

SUPREME COURT OF THE STATE OF WASHINGTON

STATE OF WASHINGTON,

Respondent,

v.

CHARLES MOMAH,

Petitioner.

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SUPREME COURT
STATE OF WASHINGTON
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CLEEM

SUPPLEMENTAL BRIEF OF RESPONDENT

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A. ISSUES

1. Should this Court refuse to consider Momah's public trial claim because any error was invited when Momah recommended and actively participated in the individual questioning of jurors?

2. Should this Court refuse to consider Momah's public trial argument because the claim does not present an issue of manifest constitutional error?

3. Should this Court reject Momah's argument that proceedings were "closed" when limited objective evidence -- limited because there was no contemporaneous objection -- suggests that the trial court did not order anyone excluded from the proceedings?

B. FACTS

Charles Momah sexually abused numerous patients at his offices in Burien and Federal Way, Washington.¹ He abused his position of trust with women who were vulnerable and had sought him out for treatment. The sexual abuse occurred as Momah performed physical examinations.

Momah was charged with the crimes of Rape in the Third Degree in Count I (victim Heather Phillips), Indecent Liberties in Count II (victim Shellie Siewert), Indecent Liberties in Count III (victim Carman

¹ Momah's license to practice medicine has been permanently revoked. See <https://fortress.wa.gov/doh/providercredentialsearch/CaseLaserFicheDocView.aspx?DocId=70718>.

Burnetto), and Rape in the Second Degree in Count IV (victim Rena Burns). CP 421-24. He was tried by jury before King County Superior Court Judge Michael J. Trickey, and convicted as charged. CP 427-30. Trial began on October 3, 2005 and ended on November 9, 2005. On February 6, 2006, Judge Trickey imposed standard range sentences totaling 245 months. CP 593-602.

Momah timely appealed. CP 619-34. He argued, inter alia, that the trial court violated his right to a public trial when it conducted a portion of voir dire outside the courtroom. The Court of Appeals rejected this argument in a published opinion. State v. Momah, 141 Wn. App. 705, 171 P.3d 1064 (2007). The court held that Momah had failed to establish that the trial court closed the proceedings since there was no evidence that the trial court ordered closure of the court or de facto excluded anyone from attending voir dire. This Court granted review of the Court of Appeals decision, with the additional direction that the parties should address whether Momah waived review of the public trial claim.

Trial began in this case with pretrial motions on October 3, 2005. On Thursday, October 6, 2005, the court alerted counsel to the fact that KING5-TV had noted an interest in covering opening statements. 10RP 4-5. When the subject was revisited later that day, the trial court said that it did not believe television crews would arrive before opening statements,

but the court wanted defense counsel's views on the subject in case media representatives appeared during voir dire. 10RP 92. Defense counsel said, "I would very much object to jury selection being televised. And if it were, the way I have seen courts do it is, they can't show the jurors anyway; so there is not much to show, and they don't identify the jurors by name." 10RP 93. The prosecutor replied that a case had been decided that day making it clear that jury selection was open to the public.² 10RP 93. The court also said that under the newly promulgated GR 16, "the presumption is all proceedings are open." 10RP 94.

Jury selection spanned several days.³ On Thursday, October 6, 2005, the parties discussed jury questionnaires and other logistical concerns about voir dire. 10RP 68-95. Due to the amount of publicity in Momah's case, a large number of prospective jurors were summoned. 11RP 3. They were initially taken to the large King County presiding courtroom, E-942. 10RP 79-80. There is no formal jury room in the presiding courtroom, and there was discussion about how to accomplish

² State v. Brightman, 155 Wn.2d 506, 122 P.3d 150 (decided 11/6/05).

³ The verbatim reports relevant to voir dire are:
10RP (Thursday, Oct. 6th --discussion of jury logistics)
11RP (Monday, Oct. 10th -- hardship questioning)
12 RP (Tuesday, Oct. 11th -- in-chambers in a.m.; jury-room in p.m.)
13RP (Wednesday, Oct. 12th -- individual questions in courtroom; in-court inquiry of supplemental group of jurors)
14RP (Thursday, Oct. 13th -- full voir dire, jury impaneled)

jury voir dire with the large number of prospective jurors. 10RP 80-86.

