

NO. 65053-0-I

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

---

---

STATE OF WASHINGTON,

Respondent,

v.

GREGORY P. SHEARER,

Appellant.

FILED  
2011-03-15  
32

---

---

ON APPEAL FROM THE SUPERIOR COURT OF THE  
STATE OF WASHINGTON FOR WHATCOM COUNTY

The Honorable Charles R. Snyder, Judge

---

---

SUPPLEMENTAL BRIEF OF APPELLANT

---

---

ANDREW P. ZINNER  
Attorney for Appellant

NIELSEN, BROMAN & KOCH, PLLC  
1908 East Madison  
Seattle, WA 98122  
(206)623-2373

TABLE OF CONTENTS

	Page
A. <u>SUPPLEMENTAL ISSUE STATEMENT</u> .....	1
B. <u>SUPPLEMENTAL STATEMENT OF THE CASE</u> .....	1
C. <u>ARGUMENT</u> .....	2
THE TRIAL COURT VIOLATED SHEARER'S CONSTITUTIONAL RIGHT TO A PUBLIC TRIAL. ....	2
1. <i>Introduction</i> .....	3
2. <i>The trial court "closed" a portion of Shearer's trial.</i> .....	4
3. <i>The trial court erred by failing to apply the Bone-Club factors.</i> .....	5
4. <i>Shearer did not waive his public trial right by failing to object and by     participating in the in-chambers voir dire.</i> .....	6
5. <i>The trial court committed structural error.</i> .....	7
6. <i>The violation was not de minimis.</i> .....	13
7. <i>Protecting privacy did not justify the in-chambers voir dire.</i> .....	14
D. <u>CONCLUSION</u> .....	17

TABLE OF AUTHORITIES

	Page
<u>WASHINGTON CASES</u>	
<u>Allied Daily Newspapers v. Eikenberry</u> , 121 Wn.2d 205, 848 P.2d 1258 (1993).....	14
<u>Dreiling v. Jain</u> , 151 Wn.2d 900, 93 P.3d 861 (2004).....	17
<u>In re Personal Restraint of Orange</u> , 152 Wn.2d 795, 100 P.3d 291 (2004).....	10, 16
<u>Seattle Times Co. v. Ishikawa</u> , 97 Wn.2d 30, 640 P.2d 716 (1982).....	3
<u>State v. Bone-Club</u> , 128 Wn.2d 254, 906 P.2d 325 (1995).....	1, 2, 3, 4, 5, 6, 8, 9, 10, 14, 17
<u>State v. Bowen</u> , __ Wn. App. __, 239 P.3d 1114 (2010).....	6, 16
<u>State v. Brightman</u> , 155 Wn.2d 506, 122 P.3d 150 (2005).....	3, 5, 6, 9, 16
<u>State v. Duckett</u> , 141 Wn. App. 797, 173 P.3d 948 (2007).....	16
<u>State v. Easterling</u> , 157 Wn.2d 167, 137 P.3d 825 (2006).....	6, 9, 11
<u>State v. Erickson</u> , 146 Wn. App. 200, 189 P.3d 245 (2008).....	16
<u>State v. Frawley</u> , 140 Wn. App. 713, 167 P.3d 593 (2007).....	16

TABLE OF AUTHORITIES (CONT'D)

	Page
<u>WASHINGTON CASES (Cont'd)</u>	
<u>State v. Grenning</u> , 169 Wn.2d 47, 234 P.3d 169 (2010).....	7
<u>State v. Heath</u> , 150 Wn. App. 121, 206 P.3d 712 (2009).....	16
<u>State v. Levy</u> , 156 Wn.2d 709, 132 P.3d 1076 (2006).....	7
<u>State v. Leyerle</u> , __ Wn. App. __, 242 P.3d 921 (2010).....	13
<u>State v. Marsh</u> , 126 Wash. 142, 217 P. 705 (1923) .....	9, 10
<u>State v. Momah</u> , 167 Wn.2d 140, 217 P.3d 321 (2009), <u>cert. denied</u> , 131 S. Ct. 160 (2010) .....	4, 5, 8, 11, 12, 13
<u>State v. Paumier</u> , 155 Wn. App. 673, 230 P.3d 212, <u>review granted</u> , 169 Wn.2d 1017 (2010) .....	16
<u>State v. Price</u> , 154 Wn. App. 480, 228 P.3d 1276 (2009), <u>review denied</u> , 169 Wn.2d 1021 (2010) .....	12, 16
<u>State v. Sadler</u> , 147 Wn. App. 97, 193 P.3d 1108 (2008).....	5, 16
<u>State v. Strode</u> , 167 Wn.2d 222, 217 P.3d 310 (2009).....	3, 4, 5, 6, 7, 8, 11, 13, 14, 15, 16

