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STATE OF WASHINGTON

Supreme Court No. _____
(Court of Appeals No. 65053-0-I)

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

STATE OF WASHINGTON, Respondent,

v.

GREGORY PIERCE SHEARER, Appellant.

PETITION FOR REVIEW

DAVID S. McEACHRAN,
Whatcom County Prosecuting Attorney
By **HILARY A. THOMAS**
Appellate Deputy Prosecutor
Attorney for Respondent
WSBA #22007

Whatcom County Prosecutor's Office
311 Grand Avenue, Second Floor
Bellingham, WA 98225
(360) 676-6784

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STATE OF WASHINGTON

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A. IDENTITY OF PETITIONER

Petitioner, State of Washington, Respondent below, asks this Court to review the decision of the Court of Appeals, Division One, referred to in section B.

B. COURT OF APPEALS DECISION

The State of Washington petitions this Court for review of the Court of Appeals opinion in State v. Shearer, #65053-0-I (unpublished) which was filed May 31, 2011. A copy of the opinion is attached as Appendix A.

C. ISSUES PRESENTED FOR REVIEW

1. Whether Shearer should have to demonstrate a manifest error of constitutional magnitude under RAP 2.5(a) before raising a violation of his right to public trial for the first time on appeal where defense counsel did not object to going into chambers to voir dire one prospective juror, regarding her prior experience with domestic violence which rendered her biased against the defendant, and where that juror was excused for cause at defense request.
2. Whether this Court should recognize that alleged violations of the right to public trial can be de minimis and as such not implicate the defendant's right to a public trial or necessitate a new trial, and whether the in chambers questioning of one prospective juror in response to her reluctance to discuss her prior experience with domestic violence in open court was de minimis.
3. Whether the Court of Appeals erred in failing to consider the appropriate remedy for a right to public trial violation

pursuant to Momah¹ where defense counsel did not object to going into chambers to voir dire one prospective juror regarding her prior experience with domestic violence, the in chambers questioning lasted seven minutes, no one else objected to the in chambers proceeding and the in chambers questioning resulted in the juror being excused for cause.

D. STATEMENT OF THE CASE

Gregory Shearer was tried by a jury and found guilty as charged of one count of felony Harassment – Domestic Violence, in violation of RCW 9A.46.020(1)(a)(i)(2)(b) and 10.99.020, and Assault in the Fourth Degree – Domestic Violence, in violation of RCW 9A.36.041(1) and 10.99.020. CP 26-27, 94-95.

During voir dire, one juror, juror no. 7, responded in general voir dire that she was a victim of and a witness to domestic violence. VDRP 37-38. When asked how she felt about it, she stated, “I don’t want to talk about it.” When asked why she didn’t want to talk about it, she asked if she could write it down instead, and indicated she did not want to talk about it in front of a bunch of strangers. VDRP 38. When the judge inquired if she’d be more comfortable discussing it with the judge and counsel in chambers, she answered yes. Id. The court then inquired:

Is this (sic) anyone in this courtroom who would have any objection if we leave the courtroom for a moment? If the court reporter, counsel, and myself and the defendant went

¹ State v. Momah, 167 Wn.2d 140, 217 P.3d 221, *cert. denied*, 131 S.Ct. 160 (2010).

into chambers to ask some questions of Juror Number 7 in private?

Is there anyone here who would object at all to having that take place in that manner?

VDRP 39. There being no objection the judge, counsel and defendant went into chambers for seven minutes, and juror no. 7 disclosed that her baby grandson had been killed by his father in their family home three years before and informed the court she felt that experience would affect her view of the case. CP 102; VDRP 39-40. Defense counsel then moved to excuse the juror for cause, to which the State did not object and juror no. 7 was excused. CP 102; VDRP 40-41, 119.

E. REASONS WHY REVIEW SHOULD BE ACCEPTED

This Court should accept review of the Court of Appeals decision reversing Shearer's conviction based on an allegation of a violation of his right to a public trial. The decision is in conflict with a decision of the Washington Supreme Court and involves a significant question of law under the Constitutions of the State of Washington and the United States. RAP 13.4(b)(1), (3).

