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SUPREME COURT OF THE STATE OF WASHINGTON

STATE OF WASHINGTON,

Respondent,

v.

TANER TARHAN,

Appellant.

SUPPLEMENTAL BRIEF OF RESPONDENT

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ORIGINAL

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A. ISSUES PRESENTED

1. Whether review of the claim is precluded when the defendant advocated for and proposed a confidential juror questionnaire, which the trial court later sealed at the defendant's urging.

2. Whether, to resolve the tension between jurors' legitimate privacy rights and the right to a public trial under article I, sections 10 and 22, this Court should hold that confidential juror questionnaires are not court records because they are proposed and used by the parties to assist the parties in conducting voir dire in an open court room. The questionnaires are not used by the judge in a deliberative process and they always inhere to the defendant's benefit.

3. Whether, assuming the questionnaires are court records, the Court should hold that, court *records* are fundamentally different from court *proceedings* and the "remedy appropriate to the violation" is remand for a *Bone-Club* hearing on the record to determine whether the records may remain sealed.

B. STATEMENT OF THE CASE

1. FACTS.

The facts of Tarhan's participation, along with that of his twin brother and their two friends, in the gang rape of H.W. were discussed in detail in the Court of Appeals opinion and will not be repeated here.

2. JUROR QUESTIONNAIRES.

In his trial brief, Tarhan's counsel requested the opportunity to submit a **confidential questionnaire** to jurors because counsel recognized the "sensitive nature of inquiries in rape cases," and thus wanted each potential juror to complete the questionnaire.[1] 1301 (emphasis in original). If a prospective juror thought that the questions called for personal information he or she could ask the court to allow further inquiry outside the presence of the jury pool. CP 1301, 1311. Counsel also expressed concern about the "great deal of news media attention" directed at persons accused of forcible sex crimes and the community condemnation of such conduct.[2] CP 1301.

Tarhan's questionnaire sought information to assess the juror's "ability to be fair and impartial." CP 1311. Tarhan's questionnaire assured jurors that their responses "will be available <u>only</u> to the judge, the defendant and the attorneys for both parties . . . and will be <u>destroyed</u> if

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[1] Although each of the defense counsel wanted the trial court to use a confidential juror questionnaire, all counsel agreed that Taner Tarhan's counsel was "taking the lead on a questionnaire." *See* 6/23/08 RP 11-30; CP 1301-04, 1310-17, 1322 (e-mail dated 6/20/08 at 5:20 P.M.).

[2] Tarhan's counsel did not mention any media coverage specific to this case, but rather, spoke in general terms about media coverage of "forcible sex crimes." CP 1302.

you are not selected," and, if selected, "your responses will be sealed in the permanent record and thus not available for public scrutiny."[3] CP 1311 (emphasis added).

The trial court, deputy prosecutor and Tarhan's counsel exchanged a "fair amount of communication . . ." via e-mail and in open court concerning the format and content of the juror questionnaires.[4] CP 1319-39; 6/23/08 RP 11-15. The questionnaires proposed by the State and Tarhan's counsel were "essentially the same." 6/23/08 RP 13. However, Tarhan's counsel also advocated for the inclusion of questions that focused on the nature of the charges: a rape by four men.[5] 6/23/08 RP 15-30; *see also* CP 1319 (e-mail dated 6/22/08 at 11:19 A.M.) and CP 1332.

The questionnaire explored issues that arise in many sexual assault cases, such as whether the prospective juror had been a sexual assault

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[3] The final version of the questionnaire 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 126-1256 (completed juror questionnaires).

[4] The trial court agreed that, given the nature of the charges, the prospective jurors would be given questionnaires. CP 1319 (e-mail dated 6/20/08 at 4:55 P.M.); 6/23/08 RP 12. Separate and apart from the confidential juror questionnaire, the trial court also gave its own hardship questionnaire. CP 1320 (e-mail dated 6/20/08 at 3:33 P.M.); CP 1328; 6/23/08 RP 23-24.