TABLE OF AUTHORITIES (CONT'D)

	Page
 <u>WASHINGTON CASES (Cont'd)</u>	
<u>State v. Vega</u> , 144 Wn. App. 914, 184 P.3d 677 (2008), <u>review denied</u> , 165 Wn. 2d 1024 (2009) .....	12
<u>State v. Castro</u> , 141 Wn. App. 485, 170 P.3d 78 (2007) .....	16
 <u>FEDERAL CASES</u>	
<u>Arizona v. Fulminante</u> , 499 U.S. 279, 111 S. Ct. 1246, 113 L. Ed. 2d 302 (1991).....	7
<u>Neder v. United States</u> , 527 U.S. 1, 119 S. Ct. 1827, 144 L. Ed. 2d 35 (1999).....	7, 9
<u>Presley v. Georgia</u> , __ U.S. __, 130 S. Ct. 721, __ L. Ed. 2d. __ (2010).....	3, 4, 5, 14
<u>Waller v. Georgia</u> , 467 U.S. 39, 104 S. Ct. 2210, 81 L. Ed. 2d 31 (1984).....	7, 8, 9, 10, 13
 <u>RULES, STATUTES AND OTHER</u>	
U.S. Const. amend. 6 .....	1, 2, 3, 5, 7, 8, 14
Wash. Const. art. I, § 10 .....	3
Wash. Const. art. I, § 22 .....	1, 2, 3, 14

A. SUPPLEMENTAL ISSUE STATEMENT

Did the trial court violate Gregory P. Shearer's constitutional right to a public trial, as guaranteed by the Sixth Amendment and article I, § 22 of the Washington Constitution, by holding part of the voir dire of one prospective juror in chambers without first conducting a "Bone-Club"<sup>1</sup> analysis?

B. SUPPLEMENTAL STATEMENT OF THE CASE

The state charged Gregory P. Shearer with felony harassment and fourth degree assault against his girlfriend, Lynn Honcoop, for events occurring during an argument at their shared residence. CP 94-95. During voir dire, the prosecutor asked whether anyone was a recent victim of or knew a recent victim of domestic violence. RPVD 37-38.<sup>2</sup> Prospective Juror 7 raised her hand. RPVD 37.

When the prosecutor asked how she felt about it, Juror 7 said she did not want to talk about it. She said it was difficult to discuss it in front of strangers. The trial court asked, "Would it be more comfortable if

---

<sup>1</sup> State v. Bone-Club, 128 Wn.2d 254, 906 P.2d 325 (1995).

<sup>2</sup> "RPVD" represents the verbatim report of the January 12, 2010, jury selection. Counsel received the verbatim report December 29, 2010.

counsel and you and I were to meet in chambers so you can discuss it with us there? RPVD 38. Juror 7 said, "Yes." RPVD 38.

The court asked whether anyone in the courtroom would object "[i]f the court reporter, counsel, and myself, and the defendant went into chambers to ask some questions of Juror Number 7 in private?" Hearing nothing, the court reporter, judge, counsel, and Shearer went into chambers with Juror 7. She then revealed her six-month old grandson was killed by his father in her family home. She said she was still healing from the loss and that it would likely affect her decision in Shearer's case. RPVD 39-40. Shearer's counsel moved to excuse for cause and the court granted the motion. RPVD 40-41.

C. ARGUMENT

THE TRIAL COURT VIOLATED SHEARER'S  
CONSTITUTIONAL RIGHT TO A PUBLIC TRIAL.

