebutted an inference raised during cross-examination that the State’s failure to conduct a polygraph examination on a testifying witness had deprived the jury admissible evidence of the witness’s credibility? 1

B. STATEMENT OF THE CASE. 1

 1. Procedure 1

 2. Facts 4

C. ARGUMENT. 7

 1. DEFENDANT’S CLAIM THAT JUROR QUESTIONNAIRES WERE IMPROPERLY SEALED WITHOUT A *BONE-CLUB* ANALYSIS SHOULD BE REJECTED BECAUSE HE FAILED TO PERFECT THE RECORD AND THE CHALLENGED PROCEDURE IS NOT A COURTROOM CLOSURE GOVERNED BY *BONE-CLUB*..... 7

2.	DEFENDANT FAILED TO SHOW THE TRIAL COURT ABUSED ITS DISCRETION WHEN IT ALLOWED THE STATE TO ADDUCE EVIDENCE THAT REBUTTED AN INFERENCE RAISED DURING CROSS-EXAMINATION THAT THE STATE'S FAILURE TO CONDUCT A POLYGRAPH EXAMINATION HAD DEPRIVED THE JURY ADMISSIBLE EVIDENCE OF THE WITNESS'S CREDIBILITY	13
D.	<u>CONCLUSION</u>	22

Table of Authorities

State Cases

<i>Allemeier v. Univ. of Wash.</i> , 42 Wn. App. 465, 472-73, 712 P.2d 306, rev. denied, 105 Wn.2d 1014 (1986)	8
<i>Bulzomi v. Dep't of Labor & Indus.</i> , 72 Wn. App. 522, 525, 864 P.2d 996 (1994).....	8
<i>Favors v. Matzke</i> , 53 Wn. App. 789, 794, 770 P.2d 686 (1989).....	8
<i>In re Detention of Morgan</i> , 161 Wn. App. 66, 84, 253 P.3d 394 (2011).....	8
<i>In re Detention of Taylor</i> , 132 Wn. App. 827, 836, 134 P.3d 254 (2006).....	16
<i>In re Pers. Restraint of Stockwell</i> , 160 Wn. App. 172, 178, 248 P.3d 576 (2011).....	7, 8, 9, 10, 11, 12
<i>Lockwood v. AC & S, Inc.</i> , 109 Wn.2d 235, 255, 744 P.2d 605 (1987).....	22
<i>State v. Avendano-Lopez</i> , 79 Wn. App. 706, 714, 904 P.2d 324 (1995).....	17
<i>State v. Bone-Club</i> , 128 Wn.2d 254, 906 P.2d 325 (1995).....	1, 7, 9, 12
<i>State v. Brett</i> , 126 Wn.2d 136, 174-75, 892 P.2d 29 (1995)	13
<i>State v. Brightman</i> , 155 Wn.2d 506, 514-15, 122 P.3d 150 (2005).....	7
<i>State v. Brown</i> , 132 Wn.2d 529, 571-572, 940 P.2d 546 (1997) cert denied, 523 U.S. 1007, 118 S. Ct. 1192, 140 L. Ed. 2d 322 (1998).....	13
<i>State v. Castellanos</i> , 132 Wn.2d 94, 97, 935 P.2d 1353 (1997).....	13
<i>State v. Coleman</i> , 252 Wn. App. 624, 214 P.3d 158 (2009).....	9, 12
<i>State v. Cunningham</i> , 93 Wn.2d 823, 831, 613 P.2d 1139 (1980)....	19, 20

<i>State v. Descoteaux</i> , 94 Wn.2d 31, 614 P.2d 179 (1980).....	20
<i>State v. Gefeller</i> , 76 Wn.2d 449, 454-55, 458 P.2d 17 (1969)	16, 17, 18
<i>State v. Halstien</i> , 122 Wn.2d 109, 127, 857 P.2d 270 (1993).....	20
<i>State v. Hartzell</i> , 156 Wn. App. 918, 934-35, 237 P.3d 928 (2010)	17
<i>State v. Hughes</i> , 118 Wn. App. 713, 724, 77 P.23d 681 (2003).....	13
<i>State v. Ish</i> , 170 Wn.2d 189, 195, 241 P.3d 389 (2010).....	13, 19
<i>State v. Jones</i> , 114 Wn. App. 284, 298, 183 P.3d 307 (2008)	17
<i>State v. McDonald</i> , 138 Wn.2d 680, 693, 981 P.2d 443 (1999)	13
<i>State v. Momah</i> , 167 Wn.2d 140, 156, 217 P.3d 321 (2009).....	9, 10, 12
<i>State v. Myers</i> , 133 Wn.2d 26, 36, 941 P.2d 1102 (1997).....	22
<i>State v. Ortega</i> , 134 Wn. App. 617, 626, 142 P.3d 175 (2006).....	17
<i>State v. Reay</i> , 61 Wn. App. 141, 149-50, 810 P.2d 512 (1991)	16
<i>State v. Riley</i> , 121 Wn.2d 22, 31, 846 P.2d 1365 (1993)	8
<i>State v. Smith</i> , 162 Wn. App. 833, 846-47, 262 P.3d 72, <i>rev. denied</i> , 173 Wn.2d 1007 (2012)	8, 9, 10, 12
<i>State v. Stark</i> , 48 Wn. App. 245, 249-250, 738 P.2d 684 (1987).....	21
<i>State v. Stroud</i> , 167 Wn.2d 222, 217 P.3d 310 (2009).....	10, 11
<i>State v. Sutherland</i> , 94 Wn.2d 527, 530, 617 P.2d 1010 (1980)	20
<i>State v. Tarhan</i> , 159 Wn. App. 819, 829-32, 246 P.3d 580 (2011), <i>rev. granted</i> , <i>State v. Beskurt</i> , 172 Wn.2d 1013, 259 P.3d 1109 (2011).....	9, 12
<i>State v. Taylor</i> , 83 Wn.2d 594, 598, 521 P.2d 699 (1974).....	13
<i>State v. Tharp</i> , 96 Wn.2d 591, 599, 637 P.2d 961 (1981).....	20
<i>State v. Thomas</i> , 150 Wn.2d 821, 856, 83 P.3d 970 (2004)	13