[5] To that end, counsel proposed one question that asked whether there is "anything about a sexual act with multiple partners that you consider morally or ethically repugnant, even if done between consenting adults?" CP 1316 (question 39). Another question asked whether "the allegation of consensual intercourse with more than one male partner [is] so outrageous to you that you believe you would not be a *fair, impartial juror* to either party?" CP 1316 (question 40) (emphasis supplied).

victim, whether the person knew the assailant and whether the assailant was a family member.[6] CP 1312 (questions 1-3). Because three defendants were of Turkish ancestry, defense counsel wanted to include questions that explored possible bias because of the proximity of Turkey to Iraq and Iran. *See* CP 1322 (e-mail dated 6/20/08 at 5:20 P.M.); 6/23/08 RP 24-27. Tarhan's counsel recognized that this topic might be "uncomfortable" for the jurors, but he argued that the questionnaire needed to address the defendants' ethnicity, because it was important for the jurors to "open up in a way that we can get all the information."[7] 6/23/08 RP 27.

After the questionnaires had been completed, the trial court said,

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

6/23/08 RP 118. All counsel expressed the need to have more time to review the questionnaires. 6/23/08 RP 118-19. The court acknowledged

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[6] Three jurors had been raped, one by a brother, one by his pastor. 6/24/08 RP 55; 6/25/08 RP 98-100; 6/30/08 RP 119-20. One juror's wife and his two sisters had been raped, another juror's two sisters had been raped. 6/24/08 RP47; 6/30/10 RP 130. A mother, a daughter and a granddaughter had been raped. 6/24/08 RP 121; 6/25/08 RP 91, 100. And, multiple childhood friends had been sexually abused or raped. 6/24/08 121, 733-76; 6/25/08 RP 108-09.

[7] One juror was sexually abused at age four and said that she came from a culture similar to that of Turkey, where female rape victims were at fault (because they either dressed or talked inappropriately). 6/25/08 RP 91, 98-100.

that there was an "awful lot" of information to review. 6/23/08 RP 119. The court stated:

> You can imagine why I'm nervous about having this leave the courthouse. The thing is I know all of you, and I also – you are 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.

6/23/08 RP 119.

Two days later (June 25), the trial court advised the venire that the goal of jury selection is to ensure that the case gets tried before an "impartial jury." 6/25/08 RP 66. Then, after preliminary jury instructions and general questions posed by the court, individual questioning of the jurors occurred *in open court*, but outside the presence of the venire. Tarhan's counsel actively participated in the individual questioning and ferreted out information that he believed was important to ensuring that Tarhan and his co-defendants were tried by an impartial jury.[8] *See, e.g.*, 6/24/08 RP 77-84, 109-12.

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[8] All but one of the prospective jurors who had been raped or had a family member or friend sexually assaulted, were excused *in open court* and *without objection*. 6/24/08 RP 55-57, 733-76; 6/25/08 RP 99-101, 108-09.

After six days of voir dire, conducted in open court, the parties exercised their peremptory challenges on the record in open court. 7/2/08 RP 98-103. A jury was ultimately selected and sworn. 7/2/08 RP 103-05; 7/8/08 RP 24-30 (P.M. session).

The trial court later entered an order to seal the confidential juror questionnaires. CP 119-20. The court made specific findings in its order:

> The Court having reviewed the applicant's motion[9] and declaration to seal specific documents or this file, *and pursuant to applicable case law and court rules*, finds compelling circumstances to grant the order exist. . . .

CP 119 (emphasis added). The court explained that sealing was necessary because, "Jurors signed confidential questionnaires containing information concerning sexual abuse with the understanding that the questionnaires would be sealed." CP 119.

C. ARGUMENT

This case presents, first and foremost, the opportunity for this Court to unequivocally hold that a defendant who invited a trial court to seal records or proceedings cannot complain on appeal that the court accepted his invitation. Alternatively, this Court should hold that Tarhan failed to preserve and or affirmatively waived any right to complain that the juror questionnaires were sealed.

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[9] Although the trial court did not hear a separate motion to seal the questionnaires, Tarhan had proposed the sealing and destruction of questionnaires in his proposed questionnaire.

If this Court determines that Tarhan's claims are reviewable, this Court should resolve the tension between jurors' privacy rights under art. I, § 7 and the rights to open proceedings in art. I, §§ 10 and 22. The clearest means to resolve this tension would be to recognize that juror questionnaires are not court records at all, but rather are tools used by the lawyers to choose an impartial jury. This Court should recognize that not all documents that come into a court's possession are part of the court's deliberative process. Documents that merely come into the court's possession but which are primarily used by the lawyers need not be disclosed to the public pursuant to art. I, § 10.

At a minimum, this Court should tailor the remedy to the violation and hold that improper sealing of a document is not structural error.