The trial court's use of in-chambers voir dire of a prospective juror was a closure and required a sua sponte Bone-Club analysis. Because the trial court did not engage in the analysis, did not consider alternatives to closure, and did not enter findings to justify the closure, it violated Shearer's right to a public trial under the Sixth Amendment and article I, section 22 of the Washington Constitution. Shearer did not waive a challenge to the improper closure by failing to object. The violation was

not de minimis. The trial court's closure error was structural and requires reversal of Shearer's convictions and remand for a new trial.

*1. Introduction*

The Sixth Amendment to the United States Constitution and article I, section 22 of the Washington Constitution guarantee the accused a public trial by an impartial jury. Presley v. Georgia, \_\_\_ U.S. \_\_\_, 130 S. Ct. 721, 724, \_\_\_, \_\_\_ L. Ed. 2d. \_\_\_ (2010); State v. Bone-Club, 128 Wn.2d at 261-62.<sup>3</sup> Additionally, article I, section 10 of the Washington Constitution provides that “[j]ustice in all cases shall be administered openly, and without unnecessary delay.” This latter provision gives the public and the press a right to open and accessible court proceedings. Seattle Times Co. v. Ishikawa, 97 Wn.2d 30, 36, 640 P.2d 716 (1982).

Whether a trial court procedure violates the right to a public trial is a question of law this Court reviews de novo. State v. Brightman, 155 Wn.2d 506, 514, 122 P.3d 150 (2005). The public trial right may be asserted for the first time on appeal. State v. Strode, 167 Wn.2d 222, 229, 217 P.3d 310 (2009). The accused's right to a public trial under both the

---

<sup>3</sup> The Sixth Amendment provides in pertinent part that “[i]n all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury . . . .” Article I, section 22 provides that “[i]n criminal prosecutions the accused shall have the right . . . to have a speedy public trial by an impartial jury . . . .”

federal and state constitutions applies to voir dire. Presley, 130 S. Ct. at 724; State v. Momah, 167 Wn.2d 140, 148, 217 P.3d 321 (2009), cert. denied, 131 S. Ct. 160 (2010).

2. *The trial court "closed" a portion of Shearer's trial.*

The trial court questioned one prospective juror in chambers. This was unquestionably a "closure" under Momah and Strode. See Momah, 167 Wn.2d at 148-49 (holding that presumption of open judicial proceedings extends to voir dire and that courts apply Bone-Club factors<sup>4</sup> to determine whether closure is appropriate); Strode, 167 Wn.2d at 227

---

<sup>4</sup> The Bone-Club factors are:

1. The proponent of closure or sealing must make some showing [of a compelling state 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.

Bone-Club, 128 Wn.2d at 258-59.

(questioning of 11 potential jurors in chambers "was a courtroom closure and a denial of the right to a public trial."); State v. Sadler, 147 Wn. App. 97, 112, 193 P.3d 1108 (2008) ("trial court's affirmative act of moving the proceeding into the jury room, a part of the court not ordinarily accessible to the public, without inviting the public to attend, had the same effect as expressly excluding the public.").

3. *The trial court erred by failing to apply the Bone-Club factors.*

A judge violates a defendant's right to a public trial under the Sixth Amendment by conducting part of jury selection in the judge's chambers without sua sponte considering reasonable alternatives to closure, identifying an overriding interest likely to be prejudiced without closure, and entering specific findings justifying closure. Presley, 130 S. Ct. at 724-25. The same is true under article I, section 22 absent sua sponte consideration of the Bone-Club factors. Momah, 167 Wn.2d at 140; Strode, 167 Wn.2d at 228-29; see State v. Brightman, 155 Wn.2d 506, 518, 122 P.3d 150 (2005) ("Because the record in this case lacks any hint that the trial court considered Brightman's public trial right as required by Bone-Club, we cannot determine whether the closure was warranted.").

The trial court in Shearer's case neither considered alternatives to closure nor applied the Bone-Club factors. Nor did the court mention Shearer's constitutional right to a public trial. This is error.