F. ARGUMENT

The Court of Appeals in this case reversed Shearer's convictions because it held that "a failure to conduct a Bone-Club analysis before closing criminal trial proceedings requires reversal in all but the most

exceptional circumstances.” App. A, Slip Opinion at 1.² The State requests that this Court accept review not only because the Court of Appeals decision is in conflict with this Court’s holding in State v. Momah, 167 Wn.2d 140, 217 P.3d 321 (2009), regarding the appropriate remedy for an alleged right to public trial violation, but also to address whether Shearer can raise this issue for the first time on appeal where he did not object below. The State alternatively requests that this Court accept review to address whether a de minimis violation of the right to public trial implicates a defendant’s right to public trial so as to warrant reversal of the conviction.

The Court of Appeals permitted Shearer to raise a violation of his right to public trial for the first time on appeal despite his lack of objection below, presumably pursuant to its precedent and this Court’s precedent. The State requests this Court adhere to its previously enforced contemporaneous objection requirement when the constitutional right to a public trial is implicated and hold that absent some attempt to inform the

² In his opening appeal brief Shearer also raised an ineffective assistance of counsel issue regarding defense counsel’s failure to object to the admission of the victim’s written statement, made the day after the offense, as substantive evidence. The Court of Appeals did not address that issue in its opinion because it reversed on the right to public trial grounds. App. A, Slip Opinion at 7.

court that the defendant finds individual in chambers voir dire objectionable, a defendant waives the right to raise the issue on appeal.

Shearer asserts that his right to public trial under the Sixth Amendment of the federal constitution and Art. 1 §22 of the State constitution were violated when the trial court heard one venire member's concern about discussing her feelings about and experience with domestic violence in chambers. Shearer does not assert a violation of the public's right to open proceedings under Art. 1 §10 of the state constitution. The State submits that if there was any violation of the defendant's right to public trial by the very limited in chambers questioning, it was de minimis and does not warrant a new trial. The State asks this Court to accept review to adopt a de minimis violation exception regarding the right to public trial, an exception acknowledged by a number of other courts.

Further, the Court of Appeals decision specifically erred in following the plurality opinion in Strode and in neglecting the majority holding in Momah regarding the appropriate remedy for a right to public trial violation. The Court of Appeals held that, pursuant to Strode "in all but the most exceptional circumstances, closing voir dire without employing the Bone-Club analysis constitutes error for which prejudice is presumed and remand for a new trial is required." App. A, Slip Opinion at

6. This Court in Momah clearly held that only those errors that render a trial “fundamentally unfair or an unreliable vehicle for determining guilt or innocence” constitute structural error warranting automatic reversal. Only where prejudice is “sufficiently clear” is a new trial to be ordered. No prejudice can be inferred or presumed from the in chambers questioning of one juror about her unwillingness to serve on the jury because of her admitted bias against Shearer given her prior experience with domestic violence.

- 1. This Court should hold that Shearer cannot assert for the first time on appeal a violation of his right to a public trial without demonstrating that the alleged error was a manifest error of constitutional magnitude under RAP 2.5(a) when he did not object to hearing the one juror’s concerns in chambers.**

The Court of Appeals decision in this case should be reviewed because Shearer should not be permitted to assert a violation of his right to public trial for the first time on appeal where he did not object below when the issue was presented. The State argued below that the Court of Appeals should find that Shearer could not assert a violation of his right to public trial for the first time on appeal under RAP 2.5(a), although it acknowledged that the Court of Appeal’s precedents held otherwise. The Court of Appeals did not engage in any such analysis in its opinion. The

State submits that under RAP 2.5(a), the Court of Appeals erred in permitting Shearer to assert the alleged violation of his right to public trial for the first time on appeal.