<i>State v. Vazquez</i> , 66 Wn. App. 573, 583, 832 P.2d 883 (1992)	8
<i>State v. Wade</i> , 138 Wn.2d 460, 464, 979 P.2d 850 (1999)	13
<i>State v. Warren</i> , 165 Wn.2d 17, 195 P.3d 940 (2008)	20
<i>State v. Weber</i> , 99 Wn.2d 158, 166, 659 P.2d 1102 (1983)	21
<i>State v. West</i> , 70 Wn.2d 751, 424 P.2d 1014 (1967)	16
<i>State v. Woo</i> , 84 Wn.2d 472, 473, 527 P.2d 271 (1974)	16
<i>State v. Young</i> , 158 Wn. App. 707, 719, 243 P.3d 172 (2011)	17

Federal and Other Jurisdictions

<i>Brown v. Darcy</i> , 783 F.2d 1389, 1397 (9 th Cir., 1986), <i>overruled on other grounds U.S. v. Cordoba</i> , 104 F.3d 225 (9 th Cir., 1997)	16
<i>Frye v. United States</i> , 293 F. 1013 (D.C. Cir. 1923).....	16

Constitutional Provisions

Article I, section 10.....	7
Sixth Amendment	7
U.S. Const., amend. VI	7
Wash. Const., art I § 22.....	7

Rules and Regulations

CrR 6.4 (b)	11
ER 106	18
ER 401	16

A. ISSUES PERTAINING TO APPELLANT'S ASSIGNMENTS OF ERROR.

1. Should defendant's claim that juror questionnaires were improperly sealed without a *Bone-Club*¹ analysis be rejected when he failed to perfect the record and this Court has held the sealing of questionnaires is not a courtroom closure guided by *Bone-Club*?

2. Is defendant incapable of showing the trial court abused its discretion by permitting the State to adduce evidence that rebutted an inference raised during cross-examination that the State's failure to conduct a polygraph examination on a testifying witness had deprived the jury admissible evidence of the witness's credibility?

B. STATEMENT OF THE CASE.

1. Procedure

On April 14, 2011, the Pierce County Prosecutor's Office filed an amended information charging appellant, OLUJIMI BLAKENEY ("defendant") with first degree murder, drive-by shooting, unlawful

¹ *State v. Bone-Club*, 128 Wn.2d 254, 258-60, 906 P.2d 325 (1995). To protect constitutional public trial rights, a trial court must weigh the five factors before closing a criminal hearing: (1) the compelling interest warranting closure; (2) the opportunity for members of the public to object; (3) the degree of closure required; (4) the relative weight of the competing interests; and (5) the absolute necessity of the closure requested. *Id.*

possession of a firearm in the first degree, and assault in the second degree. CP 15-17. Two firearm enhancements were alleged. CP 15-17.

The Honorable Brian Tollefson presided over the trial. RP (Jul. 7, 2011) 62.² The parties agreed to distribute the State's proposed questionnaire to the venire and file the responses under seal when they were no longer needed at trial. RP (Jul. 7, 2011) 35-6; RP 25-6. The Court issued the agreed abridgment of the questionnaire to the venire on July 11, 2011; the parties received completed copies by July 12, 2011. RP (Jul. 7, 2011) 38-40; RP 1, 27, 30-2; CP 271-517. The record does not indicate a courtroom closure occurred during jury selection; however the status of the courtroom cannot be ascertained as defendant did not provide a transcript of the voir dire. RP 29-35. The jury was impaneled on July 13, 2011. RP 35. The completed questionnaires were sealed on September 23, 2011. CP 271.

Both parties gave opening statements. RP (Jul. 13, 2011) 2, 29. The prosecutor disclosed codefendants Herman Jackson ("Jackson") and Manuel Castillo ("Castillo") would testify pursuant to plea agreements; defendant suggested the agreements would influence their testimony. RP (Jul. 13, 2011) 19, 31.

² Reference to the record for any proceeding other than that of the trial will include the date when the hearing was held, *e.g.*, RP (Jul. 7, 2011) 1. Reference to the trial record will not include the date, *e.g.*, RP 1.