4. *Shearer did not waive his public trial right by failing to object and by participating in the in-chambers voir dire.*

The accused does not waive the right to challenge closure of a portion of trial on appeal by failing to timely object. Strode, 167 Wn.2d at 229; State v. Easterling, 157 Wn.2d 167, 173 n.2, 137 P.3d 825 (2006); Brightman, 155 Wn.2d at 517-18; Bone-Club, 128 Wn.2d at 261; State v. Bowen, \_\_ Wn. App. \_\_, 239 P.3d 1114, 1118 (2010).

Bowen is analogous in this regard. During jury selection, the trial court asked whether either party objected to in-chambers questioning of prospective jurors to address sensitive issues. Both the prosecutor and defense counsel stated they had no objections. Bowen, 239 P.3d at 1116-17. The court nevertheless addressed the public trial question and ordered a new trial because the trial court did not adequately consider the accused's public trial right. Bowen, 239 P.3d at 1120.

The court in Shearer's case did less than the trial judge in Bowen. The court asked whether "anyone in this courtroom" objected to in-chambers questioning of Juror 7. RPVD 38-39. Unlike in Bowen, the

court did not address the question to counsel or otherwise invite objection from Shearer.

Nor did counsel waive, invite, or otherwise jeopardize Shearer's right to assert his public trial right by moving to strike Juror 7. In Strode, the trial court and counsel for both parties questioned potential jurors and challenges for cause were registered in chambers. Six of 11 prospective jurors were excused for cause. Strode, 167 Wn.2d at 224. The Court held counsel's participation in chambers did not constitute a waiver of his right to a public trial.

Shearer's counsel did less than defense counsel in Strode because he asked Juror 7 no questions at all. Because the Court found no waiver in Strode, it certainly should not be found here.

5. *The trial court committed structural error.*

The trial court's error was structural under the Sixth Amendment. See Neder v. United States, 527 U.S. 1, 8, 119 S. Ct. 1827, 1833, 144 L. Ed. 2d 35 (1999) (violation of right to public trial is structural, citing Waller v. Georgia, 467 U.S. 39, 104 S. Ct. 2210, 81 L. Ed. 2d 31 (1984)); Arizona v. Fulminante, 499 U.S. 279, 309-10, 111 S. Ct. 1246, 113 L. Ed. 2d 302 (1991) (same); State v. Grenning, 169 Wn.2d 47, 60 n.11, 234 P.3d 169 (2010); State v. Levy, 156 Wn.2d 709, 724 n.3, 132 P.3d 1076 (2006).

The choice of remedy under article I, section 22, however, is not as clear. In Strode, the Court held "denial of the public trial right is deemed to be a structural error and prejudice is necessarily presumed." Strode, 167 Wn.2d at 231. This is consistent with Bone-Club, where the Court declared that "[t]he Washington Constitution provides at minimum the same protection of a defendant's fair trial rights as the Sixth Amendment." Bone-Club, 128 Wn.2d at 260. The Strode Court consequently reversed the convictions and remanded for a new trial because part of voir dire occurred in chambers. Strode, 167 Wn.2d at 231.

Yet in Momah, the Court held the closure of part of voir dire was not structural error. Momah, 167 Wn.2d at 156. The Court relied on Waller, which held the remedy for unjustified closure of a hearing on a motion to suppress evidence was a new suppression hearing, not a new trial. Momah, 167 Wn.2d. at 150. Waller held:

[T]he remedy should be appropriate to the violation. If, after a new suppression hearing, essentially the same evidence is suppressed, a new trial presumably would be a windfall for the defendant, and not in the public interest.

Waller, 467 U.S. at 50.

The Momah Court acknowledged that in the four closure cases immediately preceding its decision, it found structural error and granted automatic reversal. The Court asserted that in those cases, "we have held

that the remedy must be appropriate to the violation and have found a new trial required in cases where a closure rendered a trial fundamentally unfair." Momah, 167 Wn.2d. at 150-51. Careful review of those cases calls this claim into question; in three of the four cases, the Court found the structural error remedy necessarily followed unjustified closure.