Trial was not in session on Friday.

On Monday, October 10, 2005, the panel of about 100 jurors was sworn in and given a jury questionnaire to fill out in the presiding courtroom. 11RP 4. There was a discussion about how to accomplish individual jury voir dire since there was no jury room in the presiding courtroom. 11RP 4-7. The jury then proceeded to fill out the questionnaires in E-942. 11RP 10-18. As the jury was completing questionnaires, the judge and the parties returned to courtroom W-813 and finalized rulings on a number of pretrial matters. 11RP 18-76. Jurors who indicated potential hardship were questioned in the afternoon, as a group, in courtroom E-942. Jurors who did not note a hardship were told to return the next day. 11RP 76-77. Over the course of Monday's session, numerous jurors explained their potential hardships, and many were excused for cause. 11RP 78-156.

On Tuesday, October 11, 2005, the parties reconvened in the presiding courtroom. 12RP 1. The court noted that eight jurors had asked in their questionnaires for private questioning and eight more jurors indicated they could not be fair. 12RP 2-3. A list of jurors to be individually questioned was discussed at length. 12RP 5-8, 17-20. No objections were voiced by defense counsel. In fact, early in the Tuesday

morning discussion, defense counsel asked that individual questioning be expanded to include jurors who expressed an inability to be fair or who had some prior knowledge about the case. 12RP 4. The prosecutor and the court agreed. Id. No objections were lodged by any person in the courtroom and there is nothing in the record to suggest that members of the media or the public were present.

Ultimately, the parties and the court decided that twenty jurors were to be questioned in the morning, 12RP 17-18, and eleven were to be questioned in the afternoon. 12RP 18-19. There was no disagreement over who should be questioned or how the questioning should be conducted. In fact, defense counsel said, "I would agree with the prosecutor's list." 12RP 6. The group included three general categories of juror: 1) people who had prior knowledge about the case; 2) people who had asked for individual questioning; or 3) people who had said they could not be fair. 12RP 27.

Before moving into chambers, the court announced repeatedly in open court that it was going to conduct individual questioning in chambers. See e.g. 12RP 4, 6, 8. The record shows that the door to chambers was initially closed but it does not say whether it remained closed throughout the inquiries. 12RP 19. Throughout this individual questioning process, the bailiff and courtroom clerk appear to have

remained in the open courtroom. It appears that the bailiff shepherded jurors from the courtroom to chambers. 12RP 30 ("At this time the bailiff entered chambers"). It also appears that the clerk was electronically monitoring the chambers proceedings from the courtroom and could tell when questioning of one juror was complete and the next juror was needed. 12RP 28.⁴ The court questioned 13 jurors before lunch. 12RP 19-104.

After lunch, court reconvened in courtroom W-813 because E-942 was not available on Tuesday afternoon. 12RP 2, 104-05. The court observed:

I guess we have twenty folks outside in the hall. What I propose to do is have them come into the courtroom, we will move to the jury room for individual questioning, and question them one at a time. I thought about having them in the jury room, but there is [sic] only 16 chairs. ...

12RP 105. The jury was then seated in the courtroom and the court reminded them about the individual questioning procedure, the judge, lawyers, Momah, and the court reporter then moved into the jury room.

12RP 106. Four more jurors were questioned before the court adjourned for the day. 12RP 106-42.

⁴ At one point during individual questioning, the prosecutor observed, "The clerk indicated he is able to follow on the realtime screen what is going on, and he may be able to contact jurors for us." The judge replied: "That's what we will do." 12RP 28. It is unclear what sort of "realtime screen" was being monitored.

On Wednesday, October 12th, court reconvened in E-942 to orient a group of 50 additional jurors who had been summoned to fill the gap left by the large number of jurors excused for cause. 13RP 1-11. See also 12RP 105-06 (mentioning the additional jurors and the process to be followed once they arrived).

