

628, 72-1

62872-1

NO. 62872-1-I

**IN THE WASHINGTON COURT OF APPEALS
DIVISION ONE**

STATE OF WASHINGTON,

Plaintiff-Respondent,

v.

TANER TARHAN,

Defendant-Appellant.

FILED
COURT OF APPEALS
STATE OF WASHINGTON
DIVISION ONE
2010 APR - 2 AM 9:15

APPELLANT'S OPENING BRIEF

Appeal from the King County Superior Court
The Hon. Susan Craighead, Superior Court Judge
No. 07-1-05362-6 SEA

Steven Witchley, WSBA 20106
Law Offices of Ellis,
Holmes & Witchley, PLLC
705 Second Avenue, Suite 401
Seattle, WA 98104
(206) 262-0300
(206) 262-0335 (fax)

ORIGINAL

TABLE OF CONTENTS

I. ASSIGNMENTS OF ERROR	1
II. ISSUES PERTAINING TO ASSIGNMENTS OF ERROR	2
III. STATEMENT OF THE CASE	5
<u>Procedural Overview</u>	5
<u>Summary of the Evidence at Trial</u>	7
<u>Sealing of Juror Questionnaires</u>	11
<u>The Trial Court’s Curtailment of Tarhan’s Cross-Examination of Wasmer</u>	13
<u>Prosecutorial Misconduct</u>	14
<i>Voir Dire</i>	14
<i>Direct Examination of Heather Wasmer</i>	17
<i>Direct Examination of Kyle Kizzier</i>	20
<i>Closing and Rebuttal Arguments</i>	23
<u>Sentencing</u>	28
IV. ARGUMENT	28
<u>Mr. Tarhan’s Federal and State Constitutional Rights to an Open and Public Trial Were Violated When the Trial Court Sealed Juror Questionnaires Without First Conducting a <i>Bone-Club</i> Hearing.</u>	28
<i>Introduction</i>	28

<i>A Hearing Must Precede Any Contemplated Closure or Sealing.</i>	31
<i>The Right to an Open and Public Trial and the Requirement of a Hearing Applies to Jury Selection in General, and to Juror Questionnaires in Particular.</i>	33
<i>Violation of the Right to an Open and Public Trial is a Structural Error Which Necessitates a New Trial.</i>	34
<i>Momah is Distinguishable Because in that Case the Trial Court Held a Bone-Club Hearing or its Equivalent.</i>	35
<i>This Court’s Decision in Coleman Is Factually Distinguishable, and to the Extent Coleman Suggests that the Error Is Not Structural, Coleman Has Been Overruled In Part By Stode.</i>	38
<i>Tarhan Is Entitled to a New Trial.</i>	42
<u>Numerous Instances of Prosecutorial Misconduct During Voir Dire, the Questioning of Witnesses, and in Closing Argument Violated Tarhan’s Federal and State Due Process Rights to a Fair Trial.</u>	42
<i>Introduction</i>	42
<i>The Prosecutor Repeatedly and Egregiously Commented on Tarhan’s Constitutionally Protected Trial Rights.</i>	43
<i>The Prosecutor Appealed to the Sympathies, Passions and Prejudices of the Jury.</i>	46
<i>The Prosecutor Distorted the Nature of Reasonable Doubt.</i>	49
<i>The Prosecutor Made Herself Into an Unsworn Witness Against Tarhan.</i>	51

<i>Tarhan Was Prejudiced By the Misconduct Under Any Standard of Review.</i>	55
<u>Trial Counsel Was Ineffective in Failing to Object to the Vast Majority of Instances of Prosecutorial Misconduct.</u>	56
<u>The Trial Court’s Curtailment of Tarhan’s Cross-Examination of Wasmer Violated His Right to Confrontation.</u>	58
<u>Cumulative Error Deprived Tarhan of a Fair Trial.</u>	60
<u>The Case Must Be Remanded for Re-Sentencing to Correct the Community Custody Term and the Expiration Date of the Sexual Assault Protection Order.</u>	61
VI. CONCLUSION	63

TABLE OF AUTHORITIES

WASHINGTON CASES

<i>In Re PRP of Orange</i> , 152 Wash.2d 795, 100 P.3d 291 (2005)	29-30, 32-33, 41
<i>Seattle Times Co. v. Ishikawa</i> , 97 Wash.2d 30, 640 P.2d 716 (1982)	30
<i>State v. Bautista-Caldera</i> , 56 Wash. App. 186, 783 P.2d 116, <i>rev. denied</i> , 114 Wash.2d 1011 (1990)	47
<i>State v. Belgarde</i> , 110 Wash.2d 504, 755 P.2d 174 (1988)	47
<i>State v. Bone-Club</i> , 128 Wn.2d 254, 906 P.2d 325 (1995)	<i>passim</i>
<i>State v. Brightman</i> , 155 Wash.2d 506, 122 P.3d 150 (2005)	29, 33
<i>State v. Coleman</i> , 151 Wash. App. 614, 214 P.3d 158 (2009)	33, 38-41
<i>State v. Easter</i> , 130 Wash.2d 228, 922 P.2d 1285 (1996)	43
<i>State v. Easterling</i> , 157 Wash.2d 167, 137 P.3d 825 (2006)	29, 33, 35, 41
<i>State v. Echevarria</i> , 71 Wash. App. 595, 860 P.2d 420 (1993)	42-43, 47
<i>State v. Fleming</i> , 83 Wash. App. 209, 920 P.2d 1235 (1996), <i>rev. denied</i> , 131 Wn.2d 1018 (1997)	43, 49-50
<i>State v. Hendrickson</i> , 129 Wash.2d 61, 917 P.2d 563 (1996)	57
<i>State v. Hudlow</i> , 99 Wash.2d 1, 659 P.2d 514 (1983)	59
<i>State v. Jones</i> , 71 Wash. App. 798, 863 P.2d 85 (1993)	43
<i>State v. McKenzie</i> , 157 Wash.2d 44, 134 P.3d 221 (2006)	47
<i>State v. Momah</i> , 167 Wash.2d 140, 217 P.3d 321 (2009)	33, 35-38

<i>State v. Powell</i> , 62 Wash. App. 914, <i>rev. denied</i> , 118 Wash.2d 1013 (1992)	47
<i>State v. Rupe</i> , 101 Wash.2d 664, 683 P.2d 571 (1984)	43
<i>State v. Strode</i> , 167 Wash.2d 222, 217 P.3d 310 (2009)	<i>passim</i>
<i>State v. Wittenbarger</i> , 124 Wash.2d 467, 880 P.2d 517 (1994)	58

FEDERAL CASES

<i>Berger v. United States</i> , 295 U.S. 78 (1935)	51
<i>Brown v. United States</i> , 370 F.2d 242 (D.C. Cir. 1966)	48
<i>Burns v. Gammon</i> , 173 F.3d 1089 (8 th Cir. 1999)	44
<i>Chambers v. Mississippi</i> , 410 U.S. 284 (1973)	60-61
<i>Chapman v. California</i> , 386 U.S. 18 (1967)	60
<i>Crane v. Kentucky</i> , 476 U.S. 683 (1986)	58-59
<i>Cunningham v. Zant</i> , 928 F.2d 1006 (11 th Cir. 1991)	43-44
<i>Davis v. Alaska</i> , 415 U.S. 308 (1974)	59
<i>Hance v. Zant</i> , 696 F.2d 940 (11th Cir.), <i>cert. denied</i> , 463 U.S. 1210 (1983)	48
<i>Pirtle v. Morgan</i> , 313 F.3d 1160, (9 th Cir. 2002), <i>cert. denied</i> , 539 U.S. 916 (2003)	57
<i>Press-Enterprise Co. v. Superior Court</i> , 464 U.S. 501 (1984)	29, 33
<i>Strickland v. Washington</i> , 466 U.S. 668 (1984)	56-57
<i>United States v. Edwards</i> , 154 F.3d 915 (9 th Cir. 1998)	51-53

<i>United States v. Hermanek</i> , 289 F.3d 1076 (9 th Cir. 2002), <i>cert. denied</i> , 537 U.S. 1223 (2003)	53
<i>United States v. Hosford</i> , 782 F.2d 936 (11 th Cir. 1986)	52
<i>United States v. Johnson</i> , 968 F.2d 768 (8th Cir. 1992)	48
<i>United States v. Roberts</i> , 618 F.2d 530 (9 th Cir. 1979)	51, 53
<i>United States v. Sanchez</i> , 176 F.3d 1214 (9 th Cir. 1999)	53
<i>United States v. Solivan</i> , 937 F.2d 1146 (6th Cir. 1991)	48
<i>Waller v. Georgia</i> , 467 U.S. 39 (1984)	32
<i>Washington v. Texas</i> , 388 U.S. 14 (1967)	59

CONSTITUTIONAL PROVISIONS

United States Constitution, Fifth Amendment	14, 45
United States Constitution, Sixth Amendment	28-29, 56, 58-59
United States Constitution, Fourteenth Amendment	58
Washington Constitution, Article 1, § 10	29
Washington Constitution, Article 1, § 22	29, 58

STATUTES AND COURT RULES

RCW 7.90.150(6)(c)	62
RCW 9.94A.545(1)	61

OTHER AUTHORITY

<i>State v. Willard</i> , 144 Ohio App.3d 767, 761 N.E.2d 688 (2002)	44, 46
--	--------

I. ASSIGNMENTS OF ERROR

1. Taner Tarhan assigns error to the entry of the judgment and sentence in this case.

2. Mr. Tarhan's federal and state constitutional rights to an open and public trial were violated when the trial court sealed juror questionnaires without first conducting a hearing as required by *State v. Bone-Club*, 128 Wn.2d 254, 906 P.2d 325 (1995), and its progeny.