Under RAP 2.5(a), an error is waived if not preserved below unless it is a "manifest error affecting a constitutional right." RAP 2.5(a)(3); State v. Scott, 110 Wn.2d 682, 686-87, 757 P.2d 492 (1988); State v. Lynn, 67 Wn. App. 339, 342, 835 P.2d 251 (1992). It is the defendant's burden to show how the alleged constitutional error was manifest, *i.e.*, how it actually prejudiced his rights. State v. McDonald, 138 Wn.2d 680, 691, 981 P.2d 443 (1999).

A defendant should not be able to raise his right to a public trial for the first time on appeal without demonstrating actual prejudice pursuant to RAP 2.5(a). A fundamental principle of appellate litigation is that a defendant may not assert a claim on appeal that was not raised with the trial court. State v. Davis, 41 Wn.2d 535, 250 P.2d 548 (1953). While some assertions of violations of the right to public trial have been permitted for the first time on appeal,³ and most recently in Momah and Strode, this Court has also held that a defendant can waive the right to

³ See, e.g., State v. Bone-Club, 128 Wn. 2d 254, 906 P.2d 325 (1995), In re Orange, 152 Wn.2d 75, 100 P.3d 291 (2004), State v. Easterling, 157 Wn.2d 167, 137 P.3d 825 (2006).

public trial issue by failing to assert it below. State v. Collins, 50 Wn.2d 740, 314 P.2d 660 (1957). Prior to Bone-Club,⁴ the court in Collins held that the defendant could not raise the court's closure of the courtroom due to overcrowding for the first time on appeal, noting that "a trial court is entitled to know that its exercise of discretion is being challenged; otherwise, it may well believe that both sides have acquiesced in its ruling." *Id.* at 748. While the decision in Collins was issued prior to the existence of RAP 2.5(a), had RAP 2.5(a) been in effect the reviewing court likely would have made the same decision, determining the closure was not a manifest error and therefore not reviewable for the first time on appeal.

Despite this precedent, the court in Bone-Club summarily dismissed the state's argument that Bone-Club waived his right to raise his right to a public trial error by failing to object below pursuant to RAP 2.5(a), holding that "the opportunity to object holds "no practical meaning" unless the court informs potential objectors of the nature of the asserted interest. State v. Bone-Club, 128 Wn.2d 254, 261, 906 P.2d 325 (1995). Prior to Bone-Club this Court had required a contemporaneous objection at trial in order to raise an issue on appeal, unless the appellant

⁴ State v. Bone-Club, 128 Wn.2d 254, 906 P.2d 325 (1995).

could meet the standards of RAP 2.5(a). A rigorous adherence to the contemporaneous objection rule would avoid the unfair practice of defense misleading the trial court into believing the defendant does not object to a proposed closure but then turning around on appeal and asserting that his right to public trial was violated.

Application of a contemporaneous objection rule in this context is consistent with other jurisprudence. Under federal law, Shearer would not be able to assert a violation of his right to public trial for the first time on appeal. Under federal law, an unpreserved open courtroom claim will not be considered on appeal. Levine v. United States, 362 U.S. 610, 619, 80 S. Ct. 1038, 4 L.Ed.2d 989 (1960); Waller v. Georgia, 467 U.S. at 42 n. 2 (1984); Puckett v. U.S., ___ U.S. ___, 129 S. Ct. 1423, 1428-29, 173 L. Ed. 2d 266 (2009). The rationale for not allowing even constitutional claims for the first time on appeal was explained in Puckett:

If a litigant believes that an error has occurred (to his detriment) during a federal judicial proceeding, he must object in order to preserve the issue. If he fails to do so in a timely manner, his claim for relief from the error is forfeited. “No procedural principle is more familiar to this Court than that a ... right may be forfeited in criminal as well as civil cases by the failure to make timely assertion of the right before a tribunal having jurisdiction to determine it.” *Yakus v. United States*, 321 U.S. 414, 444, 64 S.Ct. 660, 88 L.Ed. 834 (1944).

If an error is not properly preserved, appellate-court authority to remedy the error (by reversing the judgment, for example, or ordering a new trial) is strictly circumscribed. There is good reason for this; “anyone familiar with the work of courts understands that errors are a constant in the trial process, that most do not much matter, and that a reflexive inclination by appellate courts to reverse because of unpreserved error would be fatal.” *United States v. Padilla*, 415 F.3d 211, 224 (C.A.1 2005) (en banc) (Boudin, C. J., concurring).