In Easterling, the Court found the remedy was automatic:

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. See Bone-Club, 128 Wn.2d at 261-62, 906 P.2d 325; Neder v. United States, 527 U.S. 1, 8, 119 S. Ct. 1827, 144 L. Ed. 2d 35 (1999) (citing Waller v. Georgia, 467 U.S. 39, 104 S. Ct. 2210, 81 L. Ed. 2d 31 (1984)). Prejudice is necessarily presumed where a violation of the public trial right occurs. Bone-Club, 128 Wn.2d at 261-62, 906 P.2d 325 (citing State v. Marsh, 126 Wash. 142, 146-47, 217 P. 705 (1923)). As a result, precedent directs that the appropriate remedy for the trial court's constitutional error is reversal of Easterling's unlawful delivery of cocaine conviction and remand for new trial.

Easterling, 157 Wn.2d at 181.

The Brightman Court found the structural error remedy of a new trial necessarily followed where the trial court failed to apply the Bone-Club factors before closing voir dire to the accused's friends and family:

Because the record in this case lacks any hint that the trial court considered Brightman's public trial right as required by Bone-Club, we cannot determine whether the closure was warranted. Id. at 261, 906 P.2d 325. Accordingly, we remand for a new trial. See id.

Brightman, 155 Wn.2d at 518.

In In re Personal Restraint of Orange, the trial court also excluded family and friends from part of voir dire without weighing the Bone-Club factors. Orange, 152 Wn.2d 795, 808-09, 100 P.3d 291 (2004). The Court did not hesitate in finding the remedy was reversal and remand for a new trial:

As to the remedy for the violation of Orange's public trial right, we granted the defendant in Bone-Club a new trial, stating that "[p]rejudice is presumed where a violation of the public trial right occurs." 128 Wn.2d at 261-62, 906 P.2d 325 (citing State v. Marsh, 126 Wash. 142, 146-47, 217 P. 705 (1923); Waller, 467 U.S. at 49 & n. 9, 104 S. Ct. 2210). Thus, had Orange's appellate counsel raised the constitutional violation on appeal, the remedy for the presumptively prejudicial error would have been, as in Bone-Club, remand for a new trial.

Orange, 152 Wn.2d at 814.

Finally, only in Bone-Club did the Court consider – and reject -- remanding only for a suppression hearing after concluding the trial court improperly ordered part of the hearing closed. Bone-Club, 128 Wn.2d at 261-62. It found persuasive the defendant's argument the undercover officer could testify differently in an open suppression hearing. It held, "Even if the new suppression hearing again results in the admission of [the defendant's statements to the officer], Defendant should have the opportunity to use any such variances in testimony for impeachment purposes in a new trial." Bone-Club, 128 Wn.2d at 262.

This review establishes that reversal and remand for a new trial has been considered by the Supreme Court as the "default" remedy for improper closure. This structural error remedy will always apply absent extraordinary circumstances. See Strode, 167 Wn. 2d at 226 (right to public trial is "strictly guarded to assure that proceedings occur outside the public courtroom in only the most unusual circumstances"), citing Easterling, 157 Wn.2d at 174-75.

Momah presented those circumstances:

[W]e find the facts distinguishable from our previous closure cases. Here, Momah affirmatively assented to the closure, argued for its expansion, had the opportunity to object but did not, actively participated in it, and benefited from it. Moreover, the trial judge in this case not only sought input from the defendant, but he closed the courtroom after consultation with the defense and the prosecution. 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.

Momah, 167 Wn.2d at 151-52.

Shearer's case has no comparable extraordinary facts. Defense counsel did not affirmatively assent to the closure or argue for its expansion. The trial court asked courtroom observers whether they objected to closure, but assumed counsel and Shearer would join it and the prosecutor in chambers. Unlike Momah's counsel, Shearer's attorney did not "make a deliberate choice to pursue" an in-chambers conference.

Momah, 167 Wn. 2d at 155. Unlike in Momah, Shearer's counsel expressed no concern about panelists tainted by extensive pretrial publicity. Momah, 167 Wn. 2d at 145-46. The judge sought no input from Shearer's counsel and closed the proceedings to honor Juror 7's desire for privacy, not to ensure an impartial jury.

Finally, Shearer did not "benefit" from the closed portion of voir dire any more than he would have had the proceeding been open to the public. Juror 7 revealed no facts about Shearer's case that could have tainted the other panel members. Instead, she was simply one of several prospective jurors who indicated she was or knew someone who was victimized by domestic violence. RPVD 36-37.