3. Numerous instances of prosecutorial misconduct during voir dire, the questioning of witnesses, and in closing argument violated Mr. Tarhan's federal and state due process rights to a fair trial.

4. Mr. Tarhan's federal and state constitutional rights to the effective assistance of counsel were violated when trial counsel failed to object to multiple instances of prosecutorial misconduct.

5. Mr. Tarhan's federal and state constitutional rights to confront and cross-examine the witnesses against him were

violated when the trial court curtailed cross-examination of Heather Wasmer regarding statements she made to the police on the night of the charged incident.

6. Cumulative error deprived Mr. Tarhan of a fair trial.

7. The trial court erred in imposing community custody for a period of time in excess of that authorized by law.

8. The trial court erred in imposing a sexual assault protection order whose duration exceeded the period of time authorized by law.

II. ISSUES PERTAINING TO ASSIGNMENTS OF ERROR

1. Does the sealing of juror questionnaires constitute a “closure” of the courtroom for purposes of a defendant’s right to an open and public trial, thereby triggering the hearing requirements of *State v. Bone-Club*, 128 Wn.2d 254, 906 P.2d 325 (1995), and its progeny? (Assignment of Error No. 2).

2. Is Mr. Tarhan entitled to a new trial where the trial court ordered that juror questionnaires be sealed without first holding a *Bone-Club* hearing? (Assignment of Error No. 2).

3. Did the prosecutor commit misconduct by (a) questioning prospective jurors about whether it was “fair” that the defendants did not have to submit to interviews with the prosecutor prior to trial; (b) questioning witnesses in a manner which commented on Mr. Tarhan’s right to a jury trial, his right to confront witnesses against him, and his right to the assistance of counsel; (c) turning herself into an unsworn witness against Tarhan by questioning the lead detective in a manner suggesting that the prosecutor’s filing of charges was proof of guilt; (d) commenting in closing on Mr. Tarhan’s right to a jury trial, his right to be present, his right to confront witnesses against him, and his right to the assistance of counsel; (e) distorting the nature of reasonable doubt in closing; and (f) appealing to the jury to base its verdict on sympathy for

Heather Wasmer rather than on the evidence? (Assignment of Error No. 3).

4. Was Mr. Tarhan prejudiced by the misconduct of the prosecutor? (Assignment of Error No. 3).

5. Was trial counsel's performance deficient in failing to object to many of the instances of prosecutorial misconduct described above? (Assignment of Error No. 4).

6. Was Mr. Tarhan prejudiced by trial counsel's failure to object to numerous instances of prosecutorial misconduct? (Assignment of Error No. 4).

7. Were Mr. Tarhan's federal and state constitutional rights to confront and cross-examine the witnesses against him violated when the trial court prohibited trial counsel from cross-examining Heather Wasmer regarding her statement to police on the night of the charged incident that she did not want the defendants to go to jail? (Assignment of Error No. 5).

8. Was the violation of Mr. Tarhan's confrontation rights harmless beyond a reasonable doubt? (Assignment of Error No. 5).

9. Did cumulative error deprive Mr. Tarhan of a fair trial? (Assignment of Error No. 6).

10. Should the case be remanded for re-sentencing where the trial court imposed 36-48 months of community custody in a case where the maximum term of community custody is 12 months? (Assignment of Error No. 7).

11. Should the case be remanded for re-sentencing where the trial court imposed a sexual assault protection order, the term of which exceeded the period authorized by law? (Assignment of Error No. 8).

III. STATEMENT OF THE CASE

Procedural Overview

Taner Tarhan and three co-defendants—Emir Beskurt, Samet Bideratan and Turgut Tarhan (Taner's brother)—were

charged by information with one count of second degree rape by forcible compulsion. CP 1-10

The four defendants were tried jointly before a jury. The jury was unable to reach a verdict on the charge of second degree rape, but found all four defendants guilty of the lesser charge of third degree rape. CP 80-81. On September 8, 2008, the trial court sentenced Tarhan to 10 months in jail, to be followed by 36-48 months of community custody. CP 105-14. The court also signed an order prohibiting Tarhan from having any contact with Heather Wasmer until August 1, 2015. CP _____, Sub. No. 70, *Sexual Assault Protection Order*.¹

Tarhan then filed this appeal. CP 115-16. His three co-defendants also appealed. Those three cases are consolidated under Court of Appeals case number 62268-4-I. Oral argument in the three consolidated appeals was held on March 3, 2010.

¹ Appellate counsel will file a *Supplemental Designation of Clerk's Papers* to make the protection order part of the record on appeal.

Summary of the Evidence at Trial

On June 3, 2007, 20-year-old Heather Wasmer spent the afternoon drinking beer by the pool at her apartment complex with her friends Caroline Concepcion and Spencer Crilly. The three then went up to the apartment Wasmer shared with Concepcion to cook dinner. 10 RP 46.

From the apartment window Concepcion and Wasmer could see Emir Beskurt and his friend “Tony,” Turgut Tarhan, in Beskurt’s 13th floor apartment. 18 RP 13, 21. Concepcion had met the two men approximately two months earlier at the pool and found Beskurt attractive. 18 RP 138. Concepcion and Wasmer beckoned to Beskurt and Tarhan to come upstairs. 18 RP 24. Beskurt and Tarhan hesitated, but after Wasmer and Concepcion gestured to them again from the window, they decided to accept the invitation. 10 RP 60; 11 RP 105.

Over the course of the evening, Beskurt and Targut Tarhan were joined by Tarhan’s twin brother, Taner, and another friend, Samet Bideratan. 19 RP 42-44. Everyone was drinking beer,

Wasmer and Concepcion were dancing, and Wasmer showed the young men tattoos on her lower back, chest, and leg. 12 RP 13; 21 RP 42. At one point Wasmer removed her tank top and was wearing only a bikini top and shorts. 14 RP 115.

Wasmer and Concepcion asked if they could see Beskurt's apartment. 18 RP 27. They invited Crilly to join them, but Crilly, who had been intimate with Wasmer the night before, was jealous and did not want to come. 10 RP 82; 11 RP 110, 113; 14 RP 68-70; 19 RP 56.

At Beskurt's apartment, Wasmer was enjoying herself but Concepcion was growing frustrated because the men were showing Wasmer more attention than her. 10 RP 101; 19 RP 50-51. Concepcion saw Beskurt sitting close to Wasmer, brushing her leg with his hand, and Taner Tarhan, seated on Wasmer's other side, also starting to touch her. 18 RP 35, 83-84. Concepcion decided to leave to "get cigarettes" (although Beskurt smoked and had cigarettes in the apartment). 18 RP 38. Concepcion chatted with

friends at the store and then, rather than return to Beskurt's apartment, she went back to Wasmer's apartment. 18 RP 38.

When Concepcion got upstairs, she found Crilly still in Wasmer's apartment, "freaking out," according to Concepcion, because he had knocked on Beskurt's door and no one had answered. 18 RP 39. Concepcion went downstairs and knocked on Beskurt's door, and eventually Wasmer answered. *Id.* Wasmer was naked except for her bikini top, which had been untied, and was crying. 18 RP 40-41. She told Concepcion that the men all started having sex with her, and asked Concepcion to retrieve her clothes. 10 RP 130; 18 RP 48. Concepcion called the police, and all four men were arrested.

Wasmer testified that she was sitting on the futon in Beskurt's apartment, with Beskurt and Taner Tarhan sitting on either side of her. 10 RP 102, 105. The two men started touching her, grazingly at first, but the situation quickly progressed and soon Wasmer found herself lying on her back on the futon. 10 RP 107. The men undressed her and started touching her intimately. 10 RP

109-11. Wasmer realized that Concepcion was gone, but had not noticed her leaving. 10 RP 102. She asked the men to “knock it off,” and repeatedly asked for Caroline. 10 RP 107, 111; 11 RP 126. The men disrobed rapidly and soon she found herself having oral and vaginal sex with all four men. 10 RP 116-17. She tried to get up but the men held her down. She found it “awkward” to resist them and said the “whole thing” was “embarrassing.” 11 RP 129. She described their behavior as “horny,” not “angry” or “scary.” 10 RP 122; 13 RP 13.

According to Bideratan and Turgut Tarhan (both of whom testified at trial), Wasmer was a willing and active participant in a group sexual encounter. 19 RP 62-66, 21 RP 57-78. When Concepcion knocked, Turgut was having vaginal intercourse with Wasmer. 21 RP 69-70. Wasmer brushed Turgut’s hands away from her hips and said, “stop, stop,” and he immediately complied. 19 RP 69; 21 RP 80.