This limitation on appellate-court authority serves to induce the timely raising of claims and objections, which gives the district court the opportunity to consider and resolve them. That court is ordinarily in the best position to determine the relevant facts and adjudicate the dispute. In the case of an actual or invited procedural error, the district court can often correct or avoid the mistake so that it cannot possibly affect the ultimate outcome. And of course the contemporaneous-objection rule prevents a litigant from “ ‘sandbagging’ ” the court—remaining silent about his objection and belatedly raising the error only if the case does not conclude in his favor. Cf. *Wainwright v. Sykes*, 433 U.S. 72, 89, 97 S.Ct. 2497, 53 L.Ed.2d 594 (1977); see also *United States v. Vonn*, 535 U.S. 55, 72, 122 S.Ct. 1043, 152 L.Ed.2d 90 (2002).

Puckett, 129 S. Ct. at 1428-29.

A number of states also prohibit defendants from raising a public trial claim for the first time on appeal. See, e.g., Wright v. State, 340 So.2d 74, 79-80 (Ala.1976); People v. Bradford, 14 Cal.4th 1005, 1046-47, 60 Cal.Rptr.2d 225, 929 P.2d 544, 570, cert. den. 522 U.S. 953 (1997); Commonwealth v. Wells, 360 Mass. 846, 274 N.E.2d 452, 453 (1971); People v. Marathon, 97 A.D.2d 650, 469 N.Y.S.2d 178, 179 (N.Y.App.Div.1983); Dixon v. State, 191 So.2d 94, 96 (Fla. 2d DCA

1966). State v. Butterfield, 784 P.2d 153, 157 (Utah 1989); People v. Thompson, 50 Cal. 3d 134, 785 P.2d 857 (1990) (claim that chambers voir dire on jurors' position on the death penalty violated open courts guarantee not reviewable on appeal absent objection).

This Court should accept review to determine whether Shearer should be required to demonstrate on appeal a manifest error of constitutional magnitude pursuant to RAP 2.5(a) before his convictions can be reversed based on an alleged violation of his right to public trial. Furthermore, the very limited in chambers questioning of one juror here was not a manifest error of constitutional magnitude because the closure was so minimal that it did not implicate Shearer's right to public trial and because there was no actual prejudice: the juror, who was admittedly biased against Shearer due to the nature of the offense, was excused for cause.

2. The limited questioning of one prospective juror regarding her experience with domestic violence was a de minimis violation and as such did not implicate Shearer's right to public trial.

The Court of Appeals declined the State's request to find that the limited closure was a de minimis violation of the right to public trial, stating that although federal courts had adopted a de minimis standard, according to the plurality's opinion in Strode, "Washington courts have

‘never found a public trial right violation to be de minimis.’ App. A, Slip Opinion at 6. The State requests that this Court adopt the de minimis rationale recognized in a number of courts and find it applicable to this case.⁵ The in chambers questioning that occurred here was minimal, addressed only one prospective juror’s prior experience with domestic violence which she believed made her biased against Shearer, and did not otherwise implicate the concerns that the right to public trial is intended to protect. Such a de minimis violation should not result in a reversal of Shearer’s conviction.

While this Court has yet to affirmatively recognize the concept of a de minimis violation of the right to public, a majority of this Court has also not explicitly held that there can be no such exception. This Court in State v. Brightman, 155 Wn.2d 506, 517, 122 P.3d 150 (2005), recognized that closures that have a de minimis effect on a proceeding do not necessarily violate the right to public trial, although it held in that case that the closure that occurred there was not de minimis. Brightman, 155 Wn.2d at 517. In order to determine whether the right to a public trial is

⁵ The issue of whether a courtroom closure may be considered de minimis was raised in State v. Lormor, No. 84319-8, currently pending before this Court.

implicated by a closure, courts look to whether the principles underlying the right to public trial are negatively impacted by the closure.