1. ANY ERROR WAS INVITED, UNPRESERVED OR WAIVED.

Tarhan claims that his right to a public trial was violated because the trial court was required to undertake a *Bone-Club*[10] analysis before it could seal confidential juror questionnaires. Tarhan, however, fails to discuss any of the long-standing rules of appellate procedure that preclude review of invited or non-preserved claims. In this case, three separate

[10] *State v. Bone-Club,* 128 Wn.2d 254, 906 P.2d 325 (1995).

reasons -- the invited error doctrine, the failure to make a contemporaneous objection and waiver -- each preclude appellate review.

a. Constitutional Rights To A Public Trial.

A criminal defendant has a right to a public trial by an impartial jury under both the federal and state constitutions. U.S. Const. amend. VI; Const. art. I, § 22. "The 'impartial jury' aspect of article I, section 22, focuses on the defendant's right to have unbiased jurors." *State v. Momah*, 167 Wn.2d 140, 152, 217 P.3d 321 (2009), *cert. denied*, __ U.S. __, 131 S. Ct. 160 (2010). In addition, article I, section 10 of our constitution requires that, "Justice in all cases shall be administered openly. . . ."

b. Tarhan Invited Any Error.

A defendant who invites error -- even constitutional error --may not claim on appeal that he is entitled to a new trial due to the error. *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). The invited error doctrine prevents the injustice of a party benefitting from an error that he caused or should have prevented. *Seattle v. Patu*, 147 Wn.2d 717, 720, 58 P.3d 273 (2002). In other words, a party should not receive a windfall on appeal after misleading the trial court. *State v. Henderson*,

114 Wn.2d 867, 868, 792 P.2d 514 (1990). To prevent Tarhan from receiving such a windfall, this Court should apply the invited error doctrine.

Indubitably, Tarhan invited the alleged error. In Tarhan's trial brief, he advocated for a specific confidential juror questionnaire that he had drafted. CP 1301-04. The questionnaire promised confidentiality during jury selection and assured jurors that after jury selection the questionnaires would either be destroyed or sealed. CP 1311. Tarhan's counsel participated in several e-mail exchanges and discussions in court in which alterations to the questionnaires were discussed at length. CP 1319-39; 6/23/08 RP 11-30. It is plain that Tarhan badly wanted the questionnaire and wanted it to be confidential, and that he persuaded the trial court to keep it private. The classic invited error doctrine precludes review of Tarhan's article I, section 22 claim by the Court.

Even under the form of invited error applied by this Court in *Momah*, Tarhan's claim fails. *See Momah*, 167 Wn.2d at 154 (stating that the facts in *Momah* did not present a "classic case of invited error"). In *Momah*, the Court looked to the tactical choices made by Momah's trial counsel (affirmatively advocating for closure during portions of voir dire, arguing for the expansion of the closure and benefitting from it). *Momah*, at 151, 155. The Court said that, "[W]e consider Momah's tactical

choices and apply the *basic premise of the invited error doctrine* to determine what, if any relief should be granted." *Id.* at 154 (emphasis supplied). The Court then concluded that, because the "remedy must be appropriate to the violation," automatic reversal was not warranted. *Id.* at 156.

This case is like *Momah* in this respect. Tarhan proposed the confidential questionnaire and argued for its expansion (to include questions about the defendants' ancestry) specifically to find fair and impartial jurors. Multiple prospective jurors were excused after disclosing extraordinarily personal information about their own – or a family member's or close friend's – sexual abuse. The jurors were excused, *without objection*, because they could not be fair and impartial, as constitutionally guaranteed. Thus, as in *Momah*, this Court should apply the "basic premise of the invited error doctrine" and conclude that Tarhan is not entitled to any relief. *See Momah*, 167 Wn.2d at 154, 156.

c. RAP 2.5(a) Precludes Appellate Review.

Even if this Court finds that Tarhan did not invite error, he failed to preserve the public trial issue for appellate review. The Court should take this opportunity to hold that the contemporary objection rule applies to open court claims. It is consistent with judicial economy and fundamental fairness.

Ordinarily, an appellate court will consider a constitutional claim for the first time on appeal only if the claim is truly constitutional, and manifest. *State v. Davis*, 41 Wn.2d 535, 250 P.2d 548 (1953); RAP 2.5(a)(3). "Failure to object deprives the trial court of [its] opportunity to prevent or cure the error." *State v. Kirkman*, 159 Wn.2d 918, 926, 155 P.3d 125 (2007).