Sealing of Juror Questionnaires

Prior to commencement of jury selection, the parties and the court agreed that jurors would complete a questionnaire to help determine whether any jurors needed to be questioned individually. *See, e.g.*, 1 RP 9-29 (extensive discussion of substance and format of questionnaire).² The trial court made it clear that it considered the questionnaires confidential and not for public consumption:

Now, I know that counsel want to have more opportunity to look at the questionnaires, but I'm very reluctant to have them leave the courtroom, and so I'm wondering if

² The Report of Proceedings will be cited as follows:

6/23/08	1 RP	7/16/08	14 RP
6/24/08	2 RP	7/17/08	15 RP
6/25/08	3 RP	7/21/08	16 RP
6/26/08	4 RP	7/22/08	17 RP
6/30/08	5 RP	7/23/08	18 RP
7/1/08	6 RP	7/24/08	19 RP (Moll)
7/2/08	7 RP	7/24/08	20 RP (Butler)
7/8/08	8 RP (Kennedy)	7/28/08	21 RP
7/8/08	9 RP (Bonicelli)	7/29/08	22 RP
7/9/08	10 RP	7/30/08	23 RP
7/10/08	11 RP	8/1/08	24 RP
7/14/08	12 RP	9/4/08	25 RP
7/15/08	13 RP		

we give you some time after court today and tomorrow morning, if that would work. . .

You can imagine why I'm nervous about having [the questionnaires] leave the courthouse. The thing is I know all of you, and I also -- you are very experienced attorneys and I think you recognize what a disaster it would be if people thought that their information was going to get Xeroxed and sent around town. Because you're officers of the court and I have such respect for all of you, I will let you take [the questionnaires] home tonight, and that, I think, will allow us to be more efficient tomorrow.

1 RP 118-19. The questionnaire itself specifically assured jurors that their “responses on the questionnaire will not be available to the public and will eliminate having to ask these questions in open court.” CP ____, Sub. No. 71, King County Superior Court No. 07-1-05360-0 SEA, *Juror Questionnaire*.³

³ The completed questionnaires are filed under seal in the Superior Court under the case number of co-defendant Beskurt. Appellate counsel will file a *Supplemental Designation of Clerk's Papers* to make the questionnaires part of the record on appeal.

On July 8, 2008, the trial court entered an order sealing the juror questionnaires. CP ____, Sub. No. 56, *Order to Seal*.⁴ The order states that “Jurors signed confidential questionnaires containing private information concerning sexual abuse with the understanding that the questionnaires would be sealed.” *Id.* No attorney signatures appear on the order.

The trial court did not hold a hearing to address the necessity for sealing juror forms and questionnaires.

The Trial Court’s Curtailment of Tarhan’s Cross-Examination of Wasmer

Immediately following the incident Wasmer was interviewed at the hospital by a detective. During the interview Wasmer said that she did not want to see any of the four defendants go to jail. 1 RP 89. The state moved in limine to prevent any of the defendants from eliciting this statement during cross-examination of Wasmer. 1 RP 88-99. The trial

⁴ Appellate counsel will file a *Supplemental Designation of Clerk’s Papers* to make the sealing order part of the record on appeal.

court granted the state's motion over objections from all of the defendants. 4 RP 96-97.

Prosecutorial Misconduct

Voir Dire

During the prosecutor's voir dire of the jury panel, the following took place:

- Prosecutor: Does everyone -- well, let me ask this: Is there anyone who thinks it's a bad thing that in a criminal case I have to give all of the evidence that I have or intend to present in court to the defense attorneys and their clients before trial, does anyone think that seems fair, unfair, that they get to know exactly what I've got? No?
- Juror 33: Do you know what they had?
- Prosecutor: No. Do you think that seems unfair?
- Juror 33: Yeah.
- Prosecutor: And why does that seem unfair?
- Mr. Savage: Objection, Your Honor.
- The Court: It's sustained. It's more complicated than that.
- Prosecutor: Well, sir, let me ask you this: If you were to learn during the course of the trial that I had never -- that the State doesn't have an opportunity to speak with defendants, do you think that is unfair?
- Juror 33: Speak with them?
- Prosecutor: To speak with them, talk to them, prior to a case.
- Mr. Savage: Your Honor, I object to the question. The Fifth Amendment says that she can't.
- Prosecutor: That doesn't mean a juror thinks the Fifth Amendment's a good thing.

The Court: Perhaps you could rephrase the question.

Prosecutor: Sir, let me ask you this: Obviously if somebody is arrested with a crime, charged with a crime, they have the right to remain silent, they don't have to talk, and we come in here for this trial, not any one of these four defendants has to get up and testify, they don't have to put on a shred of evidence, the burden is on me to prove the case. If they don't want to tell me before the case what they might testify to, they don't have to, because that's their right. Does that seem like a good thing, a bad thing, unfair to the State?

Mr. Savage: Your Honor, I have a legal matter to take up before the court.

2 RP 150-51. At this point the trial court excused the jury from the courtroom, and all four defendants moved for a mistrial. 2 RP 154-55. The court denied the motion for a mistrial, instead opting to give the jury a curative instruction. 2 RP 164-72.

Immediately following the giving of the curative instruction, the prosecutor resumed questioning the same juror,⁵ who continued to express concern that if the defense gets to hear the state's evidence ahead of time, without any reciprocal opportunity for the state, then the defendant can manufacture a

defense based on what he knows about the prosecution's

evidence:

I guess, not speaking about any of these folks here, but being able to make a defense based on what you tell them. I mean, example, you say someone was there at 10:00, and you tell them that. They could get a witness to say they were there. I guess I'm not saying that, you know, people are out of line or anything, I just somehow have a problem with being able to construe what the prosecution is saying when you can't hear what they're saying.

2 RP 173-74.

This concern clearly lingered throughout the jury selection process, as Juror 32 re-raised the issue again during the defense voir dire:

I guess we were asked the question a couple of days -- last week, I guess, about how we presented the evidence, who got what evidence, who did what, and I guess that's still in my mind, I guess, I still don't know, even though Judge Craighead read me what the law is, is who has to give who what evidence, and I guess if the prosecution has to give all of their evidence to the defendants, what evidence does the defense have to give to the prosecution? That's my question.

⁵ Although the transcript originally referred to the juror as Juror No. 33, it appears that the juror involved in this discussion was actually Juror No. 32. *See* 2 RP 173.

As far as being biased, I guess if a witness got up and there was -- and I knew that the prosecution had given evidence to the defense and they came up with something different, thinking in the back of my mind, well, they knew what that evidence was from the prosecution, what could they have done to offset that, I guess?

6 RP 65-66.

Direct Examination of Heather Wasmer

During the direct examination of Heather Wasmer the prosecutor engaged in the following line of questioning:

- Q. And Heather, since that time [of the incident], how many different people have you had to tell about this incident?
- A. Several. I mean, I don't -- I had to tell quite a few people about this.
- Q. Did you have to tell the officers that responded that night? Did you have to tell the officers what had happened when they came to the apartment that night.
- A. Briefly, yes.
- Q. What about the emergency medical technicians?
- A. The nurse at the hospital?
- Q. What about the medic people, the ambulance people?
- A. They were told, yes.
- Q. And then you mentioned the nurse at the hospital?
- A. Yes.
- Q. After that, do you remember meeting with the detective again and a prosecutor named Carol Spore?
- A. The name is definitely familiar, yes.
- Q. And do you remember that meeting -- did that meeting take place in this building?
- A. Yes.

Q. Did you have to speak with another prosecutor named Scott Leist?

A. Yes.

Q. And was he the person that handled the case before me?

A. Yes, he was.

Q. Have you had to tell me about this incident?

A. Yes.

Q. What about the four defense attorneys, have you had to tell them about it?

A. Yes.

Q. What about your family?

A. Yes.

Q. Have you had to tell your employer, Heather?

A. Not for details, but yes.

Q. Has that been difficult, to tell so many people about what happened to you?

A. It's embarrassing, yes.

Q. Heather, why is that embarrassing?

A. Because it –

Mr. McFarland: Objection, relevance.

The Court: Overruled.

A. I shouldn't have to tell them this.

Q. I'm sorry, Heather, I couldn't hear you.

A. I shouldn't have to tell them something like this. It's not something I wanted.

Q. And has it been easy for you to come into court and –

A. Not at all.

Q. This courtroom and talk about it?

A. Not at all.

Q. Heather, the night before last, when you were getting ready to come in and testify yesterday, how many hours of sleep did you get?

Mr. Meryhew: Objection, Your Honor, relevance.

The Court: Overruled.

- A. I didn't sleep at all. I couldn't turn myself off, I couldn't stop thinking about everything.
- Q. And Heather, when you knew that you had to come back today to continue testifying, how much sleep were you able to get last night?
- A. Not much, a few hours.
- Q. Heather, is this the first time since the incident that you've had to be in a room, staring at the defendants?
- A. Yes.
- Q. And how has that been for you?
- A. It's awkward, uncomfortable, really, really uncomfortable.