“... [W]hether a particular closure implicates the constitutional right to a public trial is determined by inquiring whether the closure has infringed the ‘values that the Supreme Court has said are advanced by the public trial guarantee...’ ... This analysis tends to safeguard the right at stake without requiring new trials where these values have not been infringed by a trivial closure.”

Easterling, 157 Wn.2d 167, 183-84, 137 P.3d 825 (2006) (J. Madsen concurring); *see also*, State v. Rivera, 108 Wn. App. 645, 653, 32 P.3d 292 (2001), *rev. den.*, 146 Wn.2d 1006 (2002) (opening a chambers conference regarding a juror’s complaint to the public would not further the goals of the right to public trial). “[T]he requirement of a public trial is primarily for the benefit of the accused: that the public may see he is fairly dealt with and not unjustly condemned and that the presence of interested spectators may keep his triers keenly alive to a sense of the responsibility and to the importance of their functions.” Momah, 167 Wn.2d at 148. In the context of a closure of voir dire, the public nature of the proceeding permits the defendant’s family to contribute their knowledge or insight to jury selection and permits the venire to see the interested individuals. Brightman, 155 Wn.2d at 515.

Here none of the values underlying the right to a public trial was implicated by the in-chambers colloquy with one prospective juror regarding her prior experience with domestic violence. The juror was obviously uncomfortable discussing her experience in open court. Requiring her to state her concerns in public would not have encouraged any witnesses to come forward, would not have assisted the defendant in selecting a jury – she was excused for cause at Shearer’s request — and there is no indication that it would have helped to ensure that the prosecutor and the judge carried out their duties responsibly. The in chambers proceeding only lasted seven minutes. Such a de minimis closure did not implicate Shearer’s right to public trial.

3. Under Momah reversal is not required absent a showing that the alleged right to public trial violation rendered the trial fundamentally unfair or an unreliable vehicle for determining guilt or innocence.

The Court of Appeals decision in this case should be reviewed as well because it failed to engage in the appropriate remedy analysis pursuant to Momah. Relying upon the plurality opinion in Strode, it held that a new trial was required whenever the trial court failed to conduct a Bone-Club analysis before closing a courtroom “in all but the most exceptional circumstances.” App A., Slip Opinion at 6. Momah’s holding

regarding the appropriate remedy for right to public trial violations, however, contains no such language and broadly posits that the remedy should fit the violation. Further, Momah holds that structural error cannot be found absent a showing that the closure “necessarily rendered a criminal trial fundamentally unfair or an unreliable vehicle for determining guilt or innocence.” The Court of Appeals erred in construing the remedy announced in Momah in an extremely narrow manner and in failing to apply the holding in Momah to this case.

The Momah decision makes clear that where a defendant’s right to a public trial has been violated, the court “devises a remedy appropriate to the violation.” Momah, 167 Wn.2d at 149 (*quoting* Washington v. Recuenco, 548 U.S. 212, 218-19, 126 S.Ct. 2546, 165 L.Ed.2d 466 (2006)). Reversal is only required when the violation is determined to be structural such that it “necessarily render[s] a criminal trial fundamentally unfair or an unreliable vehicle for determining guilt or innocence.” *Id.* The Momah court appropriately considered the right to a public trial in light of the central aim of the criminal proceeding to try the accused fairly. To that end it concluded that a defendant is entitled to make tactical decisions to advance what he perceives will result in a fair trial. *Id.* at 153. This Court ultimately held that the trial court’s closure did not constitute structural

error and automatic reversal was not appropriate because the closure occurred to protect Momah's right to a fair jury and did not prejudice him.

State v. Strode, 167 Wn.2d 222, 217 P.3d 310 (2009), relied upon by the Court of Appeals in its decision, was a plurality opinion. As such it provides questionable guidance as to the appropriate remedy in this case. "A plurality opinion has limited precedential value and is not binding on the courts." In re Isadore, 151 Wn.2d 294, 303, 88 P.3d 390 (2004). The Court of Appeals erred in rejecting the broad majority holding in Momah, choosing instead to apply the plurality opinion in Strode.