After these additional jurors had been instructed and provided with questionnaires, the parties returned to W-813 to continue individual questioning. 13RP 11 (“Court: The lawyers and I will reconvene downstairs to take up other matters”). Because many jurors had been excused, the group was smaller, so the court used its regular courtroom, W-813. 13RP 11.⁵ Since there was a jury room in W-813, and since by Wednesday the group of jurors needing individual questioning had dwindled to six, those six jurors remained in the jury room while the court, counsel, and Momah conducted individual questioning in the courtroom.

The record reflects the following:

(At this time the court resumed in [W]-813 with individual voir dire.)

THE COURT: We are back on the record in State versus Momah. The parties are present, as is the defendant. My understanding is we have **six jurors in the jury room**, which is the remaining list of those we need to question

⁵ The report of proceedings in this volume refers to C-813 instead of W-813. In fact, there is no courtroom C-813 in the King County Courthouse but there is a courtroom W-813. To avoid confusion, this brief will refer to the 8th floor courtroom as W-813.

individually out of the first group. So I just propose to bring them out and to continue in order. We have moved now. **We are in the general courtroom.** We will have them come out and take a chair in the jury box and we will proceed. Anything from counsel on that?

13RP 11-12 (bold added). The remaining six jurors were questioned individually and then the court took a recess. 13RP 18-49. After the recess, the parties reviewed the questionnaires for the new group of jurors, then adjourned for lunch. 13RP 52.

Upon returning from lunch, the new supplemental group of jurors was brought into open court and questioned about hardships. 13RP 52-72.⁶ The court noted that 15 jurors wanted individual questioning or said they could not be fair. 13RP 75-77. Defense counsel suggested that another person be added to that list, even though the juror did not request private questioning and the court did not seek it.

MR. ALLEN: There is one more we should, just in an ounce of precaution, take privately, 141, who on page 1 says that he was molested -- he or she was molested as a child. There is no request that this be done privately. But I am concerned about asking those questions publicly.

13RP 77. The court denied the request because the court was allowing separate inquiry only where requested by the juror. The following exchange then took place:

⁶ "At this time the prospective jury left the courtroom." 13RP 72.

MR. ROGOFF: Certainly before general voir dire the Court will remind folks that if we get into the issues that are private –

THE COURT: That is part of my standard practice, if it is something you want to discuss outside the presence of other jurors we would honor that request...

13RP 77. The court took a short recess and then began individual questioning. 13RP 78.

The verbatim report of proceedings shows that this new round of individual questioning was conducted in open court. 13RP 78 (“At this time Juror Number 105 entered the courtroom.”). This second round of individual questioning continued with each of the 14 jurors who needed individual attention. 13RP 78-154. The record reflects that each juror entered or left the courtroom, not the jury room or chambers. See e.g. 13RP 79 (“At this time Juror Number 108 entered the courtroom.”), 83 (“At this time Juror Number 108 left the courtroom.”). The judge specifically directed the jurors on where in the courtroom to sit. 13RP 115 (“THE COURT: If you could have a seat in the jury box in that corner chair in the first row closest to you? Thank you.”). At the end of the day on Wednesday, the court reviewed the procedures to be used for general voir dire the following day. 13RP 153-54.

The following day, Thursday, October 13th, jury voir dire continued as usual in Judge Trickey's regular courtroom. 14RP 1-196. The session opened with individual questioning of a juror who was sexually assaulted by a physician. 14RP 3-18. This questioning was done in open court with the rest of the jury in the jury room. 14RP 2 ("At this time Juror Number 130 entered the courtroom."). The rest of the day was devoted to ordinary voir dire. 14RP 18-201.

On Monday, October 17, 2005, the court ruled on a variety of pretrial motions and then heard opening statements from the lawyers. 15RP 1-59 (motions), 60-119 (opening statements). Before opening statements, the parties discussed issues of media coverage, like where to place the television camera during trial. The court noted the difference between reasonable restrictions on television cameras versus total closure of the courtroom. 15RP 2-4. The court then entered a detailed order concerning media coverage of the trial. 15RP 2-4.