The State called Castillo as a witness. RP 174, 231-32. Defendant cross-examined Castillo about a plea agreement provision that required him to submit to a polygraph examination at the State's request, and elicited a concession the request was never made. RP 233. The prosecutor made a motion outside the presence of the jury, arguing that cross-examination implied the State failed to collect admissible evidence of Castillo's credibility. RP 347-49. The State wanted to call Castillo's attorney to provide rebuttal testimony about the polygraph provision's purpose and the general inadmissibility of polygraph evidence. RP 347-49, 352. Defendant objected to the proposed testimony, but agreed to a limiting instruction on polygraph evidence could be properly given. RP 351, 354-55. The court ruled both of the remedial measures were appropriate under the circumstances, and each was presented at trial. RP 352-53, 355, 436-41.

Defendant was convicted as charged. CP 120-126. The trial court imposed sentence on August 3, 2011. CP 252-63. The court imposed a high end sentence of 548 months for the first degree murder count and ran it concurrent with the lesser sentences it imposed for the remaining counts. RP 254-55, 258. The court also imposed a statutorily required additional 192 months for the enhancements. CP 258. Defendant timely filed a notice of appeal on August 3, 2011. CP 264.

2. Facts

The Tacoma Police Department responded to a shooting just before midnight on Thursday, July 22, 2010. RP 106-07, 110. Police found Lisa Melancon (“Lisa”)³ dead on the front porch of the Tacoma home she shared with her husband and her teenage son. RP 113-14, 124, 419, 495, 500, 614; Ex. 14. The investigation revealed defendant shot Lisa in the face from a moving vehicle as she attempted to call 911. RP 201-02, 204, 385-87, 418-22, 460-63, 492-94, 508, 559-60, 594, 614, 618-19; Ex. 8, 14, 46-9.

The conflict that culminated in the shooting began with a dispute between defendant’s friend, Castillo, and the Melancons’ teenage neighbor, Jordan Kudla (“Jordan”). RP 367, 405, 433, 445.⁴ Castillo was upset over text messages his fiancée received from Jordan. RP 177-80, 405. Castillo challenged Jordan to a fight. RP 180-81, 543. Jackson drove Castillo and defendant⁵ to Jordan’s residence. RP 186, 541; Ex. 82-4. Jackson⁶ parked the car across the street from the Melancons’ house. RP 187, 371, 407, 482; Ex. 8-11. Castillo and Jordan fought in the street. RP 192-93, 196, 370, 406, 412-13, 446-47, 453-54, 479, 554, 548; Ex. 5, 9.

³ The State will refer to Mrs. Lisa Melancon and Mr. Joe Melancon by their first names to avoid confusion. No disrespect is intended.

⁴ The State will refer to Mr. Jordan Kudla and his mother, Ms. April Kudla, by their first names to avoid confusion. No disrespect is intended.

⁵ Defendant is sometimes referred to in the record by the monikers “OJ” and “G.” *See e.g.*, RP 53, 538.

⁶ Jackson is sometimes referred to in the record by the moniker “Six.” *See e.g.* RP 175.

Jordan's mother, April, hit Castillo with a baseball bat to help her son. RP 198, 376, 414, 454-55, 555. Defendant responded by pointing a revolver at April. RP 380-82, 456-57, 461, 556-57. Defendant fired two shots into the air. RP 380-81, 415, 417, 458, 489-90. Jordan's friend Amie Hieronymus ran next door to the Melancon house for help. RP 417. Joe Melancon walked outside to investigate. RP 418, 491, 506. Lisa Melancon stepped onto her front porch with a telephone to call 911. RP 418-19, 463, 508.

Defendant, Castillo, and Jackson returned to their car. RP 199-200, 382-84, 459-60, 492, 558; Ex. 23-6. The car almost struck April's sixty two year old father when Jackson drove away at a high rate of speed. RP 384-85, 419. Defendant fired several bullets back toward the group of approximately six people that had gathered near the Melancons' front yard. RP 201-02, 204, 385-87, 421-22, 460-62, 492-94, 508, 559-60, 594; Ex. 8. One of the bullets entered Lisa's face immediately below her right eye. RP 614, 619; Ex.14, 46-7. The bullet traveled through Lisa's brain. RP 618-19; Ex. 48-9. Lisa fell to the ground and began coughing up blood. RP 388, 463, 495, 510; Ex. 14. Lisa died almost instantly. RP 614. Joe felt Lisa's last heartbeat as he held her arm. RP 510, 620. Defendant, Castillo and Jackson went to a casino. RP 206-08, 565-66.

Defendant met Castillo the next day to hide the spent .38 caliber bullet casings that remained inside defendant's revolver. RP 211-12, 519, 521, 524-25, 569-70. They hid the casings in a patch of ivy near the Park

Avenue School. RP 211-12, 230, 519, 521, 524-25, 569-70; Ex. 18-22. The casings were recovered by police. *Id.* The Washington State Patrol concluded the bullet retrieved from Lisa's brain was consistent with .38 caliber ammunition. RP 519, 521, 524-25; Ex. 51. Defendant buried the revolver in a wooded park. RP 213-15, 217-19, 221. Castillo subsequently described that location to police. RP 221-22. A K-9 unit identified gunpowder residue in an area matching Castillo's description, but the revolver was not recovered. RP 221-22, 302, 319, 321, 328, 330, 338-41; Ex. 73-80.