This Court's recent plurality decision in *State v. Strode*, 167 Wn.2d 222, 229, 217 P.3d 310 (2009), (no contemporaneous objection is required to raise an open courts claim on appeal), conflicts with previous decisions of this Court. *See State v. Collins*, 50 Wn.2d 740, 314 P.2d 660 (1957) (holding that a closure of court to avoid disruption of closing argument could not be raised for the first time on appeal); *Sutton v. Snohomish*, 11 Wash. 24, 33, 39 Pac. 273 (1895) (refusing to consider on appeal a claim that proceedings were erroneously held at a witness's residence rather than in court). This Court should reject the plurality decision in *Strode* and hold, as it did in *Collins* and *Sutton*, that a contemporaneous objection is required to preserve an open courtroom claim.[11]

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[11] Application of the contemporary objection rule is consistent with the approach taken by the United States Supreme Court and a majority of other jurisdictions. *See* Appendix A. This argument has been fully briefed and argued in two cases pending before this Court. *State v. Wise*, No. 82802-4 and *State v. Paumier*, No. 84585-9.

Nothing in the record suggests that Tarhan objected to the sealing of the confidential juror questionnaires. To the contrary, Tarhan advocated *for* the sealing of the questionnaires of those jurors selected to serve and the destruction of the questionnaires of the other venire members. CP 1311. Absent any record on the subject, Tarhan cannot establish that he is entitled to automatic reversal of his conviction under RAP 2.5(a) analysis. Under that rule, Tarhan has failed to show that constitutional error occurred, or that the error was manifest, i.e. that it had any effect, whatsoever, on the trial. Appellate review is accordingly precluded.

d. Expressly, And By His Conduct, Tarhan Waived His Right To A Public trial.

The several opinions in *Momah* and *Strode* take very different approaches as to what constitutes a waiver of a legal right. This Court should hold that an individual may waive, either expressly or by conduct, a constitutional right to an open court, as long as the waiver is knowing, voluntary and intelligent.

It is well-settled that a defendant's mere failure to object does not constitute a waiver of his right to a public trial.[12] *See State v. Brightman*, 155 Wn.2d 506, 514-15, 122 P.3d 150 (2005); *Bone–Club*, 128 Wn.2d at

[12] This is not to be confused with the contemporaneous objection rule that requires a defendant to preserve an issue for appellate review.

261. However, a waiver of a constitutional right may either be express,[13] or implied, *i.e.*, inferred by the defendant's conduct.[14]

Here, Tarhan did not simply fail to object, nor did he merely acquiesce to the trial court's procedure. Rather, it was Tarhan's counsel who initiated the waiver process by arguing in his trial brief for the use of a confidential juror questionnaire and proposing a juror questionnaire that promised sealing or destruction after jury selection. This Court should hold that Tarhan expressly and by his conduct waived his right to an open court. To hold otherwise, would "depart[] from long-standing principles of fairness and finality by permitting the litigant two bites of the proverbial apple." *In re D.F.F.*, 172 Wn.2d 37, 50, 256 P.3d 357 (2011) (Madsen, J., *dissenting*).

2. THIS COURT WOULD PROTECT THE PRIVACY OF JURORS WITHOUT COMPROMISING OPEN COURT PRINCIPLES BY HOLDING THAT CONFIDENTIAL JUROR QUESTIONNAIRES ARE NOT COURT RECORDS.

Tarhan claims that his right to a public trial was violated because the trial court was required to make findings under the five *Bone-Club*

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[13] For example, by an on-the-record colloquy. *See City of Bellevue v. Acrey*, 103 Wn.2d 203, 207-08, 691 P.2d 957 (1984) (holding that waiver of jury trial right must be affirmative and unequivocal).

[14] *See State v. Thomas*, 128 Wn.2d 553, 559, 910 P.2d 475 (1996) ("As with the right to self-representation, the right not to testify, and the right to confront witnesses, the judge may assume a knowing waiver of the right from the defendant's conduct.").

factors[15] before it could seal the confidential juror questionnaires. Pet. for Review at 11. The Court should reject this claim.

Records provided to a court must be open so that the public can assess the court's administration of justice. Confidential juror questionnaires are different than court documents in two regards: (1) jurors have a constitutional and court rule based right to privacy and, (2) the questionnaires are documents that the lawyers use prior to voir dire, but the actual voir dire occurs in open court. The, judge makes decisions, *i.e.* administers justice, based on the proceedings conducted in open court. Thus, this Court should hold that confidential juror questionnaires are not court records, and thus not subject to a Bone-Club hearing.

a. Jurors' Privacy Right.