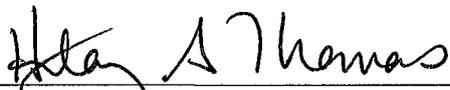
Here, the reason the court went into chambers is obvious from the record, to address the juror's unwillingness to answer the question about her prior experience with domestic violence. The court inquired if any of the persons present had any objection to questioning the juror in private, and no one did. Despite the question having been put squarely before him, defense counsel did not object. While the court may not have made the recommended specific Bone-Club findings, it certainly was cognizant of them and ensured that no one objected before going into chambers. In this regard, although there was no extensive discussion or weighing of the factors on the record, this case is similar to Momah.

To the extent that Shearer's right to public trial was implicated by the minimal questioning that occurred here, it did not impact Shearer's right to a fair and impartial jury and did not prejudice him. A new trial in this case would not be an appropriate remedy because the closure here did not render Shearer's trial fundamentally unfair and would be the type of windfall that the court in Momah indicated was not in the public interest. Momah, 167 Wn.2d at 150.

G. CONCLUSION

For the reasons set forth above, Petitioner, State of Washington, respectfully requests that this Court accept discretionary review, reverse the Court of Appeals decision, and remand to the Court of Appeals to address other issues Shearer raised but the Court of Appeals did not address because of its resolution based on the right to public trial grounds.

Respectfully submitted this 22nd day of June, 2011.


HILARY A. THOMAS, WSBA No. 22007
Appellate Deputy Prosecutor
Whatcom County Prosecuting Attorney

CERTIFICATE

I CERTIFY that on this date I placed in the U.S. mail with proper postage thereon, or otherwise caused to be delivered, a true and correct copy of the document to which this Certificate is attached to this Court and appellant's counsel, addressed as follows:

ANDREW P. ZINNER
Nielsen, Broman & Koch, PLLC
1908 E. Madison Street
Seattle, WA 98122

Sydney A. Koss
LEGAL ASSISTANT

06/21/2011
DATE

APPENDIX A

IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON

STATE OF WASHINGTON,)	NO. 65053-0-1
)	
Respondent,)	DIVISION ONE
)	
v.)	
)	
GREGORY PIERCE SHEARER,)	UNPUBLISHED OPINION
)	
Appellant.)	FILED: May 31, 2011
_____)		

LAU, J. — Article I, section 22 of the Washington State Constitution guarantees a criminal defendant the right to a public trial. In this case, the trial court conducted voir dire of an individual juror in chambers without first addressing and weighing the five factors set forth in State v. Bone-Club, 128 Wn.2d 254, 906 P.2d 325 (1995). Because a failure to conduct a Bone-Club analysis before closing criminal trial proceedings requires reversal in all but the most exceptional circumstances, we reverse Gregory Shearer's convictions for felony harassment and fourth degree assault and remand.

FACTS

The State charged Gregory Shearer with felony harassment and fourth degree assault of his girl friend, Lynn Honcoop, for events occurring during an argument at their shared residence. During voir dire, the prosecutor asked whether anyone was a recent

victim of or knew a recent victim of domestic violence. Prospective juror 7 raised her hand.

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 in front of strangers. The trial court asked, "Would it be more comfortable if counsel and you and I were to meet in chambers so you can discuss it with us there?" Juror 7 said, "Yes." Report of Proceedings, Voir Dire (Jan. 12, 2010) (RPVD) at 38. The court asked whether

anyone in this courtroom who would have any objection if the court reporter, counsel, and myself, and the defendant went into chambers to ask some questions of Juror Number 7 in private? Is there anyone here who would object at all to having that take place in that manner?

RPVD at 39. Hearing no objections, 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. Shearer's counsel moved to excuse for cause and the court granted the motion.

ANALYSIS

Shearer contends that the trial court violated his right to a public trial when it conducted voir dire of individual jurors in chambers. Whether a trial court procedure violates a criminal defendant's right to a public trial is a question of law that we review de novo. State v. Easterling, 157 Wn.2d 167, 173-74, 137 P.3d 825 (2006).