11 RP 27-30.

On re-direct examination the prosecutor returned to the theme of Wasmer's difficulty with testifying in court:

- Q. Heather, you're here for your fourth day to testify. What has this experience of testifying been like for you?
- Mr. McFarland: Objection, relevance.
- The Court: Overruled.
- A. It's been horrendous.
- Q. It's been horrendous?
- A. It's affecting everything.
- Q. And when you say it's been affecting everything, can you describe for us a little more what you mean by that?
- Mr. McFarland: Your Honor, I'm going to renew my objection. Further inquiry into this has no probative matter value in this matter.
- The Court: Sustained.
- Q. Heather, how has this been horrendous?
- Mr. McFarland: Same objection, relevance.
- The Court: Overruled.

- A. I'm missing a lot of work and I can't sleep, and I'm having a lot of nightmares about all of this. I haven't had nightmares in months about any of this. I can't sleep.
- Mr. Savage: Your Honor, I can't understand what the witness said.
- Q. Heather, and I know this is difficult, but, both, so that everyone can hear and so that the court reporter can get your words down, can you repeat what you just said?
- A. I said I can't sleep and that I've been having nightmares again. I haven't had nightmares in months over any of this, and I'm missing work. I can't afford to miss work. It's embarrassing to be here every day.

13 RP 15-16.

Direct Examination of Kyle Kizzier

Kyle Kizzier was the lead detective in charge of investigating the case. During his examination the prosecutor elicited testimony from him suggesting to the jury that it should consider the referral and filing of criminal charges to be proof of guilt:

- Q. Do you then file charges, or what do you do once you've investigated a case?
- A. In the state of Washington the police department is not responsible for filing charges, that's under the purview of the prosecutor's office. We present our case to the prosecutor's office, and they decide whether or not charges will be filed through the State.

Q. Can you estimate for us approximately how many cases you investigate a year as a detective in the special assault unit?

A. I know that I've done approximately 300 cases to date in my four years, so when I went back and actually kind of looked at rough numbers, I'm kind of surprised to see that some years it's more than others. I've had busier years than others, but the average year to date for me is about 300 cases that I've been the primary lead detective on. There have probably been another 100 where I've assisted and it's been another detective whose responsibility it was to conduct that investigation.

Q. *And those 300 cases that you investigate, are those all then referred to the prosecutor's office?*

A. *No.*

Q. What happens with –

A. Again, as I said, my job is really more of gatherer of facts. We'll get cases that in some cases we don't have enough information. *It goes to the prosecutor's office when I'm able to determine that, yes, a crime was committed and someone has been identified*, and it goes to the prosecutor's office to decide whether or not they are now going to file charges against that individual or individuals. *If I'm unable to determine who did it, if I don't have a complete case, if I'm absent some element of the crime in order to show that a crime occurred, then it won't go to the prosecutor's office.*

Q. And once it goes to the prosecutor's office, do you participate any further in the investigation?

A. I do.

Q. Can you tell us how you do that or what you do?

A. Certainly. It's -- well, first of all, after I submit a case to the prosecutor's office, if I then get additional information, my investigation doesn't stop, I continue gathering facts if something is particularly germane to the case, I will

forward that to the prosecutor's office. The prosecutor's office, in turn, will sometimes turn around and ask for clarification or additional information to a particular point. For instance, "Can you interview this other witness, interview the witness's mother," for whatever reason.

- Q. And do you then, in fact, do that at the request of the prosecutor's office?
- A. Not all the time. It's going to depend on what the request is and how reasonable or practical it might be. If the prosecutor is asking us to go interview the gas station attendants, whose mother actually knew someone who once had a friend who was robbed, it's not going to be high on our priority list to get accomplished.
- Q. Are you suggesting that we're not always reasonable, detective?
- A. Not in the slightest.
- Q. Okay. Can you tell me what a joint interview is?
- A. Certainly. A joint interview is an interview with someone who's involved in the case, typically someone who's claiming to be a victim or a witness, done not only at my behest, but in the presence of a representative of the prosecutor's office.
- Q. And what is the purpose of those interviews?
- A. It's -- you would have to ask the prosecutor exactly, but essentially what it is is to -- it's to make sure that they -- that the person who's making the claim understands the process, what's going through, and, additionally, the prosecutor might be asking some more specific questions that I did not ask in my initial interview or were not answered in the initial interview. But it's a chance for the prosecutor's office to ask some specific questions directly of the person that's being interviewed.
- Q. And is it after that that a decision is made about whether or not charges are going to be filed?

A. Again, you'd have to ask yourself, Ms. Keating. I've seen cases where a decision to file is made before the joint interview and the interview later requests it, and vice versa, the prosecutor's office wanted to meet with the person first, before making a final decision. ***But I think more typically an interview occurs before a final decision is made.***

Q. ***Do you ever send cases in to the prosecutor's office where charges are simply never filed?***

A. ***Yes.***

16 RP 54-58 (emphasis supplied). Later in the examination the prosecutor used the detective to elicit testimony regarding the absence of exculpatory evidence in the case:

Q: If in the course of an investigation, whether it be with respect to a sexual assault or child abuse case or any other type of case, if you or another detective were to get information or discover anything that would exonerate a suspect, are you required to give that information, turn that information over?

A. Both, legally and morally. It's happened before.

16 RP 92-93.

Closing and Rebuttal Arguments

During closing argument the prosecutor spent a good deal of time lamenting the fact that Wasmer had to endure a trial, while simultaneously denigrating the defendants' rights to a

trial, to counsel, and to confrontation. This pattern began

almost at the outset of the prosecutor's argument:

Heather certainly had no idea on June 3rd, 2007, that the events of that evening would end up over a year later in this courtroom, where what was taken from her and how it was taken would be analyzed in excruciating detail, in front of a room full of strangers. She had no idea that she would be questioned about that evening as if she were the one on trial, no idea that a decision about what happened to her, about what these four men did to her, would fall into the hands of each of you, 13 people, 12 people, who Heather has never met and never seen until she walked into this courtroom, but that is, in fact, where we are today.

22 RP 23.

This rhetoric continued throughout the prosecutor's closing and rebuttal. *See, e.g.*, 22 RP 29-31 (discussing what Wasmer "endured in this courtroom" during "day after day after day after day" of testimony; asserting that Wasmer would have been within her rights to refuse to discuss the incident "in front of a room full of strangers;"); 23 RP 13, 15, 27 (characterizing the defense attorneys' cross-examinations of Wasmer as

“bullying” and asserting that the questioning of Wasmer

“bordered on the offensive”); 22 RP 41:

She sat on the witness stand for four days and answered questions, and she told you, ***with these four men staring at her***, with their families staring at her, she told you what they did, she told you how she got through it.

(emphasis supplied).

The corollary to the prosecutor’s denigration of the defendants’ trial rights was her attempt—repeated throughout her arguments to the jury—to arouse sympathy for Heather Wasmer. At various times the prosecutor extolled Wasmer as brave, resilient, poised, respectful, patient and polite. 22 RP 29-31. The prosecutor’s urging of the jury to identify and to sympathize with Wasmer culminated in this extraordinary moment at the end of rebuttal argument:

Mr. McFarland asked you if your sons were on trial, what evidence would be enough. ***Well, ladies and gentlemen, if your daughter had been the victim, what kind of evidence would be enough?***

23 RP 29 (emphasis supplied).

This glaring attempt to lower the burden of proof echoed an earlier, more subtle distortion of the burden when the prosecutor instructed the jury that in order to convict the defendants the jury need only find that Wasmer was credible:

Now, if you all believed Heather, that would be enough, enough to convict these four men of rape in the second degree. There is no law, there is no requirement, that the State corroborate Heather's testimony in any way. If you believe her, it is enough.

22 RP 31.

And finally, the prosecutor returned to the theme which had led to the motion for a mistrial during voir dire—the notion that the defendants, having access to all of the state's evidence ahead of time, could tailor their defenses accordingly:

Prosecutor: Mr. Bideratan made a big mistake that night, because his DNA was found in Heather's mouth, it was found in her vagina, and it was found where it, apparently, leaked down by her anus, and the fact that that DNA was there prevented Mr. Bideratan or any of the other defendants from getting up here and saying, "Never happened, don't know what she's talking about, we never had sex."

Mr. Savage: Your Honor, I object, the suggestion that such a thing would have happened is entirely improper.

The Court: Could you move on, Counsel.

Prosecutor: What that DNA forced Mr. Bideratan to do –
Mr. Savage: Objection, Your Honor, didn't force him to do anything.
The Court: Sustained.
Prosecutor: Ladies and gentlemen, if that DNA had not been there, I would suggest to you that it would have been a lot easier to say no sex had happened, but there was DNA in her mouth, there was DNA in her vagina, and so the only way out of this –
Mr. Savage: Objection, Your Honor, I'd like to have a sidebar.
Mr. McFarland: I join in this.
Mr. Savage: And voice my objection at this point.
The Court: We'll take a brief sidebar, and be right back.
(Bench conference)
The Court: Thank you, ladies and gentlemen, I'm sorry I kept you waiting. All right, as everyone's sitting down, I'm simply going to say that the objection is sustained, and we will put the sidebar discussion and Mr. Savage's motion on the record at the break. You may proceed, Ms. Keating.
Prosecutor: Thank you, Your Honor. Ladies and gentlemen, before our break we were talking about all the different reasons you had to believe Heather Wasmer, and one of those reasons is that Mr. Bideratan's DNA was found in Heather's mouth and in her vagina, and with that, the only available defense is that this was consensual.
Mr. Savage: Objection, Your Honor.
The Court: Overruled, based on our earlier discussion.
Mr. Savage: Very well, Your Honor.
Prosecutor: The only available defense was that this was consensual, and Heather told you –
The Court: Overruled for the same reasons.