The right to the "open administration of justice" guaranteed under art. I, § 10 is not absolute. *Cohen v. Everett City Council*, 85 Wn.2d 385, 388-89, 535 P.2d 801 (1975). The General Court Rules recognize the tension between art. I, § 10 and reasonable expectations of personal

[15] These factors are as follows: 1) there must be a compelling interest justifying the closure and, if the interest is a reason other than the defendant's right to a fair trial, there must be a serious and imminent threat to the interest in question; 2) anyone present when the closure motion is made must be given an opportunity to object; 3) the method of closure must be the least restrictive means available for protecting the threatened interest; 4) the court must weigh the competing interests of the proponent of closure and the public; and 5) the closure order must be no broader in application or duration than is necessary. *Bone-Club*, 128 Wn.2d at 258-59.

privacy as provided by art. I, § 7 of the Washington State Constitution ("No person shall be disturbed in his private affairs . . . without authority of law.). GR 31(a) (policy and purpose).

"[P]ublic exposure of jurors' personal experiences can be both embarrassing and perhaps painful "for jurors." *Strode*, 167 Wn.2d at 235 (Fairhurst, J., concurring). Such concerns "necessitate[] a weighing of the competing interests by the trial court." *Id.* at 236. The tradition of protecting juror privacy is longstanding and sensible, given that juror's participation is key to the success of a juror-based trial system, the jurors will be reluctant to participate if they believe their privacy will be compromised.[16]

To protect jurors' legitimate expectation of privacy in matters deeply personal, this Court should hold that confidential juror

[16] In this case, one juror expressed his appreciation that the court permitted individual questioning, because he did not know how much of his prior sexual assault would be explored in public. Another juror also his expressed gratitude for individual questioning, because he "just didn't feel like sharing . . . with a room full of people." 6/24/08 RP 37. Still another juror, who had been sexually abused at age ten, wanted to discuss it privately because "there's (*sic*) only three people alive that even know about it, and I like keeping it that way." 6/24/08 RP 57. Another prospective juror wanted to be asked in private about the sexual abuse of family members because one of his sisters who had been raped lives "here in town"; he said that, "I'd rather not talk about it in front of everybody." (The juror said that both of his sisters had been raped). 6/24/08 RP 47-48. Another juror did not want to talk about her mother's or her best friend's rape in front of other people. 6/24/08 RP 121. Yet, the information was pertinent because it led to a for-cause challenge by the defense after she admitted that she likely could not be fair. 6/24/08 RP 120-25.

questionnaires are not court records, especially in light of the fact that questionnaires are not true court records, as discussed below.

b. Public Access To True Court Records.

In addition to court proceedings, art. I, § 10 ensures public access to court records that are submitted in support of any motion. *Dreiling v. Jain*, 151 Wn.2d 900, 907, 93 P.3d 861 (2004); *Rufer v. Abbott Laboratories*, 154 Wn.2d 530, 549, 114 P.3d 1182 (2005).

"The public shall have access to all court records except as restricted by federal law, state law, court rule, court order, or case law." GR 31(d)(1). Under GR 31(j), access to juror information is limited:

> Individual juror information, other than name, *is presumed to be private*. After the conclusion of a jury trial, the attorney for a party, or party pro se, or member of the public, may petition the trial court for access to individual juror information *under the control of court*. Upon a showing of good cause, the court may permit the petitioner to have access to relevant information. The court may require that juror information not be disclosed to other persons.

(emphasis added).

GR 15 governs the destruction, sealing and redacting of court records. GR 15(c) states in relevant part,

> In a criminal case or juvenile proceeding, the court, any party, or any interested person may request a hearing to

> seal or redact the court records. Reasonable notice of a hearing to seal must be given to all parties in the case.[17]

GR 31 provides for access to "court records":

> "Court record" includes, but is not limited to: (i) Any document, information, exhibit, or other thing that is maintained by a court in connection with a judicial proceeding, and (ii) Any index, calendar, docket, register of actions, official record of the proceedings, order, decree, judgment, minute, and any information in a case management system created or prepared by the court that is related to a judicial proceeding.