C. ARGUMENT

Momah claimed for the first time on appeal that the Court of Appeals violated his right to a public trial when it conducted one day of

voir dire in chambers and in a jury room.⁷ This Court should refuse to consider the claim because the alleged error was invited or waived.

Even if considered, the claim is meritless because Momah cannot establish that the trial court closed voir dire. Nobody was excluded on the single challenged day (Tuesday) of individual voir dire. The trial court scrupulously honored the defendant's rights and did not order closure of any sort. Moreover, the trial court conducted on Wednesday and Thursday -- in open court -- the exact same type of individual voir dire that Momah says was closed on Tuesday. The record simply does not support Momah's claim that the trial court closed the individual questioning of jurors on Tuesday, October 11th.

⁷ Momah has never claimed that he is entitled to a new trial based on a violation of the public's right to the open administration of justice. WASH. CONST. Art. 1, § 10. Unless stated otherwise in the order granting review, "the Supreme Court will review only the questions raised in the ...petition for review..." RAP 13.7(b). Momah never cited or argued Art. 1, § 10 in over 30 pages of briefing on this issue in the Court of Appeals and in his petition for review. Especially since there is a substantial question whether he has standing to assert the public's right, see State v. Strode, No. 80849-0, Momah should not be permitted to raise this new constitutional issue for the first time in a supplemental brief.

1. MOMAH EITHER INVITED OR WAIVED HIS RIGHT TO CHALLENGE THE MEANS OF PICKING A JURY BECAUSE HE AFFIRMATIVELY ASSENTED TO THE MEANS CHOSEN BY THE COURT, AND HE EVEN SUGGESTED THAT THE COURT BROADEN ITS IN-CHAMBERS INQUIRY TO INCLUDE A GREATER NUMBER OF JURORS.

Momah claimed for the first time on appeal that his right to public trial was violated by the one day of individual voir dire, even though he acquiesced in and recommended the procedure used by the trial court. Any error was either invited or waived. This Court should exercise its discretion not to address Momah's claims.

A defendant who invites error -- even constitutional error -- may not claim on appeal that the error requires a new trial. State v. Studd, 137 Wn.2d 533, 546, 973 P.2d 1049 (1999) (counsel may not request an instruction and then challenge the instruction on appeal); State v. Aho, 137 Wn.2d 736, 744-45, 975 P.2d 512 (1999) (same); State v. Smith, 122 Wn. App. 294, 299, 93 P.3d 206 (2004) (defendant who participated in drafting of jury instruction may not challenge the instruction on appeal). Invited error precludes review even if counsel inadvertently encouraged the error. City of Seattle v. Patu, 147 Wn.2d 717, 720, 58 P.3d 273 (2002) (defective jury instruction). The invited error rule recognizes that “[t]o hold otherwise would put a premium on defendants misleading trial courts.” State v. Henderson, 114 Wn.2d 867, 868, 792 P.2d 514 (1990).

This Court has held that a defendant who is merely silent in the face of manifest constitutional error does not “invite” the error. State v. Stein, 144 Wn.2d 236, 241, 27 P.3d 184 (2001). But, a defendant who “affirmatively assents” to error may invite it. For example, it has been suggested that, for purposes of applying the doctrine of invited error, there is a distinction between “whether defense counsel merely failed to except to the giving of the instruction, or whether he *affirmatively assented* to the instruction or proposed one with similar language.” State v. LeFaber, 128 Wn.2d 896, 904, 913 P.2d 369 (1996) (Alexander, J. dissenting -- italics added). See People v. Thompson, 50 Cal.3d 134, 785 P.2d 857 (1990) (failure to object to private voir dire not reviewable where defendant participated without objection and benefitted).

Under these authorities, this Court should conclude that Momah invited the procedure used by the trial court. The trial court and trial counsel struggled with the logistics of managing a large jury pool with limited space. Numerous proposals were discussed, including the trial court's proposal to question certain jurors in chambers. See 10RP 68-95; 11RP 4-7; 12RP 1-18. At no time in any of these discussions did Momah tell the court that an in-chambers inquiry might violate his rights.