And even had Juror 7 disclosed unknown facts, the court's in-chambers procedure would have been reversible error. Instead, the proper procedure is to excuse the venire and question each individual juror in open court. State v. Price, 154 Wn. App. 480, 487, 228 P.3d 1276 (2009), review denied, 169 Wn.2d 1021 (2010). See State v. Vega, 144 Wn. App. 914, 917, 184 P.3d 677 (2008) (because other prospective jurors are officers of the court, their exclusion does not violate constitutional public trial right), review denied, 165 Wn. 2d 1024 (2009).

For all the reasons the Momah Court found against a finding of structural error, this Court should find for such a result in Shearer's case.

Finally, as a practical matter, reversal and retrial is the only available remedy for improper closure of voir dire absent extraordinary circumstances. A suppression hearing, such as the one found to be improperly closed in Waller, can be easily redone. Voir dire, in contrast, involves a jury. Remand for public voir dire is a meaningless remedy absent a new trial. It is also a waste of time, for the new jury will have nothing to do. The proper remedy for Shearer is the structural error remedy – a new trial.

6. *The violation was not de minimis.*

A deliberate, full closure of part of jury selection is not a de minimis violation of the right to a public trial. See Strode, 167 Wn.2d at 230 (refusing to consider closure de minimis because it was neither "brief" nor "inadvertent"); State v. Leyerle, \_\_\_ Wn. App. \_\_\_, 242 P.3d 921, 927 (2010) (rejecting argument two-minute questioning of one prospective juror in public hallway outside courtroom was de minimis violation).

The trial court intentionally conducted part of the questioning of Juror 7 in chambers. The court then excused Juror 7 for cause. This occurred January 12, 2010 – a full three months after the Supreme Court's decisions in Momah and Strode. The trial court's violation was not de minimis.

7. *Protecting privacy did not justify the in-chambers voir dire.*

Prospective jurors' privacy is a compelling interest trial courts must protect. Strode, 167 Wn.2d at 235-36 (Fairhurst, J., concurring), 167 Wn.2d at 241 (C. Johnson, J, dissenting).

Shearer does not disagree with this general proposition. The presence of a compelling interest, however, does not of itself excuse a trial court's failure to apply the required standards under the Sixth Amendment and article I, section 22. Instead, the proponent of closure must show the compelling interest would likely be prejudiced by a public proceeding, Presley, 130 S. Ct. 724, or that an open proceeding would present a "serious and imminent threat" to that interest. Bone-Club, 128 Wn.2d at 258-59 (quoting Allied Daily Newspapers v. Eikenberry, 121 Wn.2d 205, 210-11, 848 P.2d 1258 (1993)). And even if this showing is made, a trial court must still perform the remainder of the analysis before ordering closure. Strode, 167 Wn.2d at 229.

Shearer questions the unsupported belief that the "privacy" of a closed procedure results in closer questioning of jurors and more honest answers. The opposite can also be true -- the absence of the watchful eye of the public can result in less honest answers. Frankly, the danger a prospective juror might be unwilling to truthfully reveal sensitive or embarrassing information exists whether a court is open or closed. And,

there is simply no reason to conclude a juror would be more willing to tell the truth in a courtroom where the judge, a court reporter, the prosecutor (and a law enforcement representative, if requested), defense counsel, the defendant, and jail security (if the defendant is in custody) are present, as opposed to a courtroom where members of the public can observe.

However, what is clear is that a generalized concern about the need for juror privacy is insufficient to overcome the strong presumption of openness—a presumption that can only be overcome based on specific, individualized findings, rather than a generalized concern about the need for privacy. See Storde, 167 Wn.2d at 236 (Fairhurst, J., concurring) (although agreeing that failure to close portion of voir dire would have thwarted court's procedural assurances that juror information would remain confidential and would have endangered jurors' openness and "*potentially* defendant's right to an impartial jury, 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.").

Moreover, the assumption that private questioning of potential jurors generally benefits the defendant ignores the statement that "a closed jury selection process harms the defendant by preventing his or her family from contributing their knowledge or insight to jury selection and by

preventing the venire from seeing the interested individuals." Brightman, 155 Wn.2d at 515 (citing Orange, 152 Wn.2d at 812).