22 RP 37-39.

All four defendants moved for a mistrial based upon this argument. The court denied the motion, and declined to give a curative instruction. 22 RP 51-56.

Sentencing

At sentencing the state argued that the statutorily mandated period of community custody was 36-48 months. 25 RP 17-18, 37, 46-47. Because there was some confusion regarding whether the correct period was 36-48 months or 12 months, the trial court opted to impose the greater term, with the understanding that the period of community custody could be reduced if the court were in error. 25 RP 47; *see also* CP 105-14.

IV. ARGUMENT

Mr. Tarhan's Federal and State Constitutional Rights to an Open and Public Trial Were Violated When the Trial Court Sealed Juror Questionnaires Without First Conducting a *Bone-Club* Hearing.

Introduction

The right to a public trial is protected by both the federal and the Washington state constitutions. *See* U.S. CONST.

AMEND. VI (“In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial.”); WASH. CONST., ART. 1, § 22 (“In criminal prosecutions the accused shall have the right . . . to have a speedy public trial.”); WASH. CONST., ART. 1, § 10 (“Justice in all cases shall be administered openly.”). This right includes the right to open jury selection. *State v. Strode*, 167 Wash.2d 222, 226-27, 217 P.3d 310 (2009), citing *In Re PRP of Orange*, 152 Wash.2d 795, 804, 100 P.3d 291 (2005), and *Press-Enterprise Co. v. Superior Court*, 464 U.S. 501, 505 (1984).

Washington Courts have scrupulously protected the accused’s and the public’s right to open public criminal proceedings. And “[w]hile the right to a public trial is not absolute, it is strictly guarded to assure that proceedings occur outside the public courtroom *in only the most unusual circumstances.*” *Strode*, 167 Wash.2d at 226, citing *State v. Easterling*, 157 Wash.2d 167, 174-75, 137 P.3d 825 (2006) (emphasis supplied). *See also State v. Brightman*, 155 Wash.2d

506, 514, 122 P.3d 150 (2005) (closing courtroom during *voir dire* without first conducting full hearing violated defendant's public trial rights); *Orange*, 152 Wash.2d at 812 (reversing a conviction where the court was closed during *voir dire* and holding that the process of juror selection is a matter of importance, not simply to the adversaries but to the criminal justice system); *State v. Bone-Club*, 128 Wash.2d 254, 256, 906 P.2d 325 (1995) (reversible error to close the courtroom during a suppression motion); *Seattle Times Co. v. Ishikawa*, 97 Wash.2d 30, 36, 640 P.2d 716 (1982) (setting forth guidelines that must be followed *prior* to closing a courtroom or sealing documents). “[P]rotection of this basic constitutional right clearly calls for a trial court to *resist* a closure motion *except under the most unusual circumstances.*” *Orange*, 152 Wash.2d at 805, citing *Bone-Club*, 128 Wash.2d at 259 (emphasis in original).

A Hearing Must Precede Any Contemplated Closure or Sealing.

The Washington Supreme Court recently re-affirmed the test which must be applied in every case where a closure is contemplated. *Strode*, 167 Wash.2d at 227-28. The factors which the trial court must analyze prior to any closure or sealing—also known as the *Bone-Club* factors—are:

1. The proponent of 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.
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.

Strode, 167 Wash.2d at 227-28, citing *Bone-Club*, 128 Wash.2d at 258-259 (quotations in original). As the test itself demonstrates,

analysis of the five factors must occur *before* the closure or sealing. For example, it is impossible to weigh the reasons given by a member of the press or public opposed to closure if the trial court fails to expressly invite comment on the matter. *See Strode*, 167 Wash.2d at 228-29:

The determination of a compelling interest for courtroom closure is “the affirmative duty of the trial court, not the court of appeals.” *Bone-Club*, 128 Wash.2d at 261, 906 P.2d 325. Nor is it the responsibility of this court to speculate on the justification for closure. Moreover, even if the trial court concluded that there was a compelling interest favoring closure, it must still perform the remaining four *Bone-Club* steps to thoroughly weigh the competing interests. *Id.*

After conducting a full hearing, the trial court must then make findings. The constitutional presumption of openness may be overcome only by

an overriding interest *based on findings* that closure is essential to preserve higher values and is narrowly tailored to serve that interest. The interest is to be articulated along with findings specific enough that a reviewing court can determine whether the closure order was properly entered.

Orange, 152 Wash.2d at 806, quoting *Waller v. Georgia*, 467 U.S. 39, 45 (1984) (emphasis supplied). These requirements

are necessary to protect both the accused's right to a public trial and the public's right to open proceedings. *Easterling*, 157 Wash.2d at 175.

The Right to an Open and Public Trial and the Requirement of a Hearing Applies to Jury Selection in General, and to Juror Questionnaires in Particular.

It is now beyond dispute that the process of jury selection is subject to the *Bone-Club* requirements. See, e.g., *Strode*, 167 Wash.2d at 226-27; *State v. Momah*, 167 Wash.2d 140, 148, 217 P.3d 321 (2009); *Brightman*, 155 Wash.2d at 514; *Orange*, 152 Wash.2d at 804. As the United States Supreme Court stated in *Press-Enterprise Co. v. Superior Court*, 464 U.S. at 505: “(t)he process of juror selection is itself a matter of importance, not simply to the adversaries but to the criminal justice system.”

This Court has recognized that this requirement applies with equal force to the handling of juror questionnaires. *State v. Coleman*, 151 Wash. App. 614, 621-23, 214 P.3d 158 (2009)

(notwithstanding GR 31(j), trial court must hold *Bone-Club* hearing before ordering the sealing of juror questionnaires).

Violation of the Right to an Open and Public Trial is a Structural Error Which Necessitates a New Trial.

Determining the harm which flows from the violation of a defendant's right to an open and public trial is not a quantifiable process. Because of the fundamental nature of the public trial right, and because violation of that right does not easily lend itself to harmless error analysis, the Washington Supreme court has announced that the violation of the right to an open and public trial is a structural error, and that the remedy is reversal of the defendant's conviction(s) and remand for a new trial.

Strode, 167 Wash.2d at 223:

Here, the trial court violated Tony Strode's right to a public trial by conducting a portion of jury selection in the trial judge's chambers in ***unexceptional circumstances*** without first performing the required *Bone-Club* analysis. ***This is a structural error that cannot be considered harmless. Therefore, reversal of Strode's conviction and remand for a new trial is required.***

(emphasis supplied); *see also Easterling*, 157 Wash.2d at 181 (“The denial of the constitutional right to a public trial is one of the limited classes of fundamental rights not subject to harmless error analysis.”).

Momah is Distinguishable Because in that Case the Trial Court Held a Bone-Club Hearing or its Equivalent.

Despite the clear language in *Strode*, some confusion regarding remedy may be engendered by the Washington Supreme Court’s decision in *Momah*. *Strode* and *Momah* were argued on the same day, decided on the same day, and involved similar facts—closure of the courtroom during individual voir dire. However, the Court reached opposite conclusions, affirming in *Momah* and reversing in *Strode*. Although the Supreme Court could have made the distinction much clearer, the legal line that separates *Momah* from *Strode* is simple. In *Momah*, the trial court conducted a *Bone-Club* hearing or its equivalent. In *Strode*, no *Bone-Club* hearing took place.

The *Strode* concurrence⁶ noted that “(t)he specific concerns underlying the *Bone-Club* factors were sufficiently addressed by the *Momah* trial court.” *Strode*, 167 Wash.2d at 234 (Fairhurst, J. concurring). While the *Bone-Club* factors could have been more explicitly detailed in the record, the concurrence concluded:

The purpose of the *Bone-Club* inquiry is to ensure that trial courts will carefully and vigorously safeguard the public trial right. Under the circumstances in *Momah*'s case, it is apparent that this purpose was served, and the defendant's right to a public trial was carefully balanced with another right of great magnitude—the right to an impartial jury. . .

Unlike the situation presented in *Momah*, here the record does not show that the court considered the right to a public trial in light of competing interests. The record does not show a knowing waiver of the right to a public trial. Although the dissent addresses the right of jurors to privacy, the record does not show that this interest was considered together with the right to a public trial. I agree with the dissent that “public exposure of jurors' personal experiences can be both embarrassing and perhaps painful

⁶ Both *Strode* and *Momah* were 6-3 decisions, with Justices Fairhurst, Madsen and Owens changing sides from one case to the next. Justice Fairhurst's concurrence in *Strode* (which was joined by Justice Madsen) is of particular note because it explains the reasoning of two of the three Justices who changed their votes between *Strode* and *Momah*.

for jurors.” I agree that jurors' privacy is a compelling interest that trial courts must protect. I agree that had the trial judge failed to close a portion of voir dire to the public, he would have “undermined the court's procedural assurances that juror information will remain private [and] would have jeopardized jurors' candidness and *potentially* the defendant's right to an impartial jury.” ***But the potential for jeopardizing a defendant's right to an impartial jury does not necessitate closure; it necessitates a weighing of the competing interests by the trial court. Because, unlike in Momah, the record does not show that this occurred, this case fits into the category of cases where expressly engaging in the Bone-Club analysis on the record is required. The trial court here erred in failing to engage in the Bone-Club analysis.***

Strode, 167 Wash.2d at 233, 235-36 (Fairhurst, J. concurring)

(citations to dissent omitted) (italics in original) (emphasis supplied).