GR 31(c)(4). A court record does <u>not</u> include:

> data maintained by or for a judge pertaining to a particular case or party, such as personal notes and communications, memoranda, drafts, or other working papers; or information gathered, maintained, or stored by a government agency or other entity to which the court has access but which is not entered into the record.

GR 31(c)(4).

Certain documents are excluded, however, if there is a tradition of keeping such matters confidential. *See, e.g.*, *Yakima v. Yakima Herald-Republic*, 170 Wn.2d 775, 793-95, 246 P.3d 768 (2011) (re: request for defense

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[17] If a trial court initially determined that the juror questionnaires should be sealed and so informed the venire, the jurors, as in Tarhan's case, would then have a legitimate expectation of privacy. How would the seated jury, let alone the entire venire, ever receive notification when the court later considered unsealing the questionnaires (the sealing order "must be no broader in its application or duration than necessary to serve its purpose, *Bone-Club*, 128 Wn.2d at 259)? The jurors are not a "party" to the criminal case, so they are not entitled to "reasonable notice" of a hearing. GR 15(c)(1), (e)(2).

funding for experts). Juror information, which has been traditionally private, should also be excluded from public access.

c. Balancing Juror Privacy With Open Courts.

To promote the "public's trust in *our entire judicial* system," the public must be afforded the opportunity to observe the complete judicial proceeding, "including all records the court has considered in making *any* ruling."[18] *Rufer*, 154 Wn.2d at 549. However, not all documents that enter a courtroom or pass through a judge's hands are truly "court records."[19] *See Rufer*, 154 Wn.2d 530 (distinguishing between documents in a judge's possession and relied upon in discovery from documents used to make a decision). In other words, not all documents in a judge's possession must be deemed a part of the "administration of justice."

Juror questionnaires are submitted by the parties to determine which prospective jurors need to be asked follow-up questions *in open court*. The questionnaires are, however, simply a screening tool for the lawyers. They alert the lawyers to information that assists the lawyers in conducting voir dire. The judge's decision as to what should happen with

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[18] It is doubtful that public access to confidential juror questionnaires would enhance public confidence. It is more likely that public confidence in the courts is *harmed* by the apparent disregard for the privacy rights of citizen jurors.

[19] At most, the questionnaires are similar to a court's working papers, which are not court records. GR 31(c)(4).

any given juror is made in open court, based on the parties' arguments and, perhaps a direct inquiry of the juror. The voir dire proceeding is the public's opportunity to observe the administration of justice. Allowing the questionnaires to be destroyed after voir dire, as advocated by Tarhan's counsel, does not subvert the purposes of a public trial. *See Brightman*, 155 Wn.2d at 514 ("to ensure a fair trial, to remind the officers of the court of the importance of their functions, to encourage witnesses to come forward, and to discourage perjury.").[20]

States that have addressed by statute or rule whether juror questionnaires are public documents have overwhelmingly concluded that the questionnaires should not be available to the general public.[21]

It is difficult to imagine a circumstance where the giving of a questionnaire would not be to the defendant's benefit.[22] If, however, a party wants to preserve the questionnaires for appellate review because the questionnaire is central to a legal dispute, it should be incumbent upon that party to make a motion to file the single questionnaire, which then would

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[20] In fact, failing to keep juror questionnaires confidential would likely cause jurors to withhold sensitive, but relevant, information.

[21] *See* Appendix B.

[22] *See Strode* 167 Wn.2d at 238 (C. Johnson, J., *dissenting*) recognizing that the jurors' privacy rights are "integrally connected to the defendant's right to an impartial jury.").

become a "court record." Whether the court record should then be filed or sealed would depend on a *Bone-Club* analysis.

3. IMPROPER SEALING OF COURT RECORDS IS NOT STRUCTURAL ERROR.

Even if sealing these questionnaires was error, Tarhan claims the error is "structural" and requires a new trial. Pet. for Review at 14. This argument should be rejected. Court *records* are not the same as court *proceedings*. The State has not found, and Tarhan has not cited, any case that has held the improper sealing of a document was structural error that required reversal.[23] A record remains static. It can be unsealed at any time and it will contain the same information as when pen was first put to paper. A court proceeding, on the other hand, is qualitatively different. It is dynamic. People's responses are not simply the spoken word; an observer can see the person's demeanor and hear the inflection in his or her voice.[24] Consequently, an improper closure of a proceeding cannot be remedied in the way that an improper sealing of a document can be. Because the remedy should fit the violation, the difference between

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[23] In *State v. Coleman*, the Court of Appeals held that juror questionnaires are "court records." 151 Wn. App. 614, 621-23, 214 P.3d 158 (2009). The State respectfully disagrees with the decision in *Coleman* vis-à-vis what documents constitute court records.