If private voir dire was so beneficial to the accused, defense counsel would routinely request it. But the opposite is true; trial courts almost universally initiate closed questioning.<sup>5</sup>

Even if prospective jurors tended to disclose more sensitive information in chambers or another secret place, there was no reason to believe a discussion of embarrassing subjects was even pertinent in Shearer's case. The state charged Shearer with felony harassment and misdemeanor assault. These are not charges that call for disclosure of sensitive personal matters. Cf. Strode, 167 Wn.2d at 238 (C. Johnson, J., dissenting) ("In cases such as this involving sexual abuse, counsel may voir dire jurors about experiences that may touch on deeply personal issues that might affect their ability to be fair and impartial. Jurors' willing

---

<sup>5</sup> See, e.g., Strode, 167 Wn.2d at 229 (court initiated private voir dire); Brightman, 155 Wn.2d at 511 (court); Bowen, 236 P.3d 220 (court) State v. Paumier, 155 Wn. App. 673, 676, 230 P.3d 212, review granted, 169 Wn.2d 1017 (2010) (court); Price, 154 Wn. App. 480 (court); State v. Heath, 150 Wn. App. 121, 125, 206 P.3d 712 (2009) (prosecutor's request); State v. Sadler, 147 Wn. App. at 107 (court conducted private Batson hearing in jury room); State v. Erickson, 146 Wn. App. 200, 204, 189 P.3d 245 (2008) (court); State v. Castro, 141 Wn. App. 485, 488, 170 P.3d 78 (2007) (court); State v. Duckett, 141 Wn. App. 797, 801, 173 P.3d 948 (2007) (court); State v. Frawley, 140 Wn. App. 713, 720, 167 P.3d 593, 596 (2007) (court).

and truthful disclosure of private information regarding such experiences is essential to ensuring the defendant's impartial jury right.").

Having said these things, Shearer maintains trial courts should be permitted to develop procedures that respect the privacy interests of prospective jurors and encourage more forthright answers to sensitive voir dire questions. Such procedures must, however, comply with Bone-Club. Dreiling v. Jain, 151 Wn.2d 900, 903-04, 93 P.3d 861 (2004) (the right of the public, including the press, to access trials and court records may be limited only to protect significant interests, and any limitation must be carefully considered and specifically justified).

D. CONCLUSION

The trial court violated Shearer's constitutional rights to a public trial. This Court should reverse Shearer's convictions and remand for a new trial.

DATED this 3 day of January 2011.

Respectfully submitted,

NIELSEN, BROMAN & KOCH, PLLC



---

ANDREW P. ZINNER

WSBA No. 18631

Office ID No. 91051

Attorneys for Appellant

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

---

STATE OF WASHINGTON,	)	
	)	
Respondent,	)	
	)	
v.	)	COA NO. 65053-0-1
	)	
GREGORY SHEARER,	)	
	)	
Appellant.	)	

---

**DECLARATION OF SERVICE**

I, PATRICK MAYOVSKY, DECLARE UNDER PENALTY OF PERJURY UNDER THE LAWS OF THE STATE OF WASHINGTON THAT THE FOLLOWING IS TRUE AND CORRECT:

THAT ON THE 3<sup>RD</sup> DAY OF JANUARY, 2011, I CAUSED A TRUE AND CORRECT COPY OF THE **SUPPLEMENTAL BRIEF OF APPELLANT** TO BE SERVED ON THE PARTY / PARTIES DESIGNATED BELOW BY DEPOSITING SAID DOCUMENT IN THE UNITED STATES MAIL.

[X] SHANNON CONNOR  
WHATCOM COUNTY PROSECUTOR'S OFFICE  
311 GRAND AVENUE, SUITE 201  
BELLINGHAM, WA 98225

[X] GREGORY SHEARER  
7945 KENDALL ROAD  
MAPLE, WA 98266

**SIGNED** IN SEATTLE WASHINGTON, THIS 3<sup>RD</sup> DAY OF JANUARY, 2011.

x *Patrick Mayovsky*