In this case, the trial court did not engage in any weighing of competing interests before entering the sealing order.

Indeed, there was no on-the-record discussion at all regarding the sealing order. Moreover, the order's plain language makes it clear that it was entered for the sole purpose of protecting juror privacy—rather than to promote Tarhan's right to a fair trial. *See Momah*, 167 Wash.2d at 151-52 (“Finally, and

perhaps most importantly, the trial judge closed the courtroom to safeguard Momah's constitutional right to a fair trial by an impartial jury, not to protect any other interests.”). This case thus falls into the category of cases controlled by *Strode* (where no *Bone-Club* hearing occurred, quasi- or otherwise), rather than those governed by *Momah* (where the trial court substantially complied with *Bone-Club*).

This Court’s Decision in Coleman Is Factually Distinguishable, and to the Extent Coleman Suggests that the Error Is Not Structural, Coleman Has Been Overruled In Part By Strode.

This Court decided *Coleman* on August 17, 2009, about three months before *Strode* and *Momah* were issued. In *Coleman*, the Court recognized that the sealing of juror questionnaires must be preceded by a *Bone-Club* hearing. *Coleman*, 151 Wash. App. at 621-23. Despite the fact no such hearing was held in *Coleman*’s case, the Court declined to reverse *Coleman*’s conviction, instead deciding that “[o]n these facts, we do not agree that structural error occurred.” *Id.* at

623-24.

The Court's decision not to apply structural error analysis was based on three factors:

1. "The questionnaires were used only for the selection of the jury, which proceeded in open court."
2. "The questionnaires were not sealed until several days after the jury was seated and sworn."
3. "[T]here is nothing to indicate that the questionnaires were not available for public inspection during the jury selection."

Id. at 624. From these three factors the Court concluded that "the subsequent sealing order had no effect on Coleman's public trial right." *Id.*

To the extent that *Coleman's* harm analysis remains viable in the wake of *Strode*, this case is distinguishable from *Coleman*. Here, unlike in *Coleman*, it is clear from the comments made by the trial court prior to jury selection "that the questionnaires were not available for public inspection during the jury selection." *Id.* In its pre-trial discussions with counsel, the trial court made it very clear that it considered the questionnaires to be confidential, that it had serious reservations

about allowing the attorneys to remove the questionnaires from the courtroom, and that it only allowed them to do so because it considered them officers of the court who would not disclose the contents of the questionnaires to anyone. *See* 1 RP 118-19.

Coleman rejected the argument that a structural error had occurred because it concluded that the record in that case supported an inference that the public had access to the questionnaires for some period of time prior to the sealing order. Here the record supports the opposite conclusion—that the public never had access to the questionnaires, and that the trial court specifically intended that the public not have access. On these facts, the reasoning of *Coleman* is inapposite.

Moreover, it is difficult to defend the outcome in *Coleman* in light of the Supreme Court's subsequent decision in *Strode*. *Coleman* appears to suggest—without explicitly stating—that the violation in that case was not a structural error because it was rendered *de minimis* by the public's theoretical access to the questionnaires during and for several days following jury

selection before the sealing order was entered. *Strode* squarely rejects this approach:

Some courts in other jurisdictions have held that there may be circumstances where the closure of a trial is too trivial to implicate one's constitutional right. Trivial closures have been defined to be those that are brief and inadvertent. This court, however, "has never found a public trial right violation to be [trivial or] *de minimis*." *Easterling*, 157 Wash.2d at 180, 137 P.3d 825.

Furthermore, the closure here was analogous to the closures in *Bone-Club* and *Orange*. *Orange*, 152 Wash.2d at 804-05, 100 P.3d 291; *Bone-Club*, 128 Wash.2d at 259, 906 P.2d 325. As we have stated above, the trial court and counsel for the State and Strode questioned at least 11 prospective jurors in chambers. At least 6 of those prospective jurors were subsequently dismissed for cause during this period. This closure cannot be said to be brief or inadvertent.

Strode, 167 Wash.2d at 230 (federal citations omitted). In Tarhan's every prospective juror completed the questionnaire to which the public was denied access without a *Bone-Club* hearing. To the extent that *Coleman* suggests that the sealing of juror questionnaires without a hearing is a trivial or *de minimis* violation of the public trial right and is therefore not a structural error, it has been overruled by *Strode*.

Tarhan Is Entitled to a New Trial.

Dozens of juror questionnaires were sealed in this case. No *Bone-Club* hearing was held. Indeed, there was no mention whatsoever on the record regarding the sealing of the questionnaires. The sealing of the questionnaires without a hearing violated Tarhan's right to an open and public trial. Under *Strode*, this is a structural error, and Tarhan is entitled to a new trial.

Numerous Instances of Prosecutorial Misconduct During Voir Dire, the Questioning of Witnesses, and in Closing Argument Violated Tarhan's Federal and State Due Process Rights to a Fair Trial.

Introduction

Prosecutorial misconduct denies a defendant the right to a fair trial and necessitates a new trial if there is a substantial likelihood that the comments affected the verdict. *State v. Echevarria*, 71 Wash. App. 595, 597, 860 P.2d 420 (1993). If the misconduct implicates the constitutional rights of the defendant, however, reversal is required unless the error is

harmless beyond a reasonable doubt. *State v. Easter*, 130 Wash.2d 228, 242, 922 P.2d 1285 (1996) (applying standard where prosecutor commented on defendant's pre-arrest silence); *State v. Fleming*, 83 Wash. App. 209, 216, 920 P.2d 1235 (1996), *rev. denied*, 131 Wn.2d 1018 (1997) (applying standard where prosecutor misstated nature of reasonable doubt). Even in the absence of an objection by the defense, reversal is still required if the remarks were so flagrant or ill intentioned that no curative instruction could have obviated the prejudice. *Echevarria*, 71 Wash. App. at 597.

The Prosecutor Repeatedly and Egregiously Commented on Tarhan's Constitutionally Protected Trial Rights.

It is misconduct for a prosecutor to induce the jury to draw adverse inferences from a criminal defendant's exercise of a constitutional right. *State v. Rupe*, 101 Wash.2d 664, 705, 683 P.2d 571 (1984). This includes the right to confront adverse witnesses. *See State v. Jones*, 71 Wash. App. 798, 811-12, 863 P.2d 85 (1993); *see also Cunningham v. Zant*, 928 F.2d 1006,

1019-20 (11th Cir. 1991) (outrageous misconduct for prosecutor to argue that he found it “offensive” that defendant exercised his right to trial).

In *State v. Willard*, 144 Ohio App.3d 767, 761 N.E.2d 688 (2002), the Ohio Court of Appeals reversed multiple convictions for sexual battery of a child due to this type of prosecutorial misconduct in closing argument:

We also find improper the prosecutor's statement that the complainant was required to “sit and undergo and endure cross-examination at the hands of her assailant's attorney.” The prosecutor's remarks implicated defendant's right to cross-examination and denigrated defendant's counsel for exercising the right to confront the state's primary witness, while potentially arousing the sympathies of the jurors for the complainant. The danger of such a “sarcastic statement” by the prosecutor is that it invites the jury to “punish [defendant] for making the victim of the crime go through the ordeal of cross-examination, which [defendant] had every right to do.” *Burns v. Gammon*, 173 F.3d 1089, 1095 (8th Cir. 1999).

Willard, 144 Ohio App.3d at 775.

Here, the prosecutor began her denigration of Tarhan’s constitutional rights during jury selection when she repeatedly asked jurors whether it was “fair” that the state did not have the

opportunity to speak with the defendants prior to trial. This cannot be characterized as anything other than a flagrant comment on Tarhan's Fifth Amendment rights. The prosecutor then followed-up on this argument by asserting in closing that the DNA evidence "forced" the defendants to adopt a consent defense. While it may be debatable whether the prosecutor could advance such an argument in the cases of the two testifying co-defendants, Tarhan did not testify, and any suggestion that his defense was manufactured based on the evidence introduced at trial was wholly improper.

The prosecutor did not confine her assault on Tarhan's constitutional rights to the Fifth Amendment. During her questioning of Wasmer the prosecutor repeatedly induced Wasmer to talk about how "horrendous" it was for her to submit to interviews by defense counsel, to testify in open court in front of the jury, and to be forced to "star[e] at the defendants" while on the witness stand. The prosecutor hammered on these themes in closing argument, lamenting that

Wasmer had to tell her story “in front of a room full of strangers” “day after day after day after day,” “with these four men staring at her.” But the prosecutor did not stop there. Instead, she went on to accuse defense counsel of “bullying” Wasmer and characterized defense counsels’ cross-examination as “border[ing] on the offensive.”

Taner Tarhan had a right to a jury trial. He had a right to a public trial. He had a right to the assistance of counsel—counsel who would interview the alleged victim and aggressively cross-examine her at trial. It was textbook misconduct for the prosecutor to comment adversely on these rights.