Castillo surrendered to police two days after the shooting. RP 224, 227, 231, 257. Jackson fled to Texas. RP 571-73. Defendant fled to California. RP 52-3. Defendant used the alias "G." at the time. RP 53. Defendant's California roommates learned he committed a crime in Washington. RP 58-9, 71-2. Defendant told them a woman in Washington died after he shot her with his revolver. RP 59-61, 71, 78. Defendant seemed "proud of what he ha[d] done." RP 72. The roommates reported defendant to law enforcement. RP 72, 91. Defendant was apprehended. RP 57, 73. Defendant admitted he tried to provoke police into killing him by feigning the intent to resist arrest. RP 91, 97.

Defendant rested without calling any witnesses. RP 632.

C. ARGUMENT.

1. DEFENDANT’S CLAIM THAT JUROR QUESTIONNAIRES WERE IMPROPERLY SEALED WITHOUT A *BONE-CLUB* ANALYSIS SHOULD BE REJECTED BECAUSE HE FAILED TO PERFECT THE RECORD AND THE CHALLENGED PROCEDURE IS NOT A COURTROOM CLOSURE GOVERNED BY *BONE-CLUB*.

“Both the Sixth Amendment to the federal constitution and article I, section 22 of our state constitution guarantee a criminal defendant the right to a public trial.” *In re Pers. Restraint of Stockwell*, 160 Wn. App. 172, 178, 248 P.3d 576 (2011) (citing U.S. Const., amend. VI; Wash. Const., art I § 22). “Additionally, article I, section 10 of our state constitution guarantees the public’s right to public judicial proceedings ...” *Id.* (citing Const., art. I § 10). To protect the constitutional public trial rights a trial court must conduct a hearing pursuant to *Bone-Club* before closing a criminal proceeding. *Stockwell*, 160 Wn. App. at 178, (citing *State v. Brightman*, 155 Wn.2d 506, 514-15, 122 P.3d 150 (2005); *State v. Bone-Club*, 128 Wn.2d 254, 258-60, 906 P.2d 325 (1995)). Appellate courts review claims of improper courtroom closures de novo. *Stockwell*, 160 Wn. App. at 178-79.

- a. Review is precluded by defendant's failure to perfect the record required to determine if the courtroom was closed during voir dire.

“[T]he party seeking review ... has the burden to perfect the record so the ... the reviewing court ... ha[s] all the evidence relevant to the issues presented...” *In re Detention of Morgan*, 161 Wn. App. 66, 84, 253 P.3d 394 (2011) (citing RAP 9.2(b); *Bulzomi v. Dep’t of Labor & Indus.*, 72 Wn. App. 522, 525, 864 P.2d 996 (1994); *State v. Vazquez*, 66 Wn. App. 573, 583, 832 P.2d 883 (1992); see also *State v. Riley*, 121 Wn.2d 22, 31, 846 P.2d 1365 (1993); *Favors v. Matzke*, 53 Wn. App. 789, 794, 770 P.2d 686 (1989)). “An insufficient appellate record precludes review of the alleged errors.” *Morgan*, 161 Wn. App. at 84 (citing *Bulzomi, supra*; *Allemeier v. Univ. of Wash.*, 42 Wn. App. 465, 472-73, 712 P.2d 306, *rev. denied*, 105 Wn.2d 1014 (1986)).

The Court of Appeals has consistently held no structural error occurs when juror questionnaires are used to examine the venire in open court then sealed.⁷ See *State v. Smith*, 162 Wn. App. 833, 846-47, 262 P.3d 72, *rev. denied*, 173 Wn.2d 1007 (2012); *In re Pers. Restraint of Stockwell*, 160 Wn. App. 172, 180-81, 248 P.3d 576 (2011); *State v.*

⁷ “An error is ‘structural’ when it renders a criminal trial fundamentally unfair or an unreliable vehicle for determining guilt or innocence.” *Smith, supra*, Fn. 8.

Tarhan, 159 Wn. App. 819, 829-32, 246 P.3d 580 (2011), *rev. granted*, *State v. Beskurt*, 172 Wn.2d 1013, 259 P.3d 1109 (2011); *State v. Coleman*, 252 Wn. App. 624, 214 P.3d 158 (2009); *see also State v. Momah*, 167 Wn.2d 140, 156, 217 P.3d 321 (2009).

Defendant precluded review of this claim by failing to provide a record of the voir dire which is necessary to ascertain whether the questionnaires were used to examine the venire in open court. If voir dire was conducted in open court, there would be no courtroom closure requiring a *Bone-Club* analysis under this Court's decision in *Smith*⁸ and no structural error under *Stockwell*, *Tarhan* and *Coleman*. Defendant's failure to perfect the record precluded review as it deprived the Court evidence essential to his claim.

- b. This Court has already decided a *Bone-Club* analysis is not required to seal juror questionnaires.

The trial court does not close the courtroom when it seals juror questionnaires, so a hearing pursuant to *Bone-Club* is not required. *Smith*, 162 Wn. App. at 846-47. “[A] trial court’s sealing of juror questionnaires after voir dire is not ‘structural error; nor does it render the

⁸ *Smith*, 162 Wn. App. at 848, Fn.9 (Division Two of the Court of Appeals declined to follow *Coleman*, wherein Division One of the Court held the trial court was required to conduct a *Bone-Club* analysis before sealing juror questionnaires).

trial fundamentally unfair.” *Smith*, 162 Wn. App. at 846-47, 262 P.3d 72; *Stockwell*, 160 Wn. App. at 180-81; *see also Momah*, 167 Wn.2d at 156; *State v. Stroud*, 167 Wn.2d 222, 217 P.3d 310 (2009).