[24] It is for precisely this reason that credibility determinations are not subject to appellate review. *See State v. Camarillo*, 115 Wn.2d 60, 71, 794 P.2d 850 (1990).

improper sealing of records versus proceedings should result in different remedies. The remedy for an open court violation vis-à-vis court records should be remand for a *Bone-Club* hearing, unless a defendant can demonstrate prejudice. Tarhan cannot demonstrate prejudice.

A "structural error" is an error that "necessarily renders a criminal trial fundamentally unfair or an unreliable vehicle for determining guilt or innocence." *Momah*, 167 Wn.2d at 155-56. A violation of open court proceedings may be structural error. *Compare Strode*, 167 Wn.2d at 231 (finding by a plurality of the Court that structural error occurred and the remedy was remand for a new trial) *with Momah*, 167 Wn.2d at 156 (finding courtroom closure done for the defendant's benefit and where no prejudice occurred was not structural error).

In *Momah*, where some voir dire occurred in chambers, this Court found no structural error and thus held that automatic reversal was unwarranted. 167 Wn.2d at 155-56. The Court emphasized that the remedy must be appropriate to the violation. *Id.* at 149, 154-56; *see also Waller v. Georgia*, 467 U.S. 39, 49-50, 104 S. Ct. 2210, 81 L.Ed.2d 31 (1984) (remanding for a new suppression hearing after finding a new trial could be a "windfall" for the defendant and "not in the public's interest.").

In this case, as in *Momah*, the "closure" occurred to protect the defendant's rights and did not actually prejudice him. *See Momah*, 167

Wn.2d at 156. There is nothing on the record before this Court to even suggest that Tarhan's trial was "fundamentally unfair or an unreliable vehicle for determining guilt or innocence." *See id* at 155.

The usual remedy, where the court finds that documents were sealed without the proper *Bone-Club* (or *Ishikawa*[25]) analysis, is to remand for the trial court to apply the correct rule and then unseal or maintain the documents sealed. *Rufer*, 154 Wn.2d at 540 (citing *Dreiling v. Jain*, 151 Wn.2d at 907. It was the remedy in *Coleman*: "The error was not structural. Coleman does not suggest any possible prejudice to him resulting from the order. Reversal is therefore not the remedy."[26] *Coleman*, 151 Wn. App. at 624. Remand should be the remedy here, too. *C.f. Yung v. Walker*, 468 F.3d 169, 177 (2nd Cir. 2006) ("[A] new trial is not required to remedy a violation of the public trial guarantee if some other relief would cure the violation.")

If the Court finds the confidential questionnaires are court records and that they were improperly sealed by the trial court, the Court should

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[25] *Seattle Times Co. v. Ishikawa*, 97 Wn.2d 30, 640 P.2d 716 (1982).

[26] Tarhan contends that this Court's decisions in *Momah* and *Strode* overruled *Coleman sub silentio*. Pet. for Review at 18-22. The State disagrees. Neither *Momah* nor *Strode* involved the allegedly improper sealing of juror questionnaires or the appropriate remedy for the violation.

remand for a *Bone-Club* hearing. Reversal and remand for a new trial is not "appropriate to the violation," and results in a windfall to Tarhan. *See Momah*, 167 Wn.2d at 152.

D. CONCLUSION

For the reasons stated above, this Court should decline to review Tarhan's claim of alleged error. Even if this Court finds Tarhan's claim reviewable, the Court should hold that juror questionnaires, which have traditionally been inaccessible to the public, are not court records. Finally, the Court should hold that the improper sealing of a court record is not structural error.

DATED this 17 day of October, 2011.

Respectfully submitted,

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APPENDIX A

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. App. 1966); *State v. Butterfield*, 784 P.2d 153, 157 (Utah 1989).

