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SUPREME COURT
STATE OF WASHINGTON
Jun 28, 2013, 9:00 am
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h/h No. 86216-8

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

STATE OF WASHINGTON, Petitioner,

v.

GREGORY PIERCE SHEARER, Respondent.

SUPPLEMENTAL BRIEF OF PETITIONER

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A. ISSUES

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 the court specifically inquired if anyone objected and defense counsel did not object to going into chambers to voir dire one prospective juror.
2. Whether this Court should recognize that some violations of the right to public trial are de minimis such that they do not implicate the defendant's right to a public trial, and whether the in chambers questioning of one prospective juror in response to her expressed reluctance to discuss her prior experience with domestic violence in open court was de minimis because none of the values of the right to public trial were negatively impacted by the seven minute closure.
3. Whether reversal and a new trial is an appropriate remedy for a court's failure to conduct a Bone-Club analysis before inquiring of one juror in chambers regarding her prior domestic violence experience where defendant remained silent when the court inquired if anyone objected and where no structural error occurred because the juror was excused for cause on defense motion.

B. RELEVANT FACTS

Gregory Shearer was tried by a jury and found guilty 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 general voir dire, one prospective juror, juror no. 7, responded 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 acknowledged 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 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. The juror stated she was concerned that if she were to sit on the jury, she would have flashbacks, and she would break down in front of the other jurors. VDRP 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.

C. ARGUMENT

The Court of Appeals reversed Shearer's convictions because it held that "a failure to conduct a Bone-Club¹ analysis before closing criminal trial proceedings requires reversal in all but the most exceptional circumstances." Slip Opinion at 1. The State asks this Court to hold that Shearer cannot raise this issue for the first time on appeal where he did not object below after having been specifically asked if he did. Should this Court find that Shearer can raise this issue for the first time on appeal, the State asks this Court to find that de minimis violations of the right to public trial do not implicate a defendant's right to public trial, and that the seven minute closure here was de minimis. If this Court finds that Shearer's right to public trial was violated, the limited closure did not result in structural error because the prejudice, or rather the lack thereof, can be quantified in this case. The appropriate remedy in this case is not a new trial because the seven minute in chambers voir dire of one juror excused for cause by defense clearly had no effect on defendant's trial.

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

¹ State v. Bone-Club, 128 Wn.2d 254, 261, 906 P.2d 325 (1995).

court that the defendant finds individual in chambers voir dire objectionable, a defendant may not raise the issue on appeal. Permitting Shearer to raise this issue on appeal when he was asked if he objected to the very, allegedly flawed, procedure utilized encourages sandbagging, is unfair to the prosecution and imposes a significant burden on judicial resources.

Shearer asserts the seven minute in chambers questioning without Bone-Club findings violated both his right to public trial under the Sixth Amendment of the federal constitution and Art. 1 §22 of the State constitution, but Shearer does not assert a violation of the public's right to open proceedings under Art. 1 §10. The State asks this Court to adopt the de minimis violation exception regarding the right to public trial endorsed by a number of other courts. The seven minute questioning of one juror in chambers without Bone-Club findings did not negatively impact the values guaranteed by the right to public trial. Moreover, the record clearly supports a valid basis for the limited closure under Bone-Club.

Finally, even if Shearer can raise this alleged violation of his right to public trial for the first time on appeal, the alleged violation did not result in structural error, and a new trial is not warranted. Although

Momah² has recently been characterized as “unique,” Momah has not been overruled and still stands for the proposition that closing a courtroom without specific Bone-Club findings does not always result in a structural error. This Court in Momah 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. Structural error can also result when it is difficult to quantify the prejudice from the alleged error. Here, however, no prejudice to or negative effect upon Shearer’s trial can be inferred from the in chambers questioning of one juror about her unwillingness to serve on the jury because of her prior experience with domestic violence in this domestic violence case. On the contrary, given that the juror was excused for cause on defendant’s motion, there clearly was no effect on Shearer’s trial from the in chambers questioning, and thus no prejudice should be presumed.