The parties agreed to distribute an abridged version of the State’s proposed questionnaire to the venire. RP (July 7, 2011) 35-40; RP 23-4; Ex. 271-511, 512- 517. Defendant thought the questionnaire would be helpful. RP (July 7, 2011) 36; RP 24. The questionnaire encouraged the venire to respond truthfully with an assurance responses would eventually be filed under seal.⁹ The parties received the completed questionnaires by July 12, 2011. RP 27, 30-2. Nothing in the provided record indicates the courtroom was closed during subsequent proceedings. RP 32-5. Defendant used the questionnaires to prepare. RP 30-2. The questionnaires were sealed on September 23, 2011. RP 25-6; CP 271.

⁹ “This questionnaire is being filled out under your oath as jurors. You are bound by that oath to answer truthfully the questions in this questionnaire. It is intended to provide the Court and the attorneys with information about your qualifications to sit as a juror on this case. Please answer the following questions openly, fully and truthfully. The information you provide is confidential and for use by the Judge and the lawyers during questions associated with jury selection. At the end of the jury selection process, the copies supplied to the lawyers will be collected and destroyed. The original will be filed under seal and no one will be allowed access except by court order. If there are particular questions that you want to answer outside the presence of other jurors, identify those questions at the end of your questionnaire in answer number 19, and the Court will accommodate your request.” CP 512.

Defendant's public trial right was not prejudiced when the questionnaires were sealed over one month after the verdict was entered. The questionnaires elicited information relevant to defendant's case. CP 512-517. Defendant agreed to the challenged procedure to give the venire a limited assurance of privacy. RP 25-7. Defendant benefited from the qualified promise of confidentiality as it likely encouraged disclosure of private information needed to intelligently exercise challenges pursuant to CrR 6.4.¹⁰ See generally *Stockwell*, 160 Wn. App. at 180.¹¹ Defendant's access to the completed questionnaires was not restrained and he used them to evaluate the venire. RP 25-7, 30-2. Defendant has not explained how his public trial right was nevertheless prejudiced when the questionnaires were subsequently filed in the manner he approved. RP 25-7, 30-2. The claimed violation of defendant's public trial right should fail.

Defendant's attempt to rely on public's interest in open proceedings should also fail. Defendant does not have standing to raise the public's right as a ground for relief. See *Stockwell*, 160 Wn. App. at

¹⁰ **CrR 6.4 (b) Voir Dire** "A voir dire examination shall be conducted for the purpose of discovering any basis for challenge for cause and for the purpose of gaining knowledge to enable an intelligent exercise of preemptory challenges"

¹¹ "[J]urors have a compelling interest in maintaining confidentiality in their private, personal affairs and ... those interests are integrally connected to the defendant's right to an impartial jury. *Strode*, 167 Wn.2d at 238 (C. Johnson, dissenting).

181. Even if he did, he has not proved the questionnaires were unavailable to the public during the two months that passed before the completed questionnaires were sealed. See *Coleman* 151 Wn. App. at 624; RP 27, 30-2; *Tarhan*, 159 Wn. App. at 829-32; CP 271-511. Defendant argues unavailability should be inferred from the questionnaires' notice of confidentiality. App. Br. at 16-7. Similar argument was rejected by the same division of the Court of Appeals that issued the *Coleman* decision defendant relies upon to support this claim. See *Tarhan*, 159 Wn. App. at 829-32 (appellate court would not speculate about how the trial court might have decided the public access issue if raised). Both cases reject the remedy defendant proposes. See *Coleman*, 151 Wn. App. at 623 (proper remedy is remand for a hearing pursuant to *Bone-Club*); *Tarhan*, 159 Wn. App. at 834; see also *Momah*, 167 Wn.2d at 150. Meanwhile this Court elected not to follow *Coleman*, holding a *Bone-Club* analysis is not required to file juror questionnaires under seal. *Smith*, 162 Wn. App. at 848, Fn.9. Defendant's claim is procedurally barred and meritless under the controlling authority of this Court. If this Court was inclined to overrule *Smith*, remand for a hearing pursuant to *Bone-Club* would be the only appropriate remedy. See *Stockwell*, 160 Wn. App. at 180-81; *Tarhan*, 159 Wn. App. at 834; *Coleman*, 151 Wn. App. at 623; *Momah*, 167 Wn.2d at 150.

2. DEFENDANT FAILED TO SHOW THE TRIAL COURT ABUSED ITS DISCRETION WHEN IT ALLOWED THE STATE TO ADDUCE EVIDENCE THAT REBUTTED AN INFERENCE RAISED DURING CROSS-EXAMINATION THAT THE STATE'S FAILURE TO CONDUCT A POLYGRAPH EXAMINATION HAD DEPRIVED THE JURY ADMISSIBLE EVIDENCE OF THE WITNESS'S CREDIBILITY.