But Momah was not just silent; he actively encouraged the trial court to *expand* in-chambers questioning to include all jurors who indicated they might be unfair. 12RP 4. Counsel stated:

Mr. Allen: Your Honor, it is our position and our hope that the court will take everybody individually, besides those ones we have identified that have prior knowledge. Our concern is this: They may have prior knowledge to the extent that that might disqualify themselves, or we have the real concern that they will contaminate the rest of the jury.

12RP 4. This proposal substantially increased the number of jurors who would be individually questioned. Momah should not be heard to complain on appeal that a procedure he accepted, pursued, and expanded is impermissible. Moreover, Momah then participated in an entire day of vigorous in-chambers questioning that yielded numerous challenges for cause by the defense. See e.g. 12RP 38-48, 59-68, 89-104.

Momah's recommendations for expanding in-chambers voir dire and his active participation in the process would certainly have signaled to any reasonable trial judge that the process was unobjectionable and, indeed, desired. Under such circumstances, this Court should hold that Momah invited error. His public trial claim should not be reviewed.

Even if the alleged error was not invited, it was waived. RAP 2.5(a) expresses the “nearly universal rule that an appellate court may refuse to review a claim of error that was not raised in the trial court.”

2A Karl B. Tegland, *Washington Practice: Rules Practice* RAP 2.5(a) author's cmts. at 192 (6th ed. 2004). In part, the rule “arose out of solicitude for the sensibilities of the trial court -- that the trial court should be given an opportunity to correct errors and omissions” as they occur. Id. The more substantive rationale, however, recognizes that “the opposing parties should have an opportunity at trial to respond to possible claims of error, and to shape their cases to issues and theories, at the trial level, rather than facing newly-asserted errors or new theories and issues for the first time on appeal.” Id. In essence, RAP 2.5(a) is “designed to eliminate the time and expense of unnecessary appeals by encouraging the resolution of issues at the trial court level—a policy that benefits the parties and the appellate courts alike.” Id.

RAP 2.5(a)(3) creates an exception to the rule that a party must object to error in the trial court, but review is appropriate only as to “manifest error affecting a constitutional right.” State v. Scott, 110 Wn.2d 682, 686-87, 757 P.2d 492 (1988) (failure to instruct on “knowledge” was not manifest error); State v. Lynn, 67 Wn. App. 339, 342, 835 P.2d 251 (1992) (failure to establish unavailability of witness was not manifest error). RAP 2.5(a)(3) is not intended to afford defendants a means for obtaining new trials whenever they can identify a constitutional issue not raised before the trial court. Scott, 110 Wn.2d at 688.

Issues raised for the first time on appeal are frequently more difficult to analyze because the facts were never developed below. In State v. Kirkpatrick, 160 Wn.2d 873, 161 P.3d 990 (2007), for example, this court refused to consider the constitutionality of a search where the claim was not raised in the trial court. The Court explained that it was impossible to assess the record when no factual record was developed. Kirkpatrick, 160 Wn.2d at 879-81. Likewise, in State v. Kirkman, 159 Wn.2d 918, 926, 155 P.3d 125 (2007), this Court held that to fall within the RAP 2.5(a)(3) exception, “[t]he defendant must identify a constitutional error and show how the alleged error actually affected the defendant's rights at trial. It is this showing of actual prejudice that makes the error ‘manifest,’ allowing appellate review.” Kirkman, 159 Wn.2d at 926-27 (quoting State v. McFarland, 127 Wn.2d 322, 333, 899 P.2d 1251 (1995)).