APPENDIX B

Ala. R. Ct. 18.2(b) ("If a juror questionnaire containing personal information is obtained from a prospective juror in any case appealed to the Court of Criminal Appeals, that questionnaire shall not be included in the clerk's portion of the record on appeal. ... Any such questionnaires supplemented into the appellate record shall be available for inspection only by the court and the parties to the appeal."); Alaska R. Admin 15(j)(2)-(3) ("Trial questionnaires and trial panel lists are confidential. ... The parties, their attorneys, and agents of their attorneys shall not disclose ... the trial questionnaires ..."); Ariz. S. Ct. R. 123(e)(9) ("information obtained by special screening questionnaires or in voir dire proceedings that personally identifies jurors summoned for service, except the names of jurors on the master jury list, are confidential, unless disclosed in open court or otherwise opened by order of the court."); Colo. Rev. Stat. §13-71-115(2) ("With the exception of the names of qualified jurors and disclosures made during jury selection, information on the questionnaires shall be held in confidence by the court, the parties, trial counsel, and their agents. ... The original completed questionnaires for all prospective jurors shall be sealed in an envelope and retained in the court's file but shall not constitute a public record."); Conn. Gen Stat. 51-232(c) (questionnaires may be viewed only by court and parties and are not public records); Idaho R. Civ. P. 47(d) ("In order to provide for open, complete and candid

responses to juror questionnaires and to protect juror privacy, information derived from or answers to juror questionnaires shall be confidential and shall not be disclosed to anyone except pursuant to court order."); Idaho Crim. R. 23(1) (same language); Idaho Admin R 32(g)(7) (providing for confidentiality); Kan. Dist. Ct. R. 167 (suggested form informs jurors that "[t]he juror questionnaire is not a public record and is only made available to court personnel and the attorneys and parties to the case being tried."); 14 Maine Rev. Stat. § 1254-A(7)-(9) (questionnaires "may at the discretion of the court be made available to the attorneys and their agents and investigators and the pro se parties at the courthouse for use in the conduct of voir dire examination" and such information may not be further disclosed without court authorization); Mass. Gen. Laws, ch. 234A § 22 ("A notice of the confidentiality of the completed questionnaire shall appear prominently on the face of the questionnaire."); Mass. Gen. Laws, ch. 234A, § 22 (information in questionnaires not to be disclosed except to court and parties and is not a public record); Mich. Ct. R. 2.510(C)(1) (questionnaires available only to parties and court absent court order); Mich. Ct. R. 6.412(A) (applying R. 2.510 to criminal cases); Mo. S. Ct. R. 27.09(b) ("Jury questionnaires maintained by the court in criminal cases shall not be accessible except to the court and the parties. Upon conclusion of the trial, the questionnaires shall be retained under seal by

the court except as required to create the record on appeal or for post-conviction litigation. Information so collected is confidential and shall not be disclosed except on application to the trial court and a showing of good cause."); N.H. Super. Ct. R. 61-A (attorneys entitled to a copy of the questionnaire, but "shall not exhibit such questionnaire to anyone other than his client and other lawyers and staff employed by his or her firm."); N.J. R. Gen. Applic. 1:38(c) (questionnaires are confidential and not public records); N.M. Stat. § 38-5-11(C) ("questionnaires obtained from jurors shall be made available for inspection and copying by a party to a pending proceeding or their attorney or to any person having good cause for access"); Pa. R. Crim. Pro. 632(B) ("The information provided by the jurors on the questionnaires shall be confidential and limited to use for the purpose of jury selection only. Except for disclosures made during voir dire, or unless the trial judge otherwise orders pursuant to paragraph (F), this information shall only be made available to the trial judge, the defendant(s) and the attorney(s) for the defendant(s), and the attorney for the Commonwealth."); Vt. R. Civ. P. 47(a)(2) (questionnaires may be made available to public only after names and addresses have been redacted); Vt. R. Crim. P. 24(a)(2) (same); Tex. Gov't Code § 62.0132(f)-(g) (questionnaires are confidential and may be disclosed only to court and parties); *cf.*, Ark. Code § 16-32-111(b) (questionnaires may be sealed on

showing of good cause); La. Code Crim. Pro. art. 416.1(C) (jury questionnaire "may" be made a part of the record); Minn. R. Crim. P. Form 50 (advising jurors that answers are part of the public record).

Certificate of Service by Mail

Today I deposited in the mail of the United States of America, postage prepaid, a properly stamped and addressed envelope directed to Steven Witchley, the attorney for the appellant, at Law Offices of Holmes & Witchley, PLLC, 705 Second Avenue, Suite 401, Seattle, WA 98104, containing a copy of the Respondent's Supplemental Brief , in STATE V. TANER TARHAN, Cause No. 85737-7, 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.

U Brame
Name

10/17/11
Date

Done in Seattle, Washington