A trial court ruling on the admissibility of evidence is reviewed under an abuse of discretion standard. *See State v. Ish*, 170 Wn.2d 189, 195, 241 P.3d 389 (2010) (citing *State v. Brett*, 126 Wn.2d 136, 174-75, 892 P.2d 29 (1995); *State v. McDonald*, 138 Wn.2d 680, 693, 981 P.2d 443 (1999)); *State v. Wade*, 138 Wn.2d 460, 464, 979 P.2d 850 (1999). A trial court abuses its discretion if no reasonable person would have decided the matter as the trial court did. *State v. Thomas*, 150 Wn.2d 821, 856, 83 P.3d 970 (2004) (citing *State v. Castellanos*, 132 Wn.2d 94, 97, 935 P.2d 1353 (1997)). This requires a showing the trial court's evidentiary ruling was "manifestly unreasonable." *State v. Hughes*, 118 Wn. App. 713, 724, 77 P.23d 681 (2003) (citing *State v. Brown*, 132 Wn.2d 529, 571-572, 940 P.2d 546 (1997) *cert denied*, 523 U.S. 1007, 118 S. Ct. 1192, 140 L. Ed. 2d 322 (1998)). Unreasonableness is manifest when it is "obvious, directly observable, overt or not obscure...." *See State v. Taylor*, 83 Wn.2d 594, 598, 521 P.2d 699 (1974). "A trial court's judgment is presumed correct and should be sustained absent an affirmative showing of error." *Wade*, 138 Wn.2d at 464.

Defendant assigns error to rebuttal testimony given by Castillo's attorney, Michael Schwartz ("Schwartz"). The substance of the challenged testimony consisted of: (1) an acknowledgment Castillo's plea agreement required him to submit to a polygraph at the State's request; (2) a description of the polygraph provision as means to deter dishonesty; and (3) a statement polygraph results are generally inadmissible at trial. RP 440.

The State proffered the challenged testimony outside the presence of the jury. RP 352-53. The State argued defendant's cross-examination opened the door to it by implying the failure to request a polygraph deprived the jury admissible evidence of Castillo's credibility. RP 347-49.¹² The trial court ruled both the proposed rebuttal testimony and a

¹² The relevant portion of the cross-examination is provided below:

[Defendant] " [I] have a series of questions. I'm going to start out with the place you just left off ...the plea agreement ... Isn't it true you understood that if you were convicted of the charge of murder in the first degree you'd be facing upwards of 20 years in prison?

[Castillo] "Yes."

[Defendant] Okay. And the plea agreement also calls for you to submit to polygraph examinations if requested by the prosecutor, isn't that correct?

[Castillo] Yes.

[Defendant] "You haven't been asked to submit to any polygraph examinations, have you?

[Castillo] "No."

RP 233. Defendant then endeavored to impeach Castillo with statements he had made before testifying. RP 233-43.

limiting instruction¹³ were appropriate under the circumstances. RP 352-53, 355, 436-41. Defendant agreed to the limiting instruction, yet objected to the challenged testimony; on appeal he concedes he “may have opened the door to additional information ... about the polygraph provision.” RP 351, 354-55; App. Br. at 12.

- a. Defendant cannot prove the trial court abused its discretion in admitting the challenged rebuttal testimony as he opened the door to it through cross-examination.

The trial court is empowered to exercise reasonable control over the presentation of evidence so that it is effective for the ascertainment of truth. ER 611.¹⁴ Under ER 402 “[a]ll relevant evidence is admissible,

¹³ “Ladies and gentlemen, you are about to hear testimony concerning the possibility of a polygraph test being administered in this case. There is scientific dispute about the reliability of the polygraph, and the polygraph is not generally accepted in the scientific community as reliable. Based on the current scientific data supplied to the courts of this state, the polygraph has not been shown to be sufficiently reliable as an indicator of truthfulness to be admissible in court proceedings; however, a polygraph may be used by law enforcement and prosecutors as an investigatory tool, and you may consider its use or nonuse here in evaluating the investigation conducted in this case. You may not use the polygraph testimony for any other purpose.” RP 434-37.

¹⁴ ER 611—Mode and Order of Interrogation and Presentation (a) Control by Court. The court shall exercise reasonable control over the mode and order of interrogating witnesses and presenting evidence so as to (1) make the interrogation and presentation effective for the ascertainment of the truth, (2) avoid needless consumption of time, and (3) protect the witnesses from harassment or undue prejudice. (b) Scope of Cross-Examination. Cross-examination should be limited to the subject matter of the direct examination and matters affecting the credibility of witnesses. The court may, in the exercise of its discretion, permit inquiry into additional matters as if on direct examination. (c) Leading Questions. Leading questions should not be used on the direct examination of a witness except as may be necessary to develop the witness’ testimony. Ordinarily leading questions should be permitted on cross-examination. When a party calls a hostile witness, an adverse party, or a witness identified with an adverse party, interrogation may be by leading questions.”

except as limited by constitutional requirements or as otherwise provided by statute, by these rules, or by other rules or regulations applicable in the courts of this state. The general rule since *Frye v. United States*, 293 F. 1013 (D.C. Cir. 1923) is that the results of a polygraph are inadmissible absent a stipulation of the parties. *State v. Woo*, 84 Wn.2d 472, 473, 527 P.2d 271 (1974). Inadmissibility under *Frye* is due to the polygraph's lack of acceptance in the relevant scientific community; it is not mandated by a constitutional right. *Woo, supra*, 473; *see also In re Detention of Taylor*, 132 Wn. App. 827, 836, 134 P.3d 254 (2006).