Although this Court has permitted public trial claims to be raised for the first time on appeal, in each case the error was clearly "manifest." In State v. Bone-Club, 128 Wn.2d 254, 906 P.2d 325 (1995), the trial court summarily granted the State's request to clear the courtroom for pretrial testimony of an undercover detective. Bone-Club, at 256-57. In State v. Brightman, 155 Wn.2d 506, 122 P.3d 150 (2005), the trial court sua sponte ordered that the courtroom be closed for the entire 2½ days of

voir dire, excluding the defendant's family and friends. Brightman, 155 Wn.2d at 511. Likewise, in In re Personal Restraint of Orange, 152 Wn.2d 795, 100 P.3d 291 (2004), the trial court summarily ordered the defendant's family and friends excluded from all voir dire proceedings. And, in State v. Easterling, 157 Wn.2d 167, 137 P.3d 825 (2006), the trial court ordered the defendant and his attorney excluded from pretrial motions. Easterling, 157 Wn.2d at 172-73.

In each of these cases, the constitutional violation was clear; it was “manifest.” Thus, none of these cases precludes application of RAP 2.5(a) to this case, where Momah never objected and where the alleged error is not manifest because it is unclear whether a right to public trial was violated, or whether Momah was prejudiced.

Nor do this Court's decisions establish that *all* violations of the right to public trial are “manifest” error. In Bone-Club, this Court cited State v. Marsh, 126 Wash. 142, 217 P. 705 (1923), for the proposition that Bone-Club's failure to object did not waive his public trial claim. Marsh does not, however, always preclude waiver of the public trial issue; Marsh should be limited to its facts, which involved the total deprivation of public trial rights, not a partial closure of some aspect of the case.

In Marsh, an adult was illegally tried in juvenile court and private juvenile proceedings were expressly permitted by statute. Marsh, at 144.

Although Marsh was an adult, not a juvenile, the trial court withheld a jury and a lawyer, and the entire trial was held in the judge's chambers without a court reporter. Marsh in no way benefited from this trial devoid of constitutional protections. This Court reversed Marsh's conviction, holding that "there is not, nor can there be, any custom of the court for the trial of criminal cases in private." Marsh, at 145. The Court expressly distinguished, however, cases involving more limited closures:

...[A]nd in our opinion this is not a case calling for a decision upon the important question of whether or not under our Constitution there is power in the trial court, proceeding in the exercise of discretion, to exclude the public or any portion of it during the trial of a criminal case, and, if so, to what extent and under what circumstances it may be done.

Id. at 145. The Court noted that a constitutional violation "may be reviewed on appeal, although no exception or objection was interposed at the time." Id. at 146 (citing State v. Crotts, 22 Wash. 245, 60 P. 403 (1900)) (emphasis added). The complete deprivation of Marsh's rights to trial, including the right to a public trial, certainly constituted manifest constitutional error, and could be reviewed absent objection below. Thus, Marsh simply applies the long-standing rule that an appellate court may

exercise its discretion to review *manifest* constitutional errors for the first time on appeal. RAP 2.5(a).⁸

Moreover, Marsh was distinguished four years after it was decided, in a true public trial case. State v. Gaines, 144 Wash. 446, 258 P. 508 (1927). The court in Gaines distinguished Marsh as follows:

The case of State v. Marsh, bears no relation to this case upon the facts. There the defendant was charged with contributing to the delinquency of a minor and was tried without a jury in private as are juvenile delinquents. *The question as to whether 'there is power in the trial court, proceeding in the exercise of discretion, to exclude the public or any portion of it during the trial of a criminal case, and if so to what extent and under what circumstances it may be done,' was not there involved.*

Gaines, at 463-64 (italics added). The holding in Gaines suggests that Marsh simply states the usual rule -- that manifest error may be raised for the first time on appeal -- rather than the broader rule that any public trial claim may be raised for the first time on appeal.

Additionally, this Court has held that a defendant who fails to object to partial closure of the courtroom waives any claim that the trial

⁸ State v. Crotts, 22 Wash. 245, 60 P. 403 (1900), does not compel a different conclusion. In Crotts, this Court entertained for the first time on appeal an argument that the trial court had commented on the evidence. Review was proper because requiring an objection "would destroy the very object for which the objection is ordinarily made." In other words, it would be unfair to require trial counsel to object when the trial judge is commenting on the evidence because the objection would simply highlight the court's inappropriate comments and bring the lawyer into conflict with the judge in front of the jury concerning a factual matter. Such concerns are not present with regard to the right to a public trial.