The Prosecutor Appealed to the Sympathies, Passions and Prejudices of the Jury.

Just as in the *Willard* case, the prosecutor’s comments not only cast aspersions on Tarhan’s exercise of constitutional rights, they also appealed to the sympathies, passions and prejudices of the jury. *Willard*, 144 Ohio App.3d at 775.

Appellate courts have consistently condemned such appeals. *See, e.g., State v. McKenzie*, 157 Wash.2d 44, 134 P.3d 221 (2006) (prosecutor's references to the victim's lost "innocence" constituted misconduct because they appealed to the sympathies and passions of the jury); *Echevarria*, 71 Wash. App. at 598-99 (conviction reversed based on prosecutor's repeated references in opening statement to the war on drugs; defense counsel's failure to object did not preclude review); *State v. Belgarde*, 110 Wash.2d 504, 506-10, 755 P.2d 174 (1988) (murder conviction reversed due to prosecutor's appeals in closing argument to jury's passion and prejudice; defense counsel's failure to object did not preclude review); *State v. Powell*, 62 Wash. App. 914, 918-19, *rev. denied*, 118 Wash.2d 1013 (1992) (improper for prosecutor in child sex case to argue that acquittal would be equivalent to "declaring open season on children"); *State v. Bautista-Caldera*, 56 Wash. App. 186, 195, 783 P.2d 116, *rev. denied*, 114 Wash.2d 1011 (1990) (improper in statutory rape case to exhort jury to send a message to

society about problem of child sexual abuse); *Brown v. United States*, 370 F.2d 242, 246 (D.C. Cir. 1966) (conviction for assaulting police officer reversed where prosecutor argued that if jury acquitted defendant, "you might as well have martial law"); *Hance v. Zant*, 696 F.2d 940, 950-53 (11th Cir.), *cert. denied*, 463 U.S. 1210 (1983) (prosecutor's "dramatic appeal to gut emotion has no place in the courtroom"; death sentenced reversed); *United States v. Solivan*, 937 F.2d 1146, 1153 (6th Cir. 1991) ("prosecutor may not urge jurors to convict a criminal defendant in order to protect community values, preserve civil order, or deter future lawbreaking"); *United States v. Johnson*, 968 F.2d 768 (8th Cir. 1992) (reversing drug conviction based on prosecutor's inflammatory appeal to jurors as the conscience of the community).

Here, in addition to eliciting Wasmer's (irrelevant) testimony about what a "horrendous" experience trial had been for her, the prosecutor appealed in closing to the jurors' sympathies by speaking admiringly of Wasmer's bravery,

resilience and poise. The prosecutor then—incredibly—urged jurors to imagine that Wasmer were their own daughter. There can be little doubt that the prosecutor's stark appeals to jurors' emotions constituted egregious misconduct.

The Prosecutor Distorted the Nature of Reasonable Doubt.

In *State v. Fleming*, the prosecutor in a rape trial argued that in order to acquit the defendants, the jury would have to find that the complainant was lying or confused about what had happened. *Fleming*, 83 Wash. App. at 213. The defense failed to object to these comments. *Id.* at 216. Given the well-established precedent in this area, however, the Court had no difficulty concluding that the misconduct was flagrant and ill-intentioned. *Id.* at 214. Applying a constitutional harmless error standard, the Court of Appeals reversed the defendants' convictions for rape, noting that:

The prosecutor's argument misstated the law and misrepresented both the role of the jury and the burden of proof. The jury would not have had to find that D.S. was mistaken or lying in order to acquit; instead, it was

required to acquit *unless* it had an abiding conviction in the truth of her testimony. . . Misstating the bases upon which a jury can acquit may insidiously lead, as it did here, to burden-shifting and to an invasion of the right to remain silent. . .The State must convict on the merits, and not by way of misstating the nature of reasonable doubt, misstating the role of the jury, infringing on the right to remain silent, and improperly shifting the burden of proof to the defense.

Id. at 213-16.

Tarhan's prosecutor distorted the nature of reasonable doubt in two respects. First, the prosecutor argued that it would be "enough to convict these four men of rape" if the jury found Wasmer credible. But this is false. The jury could find Wasmer credible and *still* have a reasonable doubt about whether the crime of rape occurred. The issue before the jury was not solely whether one witness or another was credible. The issue was whether the state met its burden of proving each element of the crime beyond a reasonable doubt.

Second, and more importantly, the prosecutor urged jurors to imagine Wasmer as their daughter, and then to apply whatever burden of proof they would feel was appropriate under those

circumstances: “[L]adies and gentlemen, if your daughter had been the victim, what kind of evidence would be enough?”

The Prosecutor Made Herself Into an Unsworn Witness Against Tarhan.

It is a “well-established principle that the prosecutor has a special obligation to avoid ‘improper suggestions, insinuations, and especially assertions of personal knowledge.’” *United States v. Roberts*, 618 F.2d 530, 533 (9th Cir. 1979), quoting *Berger v. United States*, 295 U.S. 78, 88 (1935) (emphasis supplied). Assertions of personal knowledge run afoul of the advocate-witness rule, which prohibits attorneys from testifying in cases they are litigating. *United States v. Edwards*, 154 F.3d 915, 921 (9th Cir. 1998). The advocate-witness rule is particularly important in criminal cases, where the concern is “that jurors will be unduly influenced by the prestige and prominence of the prosecutor’s office and will base their credibility determinations on improper factors.” *Id.*

[T]he danger in having a prosecutor testify as a witness is that jurors will automatically presume the prosecutor to be

credible and will not consider critically any evidence that may suggest otherwise. . . [T]he policies underlying the advocate-witness rule “apply equally when a prosecutor implicitly testifies to personal knowledge or otherwise attains ‘witness verity’ in a case in which he appears as an advocate for the government. . .” [The rule is] designed to prevent prosecutors from taking advantage of the natural tendency of jury members to believe in the honesty of lawyers in general, and government attorneys in particular. . .

Id. at 921-22, quoting *United States v. Hosford*, 782 F.2d 936, 939 (11th Cir. 1986). In *Edwards*, the prosecutor discovered a critical piece of evidence – a receipt bearing the defendant’s name inside a bag containing narcotics – during a recess in the trial. The next day he elicited testimony regarding his discovery from two police officers who were present at the time he found the evidence. The Ninth Circuit held that the prosecutor’s continued participation in the trial constituted prejudicial error mandating reversal and a new trial.

The prosecutor’s implicit testimony was devastating to Edwards’s only theory of defense, and it was a blow against which he had no way to defend. Because the prosecutor was not subject to cross-examination, defense counsel did not have a fair opportunity to cast doubt on the circumstances under which the receipt was found. . .

[T]he prosecutor functioned throughout the second half of Edwards's trial as a silent witness for the prosecution. Unlike other witnesses, however, he was not subject to cross-examination and the jury members never had an opportunity to evaluate for themselves whether his story was to be believed.

Id. at 922-23. *See also Roberts*, 618 F.2d at 532-34 (error for prosecutor to refer to facts not in evidence by arguing to jury that detective was present in court to insure that government witness complied with immunity agreement by testifying truthfully); *United States v. Sanchez*, 176 F.3d 1214, 1223 (9th Cir. 1999) (error for prosecutor to cross-examine defendant about his reputation as a drug dealer; question assumed facts not in evidence); *United States v. Hermanek*, 289 F.3d 1076, 1098-99, 1102 (9th Cir. 2002), *cert. denied*, 537 U.S. 1223 (2003) (error for prosecutor to assume "witness-like role" by using "we" and "us" to describe investigation; error harmless where comments did not go "to the heart of the case").

In examining Detective Kizzier, the prosecutor first elicited improper opinion evidence that the defendants were

guilty by inducing Kizzier to say that he only refers cases to the prosecutor's office when he has determined that a crime has been committed and has identified the perpetrator. But the prosecutor went even further—eliciting from the detective that the prosecutor's office does not file charges in every case that he refers to them.

In other words, the detective only refers cases in which he is sure that there has been a crime and that he has the right suspect, and even then the prosecutor's office does not charge every case that he refers. This line of questioning effectively transformed the prosecutor into an unsworn witness against Tarhan: the prosecutor's office would not have charged Tarhan with rape unless the prosecutor was convinced of his guilt.

Tarhan Was Prejudiced By the Misconduct Under Any Standard of Review.

Trial counsel failed to object to the vast majority of the prosecutor's questions and arguments discussed above, but the prosecutor's conduct—which sweepingly implicated Tarhan's constitutionally protected trial rights—cannot be characterized as anything by flagrant and ill-intentioned. And given that the comments intruded upon Tarhan's constitutional rights, this Court must grant relief unless it finds that the misconduct was harmless beyond a reasonable doubt.

The evidence in this case was hardly overwhelming—indeed, the jury was unable to reach a verdict on the greater charge of second degree rape—and it is easy to see how the prosecutor's tactics could have tipped the scale in the state's favor on the lesser-included charge of which Tarhan was convicted. This Court should reverse and remand for a new trial.

Trial Counsel Was Ineffective in Failing to Object to the Vast Majority of Instances of Prosecutorial Misconduct.