1. **Shearer should not be permitted to assert a violation of his right to a public trial for the first time on appeal when he did not object to hearing the one juror’s concerns in chambers after the trial court specifically inquired if anyone objected to the in chambers questioning.**

Recent decisions holding that any claimed courtroom closure may be raised on appeal, even if there was no objection below, are based on a

² State v. Momah, 167 Wn.2d 140, 217 P.3d 321 (2009).

case superseded by RAP 2.5(a)(3) and are incorrect and harmful. This Court should correct course and require a contemporaneous objection in order to raise a violation of the right to public trial on appeal, unless the defendant can demonstrate a manifest error of constitutional magnitude under RAP 2.5(a)(3). This Court should then find that the limited in chambers questioning that occurred here does not rise to the level of manifest error of constitutional magnitude.

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). Requiring a contemporaneous objection provides the trial court an opportunity to prevent or cure the error. State v. Kirkman, 159 Wn.2d 918, 926, 155 P.3d 125 (2007); *see also*, State v. Paumier, 176 Wn.2d 29, 52, 288 P.3d 1126 (2012) (J. Wiggins dissenting) (trial court should be given opportunity to correct mistakes at time they are made in order to avoid unnecessary appeals and retrials). While some assertions of violations of the right to public trial have been permitted for the first time on appeal, and most recently in Wise³ and Paumier, this Court has also held that a defendant

³ State v. Wise, 176 Wn.2d 1, 15, 288 P.2d 1113 (2012).

can waive⁴ the right to public trial issue by failing to assert it below. State v. Collins, 50 Wn.2d 740, 314 P.2d 660 (1957). The court in Collins held that the defendant could not raise the court's partial closure of the courtroom 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."⁵ *Id.* at 748.

Cases that have concluded that public trial claims are exempt from the contemporaneous objection requirement rely upon a single case: State v. Marsh, 126 Wash. 142, 217 P.705 (1923).⁶ *See, e.g., State v. Wise*, 176 Wn.2d 1, 15, 288 P.3d 1113 (2012); Paumier, 176 Wn.2d at 36; Bone-Club, 128 Wn.2d at 257. That case was decided 50 years before the adoption of the Rules of Appellate Procedure. The adoption of RAP

⁴ While the court in Collins used the term "waive," there is a significant distinction between waiver and forfeiture of a right. "Waiver" is the intentional relinquishment of a known right, while "forfeiture" is the "failure to make a timely assertion of a right." U.S. v. Olano, 507 U.S. 725, 733-34, 113 S.Ct. 1770, 123 L.Ed.2d 508 (1993). Waiver extinguishes the "error," while under forfeiture the error still exists despite the failure to timely raise it. *Id.* Requiring an objection in order to preserve an issue promotes judicial efficiency by permitting a court to know when defense is not intending to waive an issue by silence.

⁵ This Court has never addressed, let alone distinguished, its opinion in Collins on this point. The court in Bone-Club cited Collins with approval in addressing the issue of whether a partial closure rose to the level of a constitutional violation. Bone-Club, 128 Wn.2d at 258.

⁶ Moreover, Marsh involved a complete closure of an unrecorded proceeding of a juvenile who was unrepresented by counsel. The circumstances in Marsh clearly would have satisfied today's RAP 2.5(a) standard.

2.5(a)(3) by this Court limited the ability of a defendant to obtain review of a claim of constitutional error, as under that rule, simply identifying a constitutional issue is no longer sufficient to obtain review of an issue not litigated below. State v. Scott, 110 Wn.2d 682, 687-88, 757 P.2d 492 (1988). 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); Scott, 110 Wn.2d at 686-87. The defendant must show both a constitutional error and actual prejudice to his rights. Kirkman, 159 Wn.2d at 926-2. To demonstrate actual prejudice there must be a "plausible showing by the [appellant] that the asserted error had practical and identifiable consequences in the trial of the cases." Id. at 935.