Evidence of polygraph examinations may become admissible if cross-examination opens the door to its use so long as the evidence is relevant to the issue raised. *See State v. Gefeller*, 76 Wn.2d 449, 454-55, 458 P.2d 17 (1969); *see also State v. West*, 70 Wn.2d 751, 424 P.2d 1014 (1967). For instance, law enforcement's investigatory use of a polygraph can be admissible when a defendant's cross-examination puts the thoroughness of the investigation at issue. *See generally State v. Reay*, 61 Wn. App. 141, 149-50, 810 P.2d 512 (1991) (polygraph examination admissible as operative fact when relevant regardless of its results);¹⁵ *Brown v. Darcy*, 783 F.2d 1389, 1397 (9th Cir., 1986), *overruled on other*

¹⁵ "Relevant evidence" means evidence having any tendency to make the existence of any fact that is of consequence to the determination of the action more probable or less probable than it would be without the evidence. ER 401.

grounds, *U.S. v. Cordoba*, 104 F.3d 225 (9th Cir., 1997). This outcome accords with the general rule that “[a] party’s introduction of evidence that would be inadmissible if offered by the opposing party ‘opens the door’ to explanation or contradiction of that evidence.” *State v. Ortega*, 134 Wn. App. 617, 626, 142 P.3d 175 (2006) (citing *State v. Avendano-Lopez*, 79 Wn. App. 706, 714, 904 P.2d 324 (1995)); see also *State v. Young*, 158 Wn. App. 707, 719, 243 P.3d 172 (2011)(even constitutionally protected evidence can become admissible if defendant opens the door to its use) (citing 5 Karl B. Tegland, Wash. Prac.: Evidence Law and Practice § 103.14 (5th ed. 2007)); see also *Gefeller*, 76 Wn.2d at 454-55.; *State v. Hartzell*, 156 Wn. App. 918, 934-35, 237 P.3d 928 (2010); *State v. Jones*, 114 Wn. App. 284, 298, 183 P.3d 307 (2008). Otherwise a defendant could “brin[g] up a subject [only to] drop it at a point where it might appear advantageous to him, and then bar the [State] from all further inquiries about it” See *Gefeller*, 76 Wn.2d at 455.

Defendant’s opening statement identified Castillo’s plea agreement as a factor that would influence his testimony. RP (Jul.13, 2011) 31. Defendant limited cross-examination into that agreement to Castillo’s reduced potential for punishment and the State’s failure to subject Castillo to a polygraph. RP 233.¹⁶ Defendant then endeavored to impeach Castillo with his pretrial statements. RP 233-43.

¹⁶ The cross-examination at issue is set forth in Fn. 13, page 15.

Defendant failed to prove it was an abuse of discretion for the trial court to allow the challenged rebuttal evidence. Defendant opened the door when he made the State's administration of the polygraph provision an issue in his case and concedes nearly as much on appeal. *See Gefeller*, 76 Wn.2d at 454-55; *see also e.g.*, ER 106;¹⁷ App.Br. at 12. Defendant's cross-examination implied the State refrained from collecting admissible evidence of Castillo's credibility with the polygraph because it was either haphazard in its investigation or apprehensive about the results.

Defendant argued the latter inference in summation when he suggested Castillo falsely corroborated the State's theory of the case to benefit from the plea agreement. RP 707. The challenged testimony properly rebutted defendant's cross-examination by showing the polygraph evidence was absent due to its inadmissibility rather than an investigatory failure that called the State's motives or judgment into question. The trial court acted well within its discretion when it permitted that evidence.

Defendant claims the trial court erred because the challenged evidence improperly vouched for Castillo. "Improper vouching generally occurs (1) if the prosecutor expresses [a] personal belief as to the veracity of the witness or (2) if the prosecutor indicates that evidence not presented

¹⁷ ER 106: "When a writing or recorded statement or part thereof is introduced by a party, an adverse party may require the party at that time to introduce any other part, or any other writing or recorded statement, which ought in fairness to be considered contemporaneously with it."

at trial supports the witness's testimony. *Ish*, 170 Wn.2d at 196. Defendant argues the challenged evidence vouched in the latter manner by "impl[ying] the State had some independent reason to believe ... Castillo was being truthful." App. Br. at 12. That assertion is unfounded as the State argued the admitted evidence was the only measure of Castillo's credibility. RP 680-84. It was defendant—not the prosecutor—who revealed that the State did not think it was necessary to give Castillo a polygraph examination before trial. RP 233. Defendant was therefore solely responsible for any affect that evidence had on the verdict. *See Ish*, 170 Wn.2d at 198-99 (The Washington Supreme Court has held a defendant impeaches a witness on cross-examination with the terms of a plea agreement at the risk of the State disclosing provisions requiring the witness to give truthful testimony). The challenged evidence likely quelled speculation about the State's decision to forego the polygraph by presenting it as an administrative practice to reserve investigatory resources for the collection of admissible evidence. No abuse of discretion has been shown.

- b. Any error would be harmless since the challenged evidence was an insignificant component of the evidence adduced at trial.

Defendant cannot prove he was prejudiced by the challenged ruling so his assignment of error could not succeed if proven. *See State v. Cunningham*, 93 Wn.2d 823, 831, 613 P.2d 1139 (1980).