Effective assistance of counsel is guaranteed by the Sixth Amendment to the United States Constitution. *Strickland v. Washington*, 466 U.S. 668 (1984). To establish that trial counsel's representation was constitutionally inadequate, Tarhan must show that counsel's performance was deficient—*i.e.*, that it fell below an objective standard of reasonableness—and that the deficient performance was prejudicial. *Strickland*, 466 U.S. at 687-88. The proper measure of attorney performance is reasonableness under prevailing professional norms. *Id.* at 688. In order to demonstrate prejudice arising from counsel's deficient performance, Tarhan must show that there is a reasonable probability that, but for counsel's errors, the result of the proceeding would have been different. *Strickland*, 466 U.S. at 694.

A reasonable probability is a probability sufficient to undermine confidence in the outcome. *Id.* The "reasonable probability" standard is not stringent, and requires a showing by

less than a preponderance of the evidence that the outcome of the proceeding would have been different had the claimant's rights not been violated. *See, e.g., Pirtle v. Morgan*, 313 F.3d 1160, 1172 (9th Cir. 2002), *cert. denied*, 539 U.S. 916 (2003), quoting *Strickland*, 466 U.S. at 694:

A “reasonable probability” is less than a preponderance: “the result of a proceeding can be rendered unreliable, and hence the proceeding itself unfair, even if the errors of counsel cannot be shown by a preponderance of the evidence to have determined the outcome.”

Failure to lodge an appropriate objection constitutes deficient performance if there was no discernible tactical reason for the failure to object. *See, e.g., State v. Hendrickson*, 129 Wash.2d 61, 78, 917 P.2d 563 (1996) (deficient performance for counsel to fail to object inadmissible of evidence of defendant’s prior convictions; “[W]e cannot discern a reason why Hendrickson's counsel would not have objected to such damaging and prejudicial evidence.”).

During Tarhan’s trial there were numerous occasions when a timely objection by trial counsel could have prevented

the jury's exposure to improper and highly prejudicial testimony and arguments. There is simply no conceivable tactical reason for counsel's failure to do so.

Moreover, for the reasons discussed above, there is at least a reasonable likelihood that if trial counsel had performed adequately the result of the trial would have been different. Trial counsel was ineffective, and this constitutional deficiency provides a separate ground for this Court to reverse and remand for a new trial.

The Trial Court's Curtailment of Tarhan's Cross-Examination of Wasmer Violated His Right to Confrontation.

Due process requires an accused be given "a meaningful opportunity to present a complete defense." *State v. Wittenbarger*, 124 Wash.2d 467, 474, 880 P.2d 517 (1994); *Crane v. Kentucky*, 476 U.S. 683, 690 (1986); U.S. Const., Sixth and Fourteenth Amend.; Wash. Const. Art. 1, § 22. "The right to offer the testimony of witnesses . . . is in plain terms the right to present a defense, the right to present the defendant's

version of the facts as well as the prosecution's to the jury so it may decide where the truth lies." *Washington v. Texas*, 388 U.S. 14, 19, (1967).

Criminal defendants also have a right under the Sixth Amendment and Article I, section 22 of the Washington Constitution to confront the witnesses against them. *State v. Hudlow*, 99 Wash.2d 1, 14-15, 659 P.2d 514 (1983). Defense counsel exercises a defendant's right to confrontation primarily through the cross-examination of the State's witnesses, "the principle means by which the believability of a witness and the truth of his testimony are tested." *Davis v. Alaska*, 415 U.S. 308, 316 (1974). Absent a valid justification, excluding relevant defense evidence denies the right to present a defense because it "deprives a defendant of the basic right to have the prosecutor's case encounter and survive the crucible of meaningful adversarial testing." *Crane*, 476 U.S. at 689-690.

Here, the trial court prohibited the defense from questioning Wasmer regarding statements she made

immediately after the incident to Detective Kizzier that she did not want the defendants to go to jail. This statement was relevant because it suggested ambivalence on Wasmer's part about what had just happened, and it served to impeach the state's evidence that Wasmer's behavior immediately following the incident was consistent with that of a rape victim. It was error for the trial court to exclude this evidence.

The denial of Tarhan's right to confrontation entitles him to a new trial unless the State can convince the Court that the error was harmless beyond a reasonable doubt. *Chapman v. California*, 386 U.S. 18, 24 (1967). The State cannot meet this heavy burden.

Cumulative Error Deprived Tarhan of a Fair Trial.

The United States Supreme Court has clearly established that the combined effect of multiple trial court errors violates due process where it renders the resulting criminal trial fundamentally unfair. *Chambers v. Mississippi*, 410 U.S. 284, 298 (1973) (combined effect of individual errors "denied

[Chambers] a trial in accord with traditional and fundamental standards of due process” and “deprived Chambers of a fair trial”). The cumulative effect of multiple errors can violate due process even where no single error rises to the level of a constitutional violation or would independently warrant reversal. *Chambers*, 410 U.S. at 290 n.3. Where the combined effect of individually harmless errors renders a criminal defense “far less persuasive than it might [otherwise] have been,” the resulting conviction violates due process. *See Chambers*, 410 U.S. at 294.

Even if Tarhan’s individual claims of error do not merit relief, the cumulative effect of the errors in his case warrant reversal and remand for a new trial.

The Case Must Be Remanded for Re-Sentencing to Correct the Community Custody Term and the Expiration Date of the Sexual Assault Protection Order.

RCW 9.94A.545(1) states in relevant part that “on all sentences of confinement for one year or less, in which the offender is convicted of a sex offense . . . the court may impose

up to one year of community custody.” Tarhan was sentenced to ten months in jail. Accordingly, the trial court only had authority to sentence him to 12 months community custody. The state has conceded this issue in the consolidated appeals of the three co-defendants.

Similarly, RCW 7.90.150(6)(c) authorizes the imposition of a sexual assault protection order in this case “for a period of two years following the expiration of any sentence of imprisonment and subsequent period of community supervision, conditional release, probation, or parole.”

Tarhan was taken into custody on August 1, 2008, and then sentenced to ten months in jail on September 4, 2008. As discussed above, he was eligible for a term of community custody of one year. Accordingly, pursuant to statute the sexual assault protection order should have an expiration date no later than June 1, 2012 (August 1, 2008 plus ten months plus 12 months plus 24 months). As with the community custody

issue, the state has conceded this issue in the consolidated appeals of the three co-defendants.

V. CONCLUSION

For the foregoing reasons, this Court should reverse Tarhan's conviction and remand for a new trial (Assignments of Error 1-6), or should vacate the judgment and remand for re-sentencing (Assignments of Error 1, 7 and 8).

DATED this 2nd day of April, 2010.

Respectfully Submitted:



Steven Witchley, WSBA #20106
Law Offices of Ellis,
Holmes & Witchley, PLLC
705 Second Avenue, Suite 401
Seattle, WA 98104
(206) 262-0300
(206) 262-0335 (fax)
steve@ehwlawyers.com

CERTIFICATE OF SERVICE

I, Steven Witchley, hereby certify that on April 2, 2010, I served a copy of the attached brief on counsel for the State of Washington by causing the same to be hand-delivered to the office of:

James Whisman
Appellate Unit Supervisor
King County Prosecuting Attorney's Office
516 Third Avenue, Room W554
Seattle, WA 98104



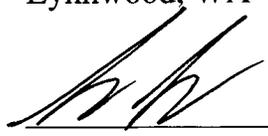
Steven Witchley

1
2
3
4
5
6
7
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25
26
27
28
29
30

IN THE WASHINGTON STATE COURT OF APPEALS
DIVISION ONE

STATE OF WASHINGTON,)
) NO. 62871-1-1
 Respondent,)
) SUPPLEMENTAL CERTIFICATE
 v.) OF SERVICE
)
 TANER TARHAN,)
)
 Appellant.)
)
)
)
)
)

I, Steven Witchley, hereby certify that on April 2, 2010, I served a copy of
Appellant's Opening Brief on Mr. Tarhan by causing the same to be mailed, first-class
postage prepaid, to:

Taner Tarhan
2308 188th Place SW
Lynnwood, WA 98036

Steven Witchley, WSBA #20106
Attorney for Taner Tarhan

FILED
COURT OF APPEALS, DIV. #1
STATE OF WASHINGTON
2010 APR -5 AM 9:58

ORIGINAL

LAW OFFICES OF ELLIS HOLMES & WITCHLEY		WELLS FARGO BANK, N.A.	
705 2ND AVENUE SUITE 401 SEATTLE, WA 98104 (206) 262-0300		SEATTLE, WA 98104 19-854-1250	
PAY TO THE ORDER OF <u>Court of Appeals, Division One</u>		4/2/2010	
		\$	**750.00
<u>Seven Hundred Fifty and 00/100</u>		***** DOLLARS	
MEMO	Court of Appeals, Division One 600 University St. One Union Square Seattle WA 98101 court sanction 62872-1 Tarhan		
			
		MP	
⑈001938⑈ ⑆125008547⑆6757559106⑈			

Security Features Included. Details on back.

LAW OFFICES OF ELLIS HOLMES & WITCHLEY			1938
Court of Appeals, Division One		4/2/2010	
	fine for late brief		750.00

RECEIVED
 COURT OF APPEALS
 DIVISION ONE
 APR 02 2010