The state and federal constitutions guarantee the right to a public trial. Article I, section 22 of the Washington Constitution provides, "In criminal prosecutions the accused shall have the right . . . to have a speedy public trial . . ." The Sixth

Amendment to the United States Constitution states, "In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial"¹ These provisions assure a fair trial, foster public understanding and trust in the judicial system, and give judges the check of public scrutiny. State v. Duckett, 141 Wn. App. 797, 803, 173 P.3d 948 (2007) (citing State v. Brightman, 155 Wn.2d 506, 514, 122 P.3d 150 (2005); Dreiling v. Jain, 151 Wn.2d 900, 903-04, 93 P.3d 861 (2004)). While the right to a public trial is not absolute, Washington courts strictly guard it to assure that proceedings occur outside the public courtroom in only the most unusual circumstances. State v. Strode, 167 Wn.2d 222, 226, 217 P.3d 310 (2009); Easterling, 157 Wn.2d at 174-75; In re Pers. Restraint of Orange, 152 Wn.2d 795, 804-05, 100 P.3d 291 (2004).

To protect the defendant's right to a public trial, our Supreme Court held in Bone-Club that a court must analyze and weigh five factors before closing part of a criminal trial.² This requirement applies to the closure of jury selection. Orange, 152 Wn.2d at 807-14. Here, the record reflects that the court conducted questioning in chambers to

¹ Additionally, article I, section 10 of the Washington State Constitution provides, "Justice in all cases shall be administered openly, and without unnecessary delay." This provision secures the public's right to open and accessible proceedings.

² Under Bone-Club,

"1. The proponent of closure . . . 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." Bone-Club, 128 Wn.2d at 258-59 (alteration in original) (quoting Allied Daily Newspapers v. Eikenberry, 121 Wn.2d 205, 210-11, 848 P.2d 1258 (1993)).

protect the privacy of prospective jurors without first undertaking the required Bone-Club analysis.

The State contends that, notwithstanding this error, Shearer is not entitled to appellate relief. As in State v. Momah, 167 Wn.2d 140, 217 P.3d 321 (2009), cert. denied, 131 S. Ct. 160 (2010), the State argues the error was not a structural one and that it caused no prejudice and thus does not require reversal. The State points out that Shearer did not object to the procedure, participated in it, and that the procedure ensured jury impartiality.

On the other hand, Shearer contends that this case is not like Momah but is instead controlled by Strode and State v. Bowen, 157 Wn. App. 821, 239 P.3d 1114 (2010). Under Strode, the failure to conduct a Bone-Club analysis before conducting voir dire in chambers requires automatic reversal and remand for a new trial. Strode, 167 Wn.2d 222. Shearer is correct.

Momah involved unusual circumstances. The media had heavily publicized Momah's case, which raised concerns about juror impartiality. Momah, 167 Wn.2d at 145. As a result, the court and counsel conducted individual voir dire of those potential jurors who indicated that they had prior knowledge of the case, asked for private questioning, or stated they could not be fair. Momah, 167 Wn.2d at 145-46. Although the trial court did not explicitly apply the Bone-Club factors before closing the courtroom, our Supreme Court affirmed Momah's conviction. Momah, 167 Wn.2d at 145, 156. The court observed that the trial court and counsel recognized and "carefully considered" Momah's competing article I, section 22 rights. Momah, 167 Wn.2d at 156. And "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.”

Momah, 167 Wn.2d at 151. The court concluded that Momah's conduct was indicative of deliberate tactical choices to protect his right to an impartial jury. Momah, 167 Wn.2d at 155; see also Strode, 167 Wn.2d at 234 (Fairhurst, J., concurring) (“The record shows [Momah] intentionally relinquished a known right.”). The court found these circumstances distinguished Momah from the court's previous public trial cases. Momah, 167 Wn.2d at 151.