court violated the state constitution. State v. Collins, 50 Wn.2d 740, 314 P.2d 660 (1957). In Collins, the trial court locked the courtroom door due to overcrowding. The defendant did not object, but raised the issue on appeal. This Court held:

Where the ruling is discretionary, a defendant who does not object when the ruling is made waives his right to raise the issue thereafter. Keddington v. State, 1918, 19 Ariz. 457, 462, 172 P. 273, L.R.A.1918D, 1093. A trial court is entitled to know that its exercise of discretion is being challenged; otherwise, it may well believe that both sides have acquiesced in its ruling. (We would add that this is a discretion that should be sparingly exercised; even the suspicion of an invasion of a defendant's constitutional right to a public trial should be avoided.)

Collins, at 748. In-chambers questioning of jurors is more like the highly discretionary decision in Collins, where failure to object was a bar to consideration of the issue on appeal. Thus, Marsh and Bone-Club simply illustrate that a violation of the right to public trial *can* be manifest error, not that any such violation *is always* manifest error.

The United States Supreme Court and a majority of jurisdictions prohibit defendants from raising the public trial claim for the first time on appeal. See Peretz v. United States, 501 U.S. 923, 936, 111 S. Ct. 2661, 115 L. Ed. 2d 808 (1991) (citing Levine v. United States, 362 U.S. 610, 619, 80 S. Ct. 1038, 1044, 4 L. Ed. 2d 989 (1960)). See also, e.g., Wright v. State, 340 So.2d 74, 79-80 (Ala.1976); People v. Bradford, 14 Cal.4th

1005, 60 Cal.Rptr.2d 225, 929 P.2d 544, 570 (1997); Commonwealth v. Wells, 360 Mass. 846, 274 N.E.2d 452, 453 (1971); People v. Marathon, 97 A.D.2d 650, 469 N.Y.S.2d 178, 179 (N.Y.App.Div.1983); Dixon v. State, 191 So.2d 94, 96 (Fla. 2d DCA 1966); State v. Butterfield, 784 P.2d 153, 157 (Utah 1989).

Finally, it should be noted that trial counsel was Mr. David Allen, an experienced, respected criminal law practitioner. Mr. Allen vigorously defended Momah and challenged any and all rulings, evidence, or conduct by the trial court or prosecutor that he believed would affect his client's right to a fair trial. Yet, he voiced no objection at all to the court's proposal that individual questioning of jurors be held in chambers and in the jury room. In fact, he proposed that more jurors, i.e., those who stated they could not be fair, be questioned in chambers. Unless Mr. Allen is presumed incompetent, it is fair to infer that he believed the court's process was consistent with his client's interests. Momah should not be allowed to second-guess that assessment on appeal. His public trial claims should be rejected.

2. NO ORAL OR WRITTEN CLOSURE ORDER WAS ISSUED BY THE TRIAL COURT, AND CLOSURE WOULD HAVE BEEN INCONSISTENT WITH THE TRIAL COURT'S DEMONSTRATED SENSITIVITY TO THE CONSTITUTIONAL GUARANTEES OF OPEN ADMINISTRATION OF JUSTICE. MOMAH HAS THUS FAILED TO ESTABLISH THAT INDIVIDUAL QUESTIONING WAS CLOSED TO THE PUBLIC.

In every courtroom closure case decided in Washington, the appellate court has reversed only upon a showing that the trial court actually issued an order closing the courtroom, or where it was clear that people were in fact excluded from the proceedings. Marsh, 126 Wash. at 142-43; Collins, 50 Wn.2d at 745-46; Bone-Club, 128 Wn.2d at 256-57; Orange, 152 Wn.2d at 801-03; Brightman, 155 Wn.2d at 511; Easterling, 157 Wn.2d at 171-73.

The evidence here suggests that the trial court did not order closure of the proceedings, and there is no evidence that anyone who wanted to observe was, or would have been, turned away. Because neither Momah nor anyone else objected to the manner of voir dire, the only available evidence is circumstantial. Still, that evidence shows that the court did not close the proceedings.