Despite Collins and RAP 2.5(a), 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, holding that "the opportunity to object holds "no practical meaning" unless the court informs potential objectors of the nature of the asserted interest. Bone-Club, 128 Wn.2d at 261. This flawed analysis stems from the court's misapplication of Art. 1 §10 concerns to the defendant's Art. 1 §22 right. This Court should refuse to apply a rule that conflicts with the Rules of Appellate Procedure and subverts the intent of RAP 2.5(a). State v.

Beskurt, 176 Wn.2d 441, 449-51, 293 P.3d 1159 (2013) (Madsen, J., concurring). The court in Bone-Club did not consider the change effected by RAP 2.5(a); its holding that a public trial error need not be raised in the trial court should be corrected.

A rigorous adherence to the contemporaneous objection rule would avoid the potential 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. 39, 42 n., 104 S.Ct. 2210, 81 L.Ed.2d 31 (1984); Puckett v. U.S., 556 U.S. 129, 129 S. Ct. 1423, 1428-29, 173 L. Ed. 2d 266 (2009). As Justice Madsen noted in her concurrence in Sublett, many other jurisdictions have held or recognized that the failure to object contemporaneously to an alleged violation of the right to public trial subjects the claimed error to

forfeiture/failure to preserve rules on review. State v. Sublett, 176 Wn.2d 58, 126-27, 292 P.3d 715 (2012) (listing cases).

Respect for stare decisis requires a clear showing that an established rule is incorrect and harmful before it is abandoned. State v. Devin, 158 Wn.2d 157, 168, 142 P.3d 599 (2006). In this instance, the Bone-Club rule is incorrect because it contradicts the spirit and letter of the Rules of Appellate Procedure adopted by this Court. It is harmful in at least three respects: 1) the trial court is denied the opportunity to correct any error; 2) if the claim of error is valid and could have been corrected, the public is unnecessarily denied the opportunity to view the original court proceedings; and 3) if the claim of error is valid and could have been corrected, a retrial that should have been unnecessary may be required. The costs of reversal are substantial: it forces jurors, witnesses, courts, the prosecution, and the defendants to repeat a trial that has already once taken place; the passage of time may render retrial difficult, even impossible; and it compromises the prompt administration of justice. United States v. Mechanik, 475 U.S. 66, 72, 106 S.Ct. 938, 89 L.Ed.2d 50 (1986). This Court should overrule its holding in Bone-Club that a defendant need not object to a public trial violation below in order to raise it on appeal.

Furthermore, the facts of this case are distinguishable from those cases, Bone-Club, Wise and Paumier, that hold that the failure to object does not waive a right to public trial violation. Here, there was not mere silence. Here the trial court specifically asked everyone in the courtroom if anyone objected at all to hearing juror no. 7's concerns in chambers. Hearing no objection, the trial court reasonably believed that Shearer did not object. Shearer had an obligation, when specifically asked, to notify the court he did not agree with hearing the juror's concerns in chambers.

The alleged error here is not whether there was *in fact* a violation of Shearer's right to public trial, but whether the in chambers questioning without Bone-Club findings violated his public trial right.⁷ His lack of objection when specifically asked if he was objecting failed to preserve his right to challenge the limited closure without those findings. His lack of objection after the court's inquiry would have led the court to believe that it could dispense with formal entry of the findings on the record at that time. While Bone-Club findings should be placed on the record at the time of closure in order to address the public's right to open proceedings under Art. 1 §10, and it is error for a court to fail to do so, again, Shearer

⁷ See, J. Madsen's dissent in Paumier, 176 Wn.2d at 39 ("the error in these cases is the failure to conduct the inquiry, not an unjustifiable closure that necessarily violates the defendant's right to public trial").

has *not* raised a violation of Art. 1 §10. Shearer waived his right to the formal entry of Bone-Club findings by failing to object.