Strode, in contrast, presented an “unexceptional” set of facts. Strode, 167 Wn.2d at 223. The trial court and counsel, out of concern for juror privacy, individually questioned in chambers potential jurors who had been victims of a sexual offense or accused of committing a sexual offense. Strode, 167 Wn.2d at 224. The court did not conduct any Bone-Club analysis, and “the record [was] devoid of any showing that the trial court engaged in the detailed review that is required in order to protect the public trial right.” Strode, 167 Wn.2d at 228. Nor did Strode engage in behavior that indicated a deliberate, tactical choice or a waiver of his public trial right. Strode, 167 Wn.2d at 231-32 (Fairhurst, J., concurring). The court therefore reversed Strode's conviction and remanded for a new trial. Strode, 167 Wn.2d at 231.

The State maintains that any violation of the public trial right resulting from the brief in-chambers voir dire of a single prospective juror was de minimis and caused no prejudice. The State argues that given the nature of this particular violation, reversal is an inappropriate remedy. We reject this argument. Under Momah and Strode, in all but the most exceptional circumstances, closing voir dire without employing the Bone-Club analysis is reversible error for which prejudice is presumed. Strode, 167 Wn.2d at 231

(citing Orange, 152 Wn.2d at 814). And although federal courts have adopted a de minimis trial closure standard,³ Washington courts have “never found a public trial right violation to be . . . de minimis.” Strode, 167 Wn.2d at 230 (quoting Easterling, 157 Wn.2d at 180)).

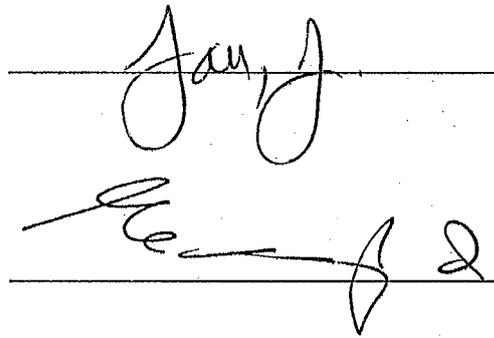
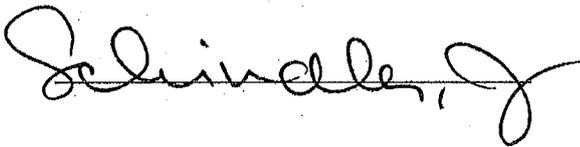
But the State argues, “Shearer’s constitutional right to a public trial was not implicated here where . . . no one, including the defense, objected to the closure and the juror was excused for cause.” Resp’t’s Br. at 7. But in Bowen, Division Two followed Strode despite the fact that the defendant did not object to in chambers voir dire. There, during jury selection, the trial court asked, “Does either party have an objection to allowing jurors to take up sensitive issues, sensitive questions, in chambers if they feel that that would be beneficial to them?” Bowen, 157 Wn. App. at 826. “Both the prosecuting attorney and defense counsel stated they had no objections.” Bowen, 157 Wn. App. at 826. Nevertheless, the court held, “[W]e cannot conclude that the trial court adequately safeguarded [the defendant’s] public trial right or that [the defendant] made deliberate, tactical choices precluding him from relief. Accordingly, we hold that this closure constituted structural error. We reverse his conviction and remand for a new trial.” Bowen, 157 Wn. App. at 833.

Pursuant to Strode, in all but the most exceptional circumstances, closing voir dire without employing the Bone-Club analysis constitutes error for which prejudice is presumed and remand for a new trial is required. Strode, 167 Wn.2d at 231 (citing Orange, 152 Wn.2d at 814). Here, as in Strode, the record does not indicate that the

³ See Easterling, 157 Wn.2d at 183 (Madsen, J., concurring) (citing numerous federal cases in support of a de minimis trial closure standard).

trial court considered Shearer's public trial right in light of competing interests. Nor does the record establish that Shearer's conduct amounted to a knowing or tactical waiver of the right to a public trial. Accordingly, because the court improperly excluded the public from a portion of jury selection without applying the Bone-Club analysis, Strode requires that we reverse Shearer's conviction and remand for new trial.⁴

WE CONCUR:



⁴ Given our resolution here, we decline to address Shearer's additional contentions or his statement of additional grounds.