First, it is clear that the trial court was aware of its duty to preserve the openness of the proceedings. The court alerted counsel to the fact that the television media wanted to film the proceedings. The court carefully

applied the relevant case law and bench-bar-press guidelines to fashion an order that balanced the interests in open proceedings against the defendant's need for a fair trial. CP 667-71 (Order Regarding Media Coverage); CP 672-78 (correspondence from court regarding importance of open court policies). And it is clear that the court had considered the Brightman case, decided just as the court began discussion of how to conduct voir dire. 10RP 93.

Second, the court never ordered -- orally or in writing, directly or indirectly -- that proceedings in chambers or in the jury room be closed in any way, shape or form. One would think that the court would have made even a *brief* comment if it had intended to preclude attendance by the press or public, especially given the court's assiduous attention to openness in all other aspects of this six-week trial.

Third, even on Tuesday, October 11th, the date at issue in this appeal, the court seemed disappointed that it could not accommodate the twenty remaining jurors in the jury room because of insufficient seating. 12RP 105.

Fourth, when the court was required to voir dire an additional group of jurors, starting on Wednesday, October 12th, the court conducted the entire individual voir dire **in the courtroom**, including individual questioning of a particular juror about a prior sexual assault by a physician

against the juror. 13RP 12-18. This questioning was indistinguishable from the type of questioning that occurred on the previous day in the chambers and jury room of E-942. The fact that this second round of individual questioning occurred in the courtroom strongly suggests that the first round of individual questioning was not closed. Moreover, the fact that the physical circumstances changed without comment from the parties or the trial judge strongly suggests that *nobody* believed that the change in physical surroundings -- whether chambers or jury room -- created a limit on access. Moreover, there is nothing in the record to suggest that a person seeking to attend the proceedings was -- or would have been -- denied access. These facts strongly suggest that the court maintained the degree of openness that was possible under the circumstances, and that no one was or would have been denied access to the proceedings.

In short, the best Momah can *allege* is a *de facto* closure. But, as pointed out in this brief and by the Court of Appeals, the evidence simply does not support that claim. A large group of jurors remained in the open courtroom as individual questioning of certain jurors was done in chambers or in the jury room. The clerk remained in the courtroom, apparently monitoring individual questioning by use of a "realtime screen." 12RP 28. The bailiff remained in the courtroom, too, and

ushered jurors into chambers or the jury room for individual questioning each time another juror was needed. It stands to reason that these court personnel could have assisted any member of the public or press had such a person wanted to observe. Finally, it is also possible that the trial judge, who was careful not to restrict access to the trial, gave instructions to his court staff to accommodate any such request, although the record does not show such evidence because the public trial issue was never raised. For these reasons, this Court should reject Momah's invitation to conclude that any part of voir dire was closed.

Such a holding would not diminish the important interests in the open administration of justice. It is possible to question jurors in a jury room or in chambers and still protect the defendant's constitutional right to a public trial. The trial court must simply be careful to accommodate those interests. Still, the practicalities of life and litigation require a certain degree of flexibility in balancing these rights, so trial judges are given wide discretion to manage their courtrooms. From the record in this case, it is readily apparent that the trial judge protected Momah's right to a public trial throughout the lengthy proceedings.

D. CONCLUSION

Under these circumstances, this Court should hold that Momah either invited or waived error. Even if this Court considers the claim, it should be rejected because Momah cannot establish that this trial court closed the single day of individual voir dire.

DATED this 9th day of May, 2008.

Respectfully submitted,

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TO E-MAIL.**

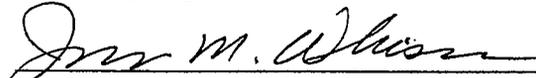
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Certificate of Service by Mail

Today I sent by electronic mail to Sheryl Gordon McCloud, the attorney for the appellant, a copy of the Supplemental Brief of Respondent, in STATE V. CHARLES MOMAH, Cause No. 81096-6 in the Supreme Court for the State of Washington.

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



Name James Whisman
Done in Seattle, Washington

5/9/08

Date 5/9/08

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