Permitting Shearer to raise this alleged violation of the right to public trial now encourages sandbagging.⁸ 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 in chambers questioning of one prospective juror regarding her experience with domestic violence was de minimis 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, although it recognized federal courts have adopted a de minimis standard. 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. Shearer's asserted violation of his right to public trial is the closure

⁸ This case presents the very concern Justice Wiggins raised in his dissent in Paumier, 176 Wn.2d at 52. While the State is not necessarily asserting that defense counsel purposefully misled the court below, the effect is the same as sandbagging. Most likely counsel below was intending to waive the issue, but it is the current state of the law which permits Shearer to exploit his silence below.

without a Bone-Club analysis. Shearer does not assert that there was no valid basis for a closure, just that the court did not do the required Bone-Club analysis. This infringement upon Shearer's right to public trial was minimal and caused at least in part by his own failure to object. The record clearly shows that had a Bone-Club analysis been done, the court would not have abused its discretion in conducting the limited in chambers questioning. The in chambers questioning addressed only one prospective juror's prior experience with domestic violence that she believed affected her ability to serve, 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

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.”

State v. Easterling, 157 Wn.2d 167, 183-84, 137 P.3d 825 (2006) (J.

Madsen concurring). “[T]he right to public trial serves to ensure a fair trial, to remind prosecutor and judge of their responsibility to the accused and the importance of their functions, to encourage witnesses to come forward, and to discourage perjury.” State v. Sublett, 176 Wn.2d at 72; *see also*, Waller v. Georgia, 467 U.S. at 46-47. 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.

Some limited private questioning of jurors does not implicate a defendant’s right to public trial. Sublett, 176 Wn.2d at 111-12 (J. Madsen concurring). As noted by Justice Madsen:

Potential jurors come into the court with all of their most private experiences and history, including, for example, personal histories of sexual abuse as children or of sexual assaults as an adult;

histories of objectively irrational but very real phobias that may be personally humiliating and which may arise during court proceedings; histories of criminal convictions; or physical conditions that causes the individual embarrassment and which may do so during a trial. It is simply not believable that individuals who would be forthcoming about such sensitive topics aired in the relative privacy of the judge's chambers or a closed court would respond with the same forthrightness if questioned in public view or that of the rest of the jury venire.

Id. at 58.

In addition to considering the values guaranteed by the public trial right in determining whether a closure is de minimis, courts have also considered the duration of the closure. U.S. v. Ivester, 316 F.3d 955, 960 (9th Cir. 2003); *see also*, Peterson v. Williams, 85 F.3d 39 (2nd Cir. 1996), *cert. den.*, 519 U.S. 878 (1996) (inadvertent closure of courtroom during defendant's testimony for 20 minutes met de minimis standard); Snyder v. Coiner, 510 F.2d 224, 230 (4th Cir. 1975) (short closure of courtroom during closing arguments was too trivial to implicate right to public trial). The de minimis standard has been applied in cases where closure was purposeful as well as unintentional. Easterling, 157 Wn.2d at 184-85 (J. Madsen concurring).

Here none of the values underlying the right to a public trial is implicated by the seven minute in-chambers colloquy with one prospective juror regarding her prior experience with domestic violence. Having the

questioning in private assisted Shearer in selecting the jury, and eliminating a potentially biased juror, because juror no. 7 quite likely wouldn't have been forthcoming about it in public. Moreover, the rest of the panel could have been tainted by hearing the details of another person's experience with domestic violence.⁹ The defense ultimately had her excused for cause. As hypothesized by Justice Madsen, such limited private questioning "advanced, not impeded," the defendant's right to fair trial by aiding him in selecting an impartial jury. *See Sublett*, 176 Wn.2d at 112 (J. Madsen concurring).

While an open courtroom during voir dire does permit a defendant's family to contribute their knowledge or insight to jury selection and permits the venire to see the interested individuals, under the facts of this case neither of those benefits were negatively impacted. The venire, including juror no. 7, were able to see the interested individuals during the rest of the voir dire, and vice versa. Shearer's family, even assuming they were present, would have been able to provide insight into jury selection with respect to every other juror, and since this juror was

⁹ Juror no. 7 stated that she thought it would take longer than 3 years to even be able to talk to another person who had been a victim of domestic violence. VDRP40.

excused for cause, there was no need to consult his family members about this specific juror.