Nonconstitutional evidentiary error is not prejudicial unless, within reasonable probability, had the error not occurred, the outcome of the trial would have been materially affected. *See Cunningham*, 93 Wn.2d at 831; *see also State v. Warren*, 165 Wn.2d 17, 195 P.3d 940 (2008); *State v. Halstien*, 122 Wn.2d 109, 127, 857 P.2d 270 (1993) (*citing State v. Tharp*, 96 Wn.2d 591, 599, 637 P.2d 961 (1981)).¹⁸

Defendant was charged with first degree murder by extreme indifference,¹⁹ drive-by shooting,²⁰ unlawful possession of a firearm in the first degree,²¹ and second degree assault.²² CP 15-17. The jury was properly instructed to decide the case according to the admitted evidence and that it should consider the credibility of codefendants testifying on behalf of the State with special care. CP 82-3 (Instruction No. 1); 94

¹⁸ “The mere fact a jury is apprised of a lie detector test is not necessarily prejudicial if no inference as to the result is raised or if an inference raised as to the result is not prejudicial. *State v. Sutherland*, 94 Wn.2d 527, 530, 617 P.2d 1010 (1980) (*citing State v. Descoteaux*, 94 Wn.2d 31, 614 P.2d 179 (1980));

¹⁹ CP 100 (Instruction No. 16) “A person commits the crime of murder in the first degree as charged in Count I, when, under circumstances manifesting an extreme indifference to human life, he or she engages in conduct which creates a grave risk of death to any person and thereby causes the death of that person.”

²⁰ CP 105 (Instruction No. 21) “A person commits the crime of drive-by shooting, as charged in Count II, when he or she recklessly discharges a firearm in a manner that creates a substantial risk of death or serious physical injury to another person and the discharge is either from a motor vehicle or from the immediate area of a motor vehicle that was used to transport the shooter or the firearm to the scene of the discharge.”

²¹ CP 109 (Instruction No. 25) “A person commits the crime of unlawful possession of a firearm in the first degree, as charged in Count III, when he has previously been convicted of a serious offense and knowingly owns or has in his possession or control any firearm.” Defendant stipulated he had previously been convicted of a serious offense and is prohibited by law to knowingly own or have in his possession or control any firearm. RP 166-67; Ex. 81.

²² CP 111 (Instruction No. 27) “A person commits the crime of assault in the second degree, as charged in Count IV, when he or she assaults another with a deadly weapon.”

(Instruction No. 10). It is presumed the jury followed those instructions. See *State v. Weber*, 99 Wn.2d 158, 166, 659 P.2d 1102 (1983).

It is not reasonable to conclude the challenged evidence had a material affect on the verdict. Defendant told the three people he lived with after fleeing to California that a woman died after he shot her with his revolver; the physical evidence admitted at trial corroborated that confession. RP 53, 55, 58-61, 66, 70-2, 78-9, 521-25, 569-70; 614; Ex. 14, 18-22, 51. One of the roommates testified defendant appeared proud of what he had done. RP 72. April identified defendant as the man who pointed a revolver at her before he shot Lisa from a moving vehicle. RP 380-88. There were approximately five people standing near Lisa when defendant's bullet killed her. RP 201-02, 204, 385-87, 421-22, 460-62, 492-94, 508, 559-60, 594. April's testimony was substantially corroborated by Hieronymus, Jordan, Frederick, and Jackson. RP 415-23, 448-50, 457-63, 489-93. The challenged ruling could not have been prejudicial as it had no effect on this independent evidence of defendant's guilt.

The claim of prejudice is also undermined by the fact the jury would have been exposed to the substance of the challenged testimony even if it had been excluded. See *State v. Stark*, 48 Wn. App. 245, 249-250, 738 P.2d 684 (1987) (Harmless error when jury was otherwise exposed to the substance of erroneously admitted testimony). The jury was alerted to the inadmissibility of polygraph evidence when the court

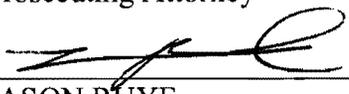
communicated that information through a limiting instruction given with the parties' consent. RP 434-37. The jury learned about the polygraph provision's purpose of deterring dishonesty when the entire provision was admitted as an exhibit and Castillo testified deceit would result in the revocation of his agreement. RP 232, 439; Ex. 86. That evidence was not objected to and the jury could have considered it for any relevant purpose since a limiting instruction was not requested. *State v. Myers*, 133 Wn.2d 26, 36, 941 P.2d 1102 (1997) (citing *Lockwood v. AC & S, Inc.*, 109 Wn.2d 235, 255, 744 P.2d 605 (1987)). The challenged testimony was therefore incapable of causing the prejudiced defendant alleged on appeal.

D. CONCLUSION.

Defendant failed to prove the juror questionnaires were improperly sealed or that the challenged evidentiary ruling was an abuse of the trial court's discretion. His convictions and sentence should be affirmed.

DATED: June 20, 2012.

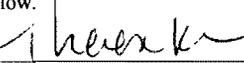
MARK LINDQUIST
Pierce County
Prosecuting Attorney



JASON RUYF
Deputy Prosecuting Attorney
WSB # 38725

Certificate of Service:

The undersigned certifies that on this day she delivered by U.S. mail of ABC-LMI delivery to the attorney of record for the appellant and appellant c/o his attorney true and correct copies of the document to which this certificate is attached. This statement is certified to be true and correct under penalty of perjury of the laws of the State of Washington. Signed at Tacoma, Washington, on the date below.

6/25/12 
Date Signature

PIERCE COUNTY PROSECUTOR

June 25, 2012 - 11:20 AM

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