Requiring the juror to speak in public concerning this sensitive issue would not have helped to ensure that the prosecutor and the judge carried out their duties responsibly. They were aware the entire in chambers questioning was being transcribed. Nothing in the record indicates that either court officer did not take their respective roles in Shearer's trial seriously.

Finally, the third and fourth values regarding the right to public trial are not implicated at all in this context. No witnesses were presented and no testimony was taken. Requiring juror no. 7 to state her concerns in public would not have encouraged any witnesses to come forward and would not have discouraged any perjury at trial. In addition, the in chambers proceeding only lasted seven minutes. Such a de minimis closure did not implicate Shearer's right to public trial.

Furthermore, if Shearer had objected, thus prompting the court that it needed to conduct a Bone-Club analysis, the Bone-Club factors would have been met. Here, there was: 1) a compelling interest and one that advanced the defendant's right to a fair trial by ensuring his right to a fair and impartial jury - the desire to protect a juror's privacy interest and the

need to have a juror be forthcoming regarding her prior experience with domestic violence because the case involved domestic violence; 2) everyone in the courtroom was given the opportunity to object and no one did; 3) inquiring of the juror on the record in chambers was the least restrictive means to address the juror's unwillingness to speak about her experience in open court; 4) the court's waiting until it was clear that the juror would not talk about her experience in an open courtroom before suggesting an inquiry in chambers reflects the court's weighing the competing interests of the defendant's right to an impartial jury and the juror's privacy against the desire for an open court; and 5) the private voir dire was no broader than necessary as it lasted only seven minutes and was limited to inquiring about the juror's domestic violence experience. *See, Bone-Club*, 128 Wn.2d at 258-59 (setting forth the five factors).

3. No actual structural error resulted from the limited closure because the excusal of the one juror for cause had no effect on the trial.

Relying upon the plurality opinion in *State v. Strode*, 167 Wn.2d 222, 217 P.3d 310 (2009), the Court of Appeals held that a new trial is required whenever the trial court fails to conduct a *Bone-Club* analysis before closing a courtroom "in all but the most exceptional circumstances." Slip Opinion at 6. However, this Court's opinion in

Momah and the U.S. Supreme Court's opinion in Waller make it clear that not every public trial violation results in structural error. Structural error is error that affects the framework of the trial, rendering a "criminal trial fundamentally unfair or an unreliable vehicle for determining guilt or innocence." Structural error is also applied in those limited situations where the trial obviously was affected by the error but it is difficult to quantify the prejudice. Here, the exclusion of the one juror, on defense motion, clearly did not affect the entire framework of the trial and did not impact the defendant's trial as the juror would have been excused whether or not she had been interviewed in chambers.

The Momah and Waller decisions make 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; Waller, 467 U.S. at 50. 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." Momah, 167 Wn.2d at 149. Since the announcement of that decision, this Court in Wise and Paumier has emphasized the unique nature of the facts of the case. Wise, 176 Wn.2d at 1, 14-15; Paumier, 176 Wn.2d at 35-36. However, the decision has not been overruled and still

stands for the proposition that not every violation of the right to public trial results in structural error.

Wrongful deprivation of the right to public trial can result in structural error. Wise, 176 Wn.2d at 13; Waller, 467 U.S. at 49, n.9. “Structural errors are a ‘very limited class’ of errors that affect the framework within which the trial proceeds; ... such that it is often difficult to assess the effect of the error.” U.S. v. Marcus, 560 U.S. 258, 130 S.Ct. 2159, 2164-65, 176, L.Ed.2d 1012 (2010); Wise, 176 Wn.2d 13-14. Because of the difficulty in assessing the impact of an unlawful closure on the trial, defendants normally are not required to demonstrate specific prejudice. Waller, 467 U.S. at 49-50. Not every violation of the right to public trial, however, will affect the framework of the trial, render the trial fundamentally unfair, or will result in unquantifiable prejudice. *See*, Gibbons v. Savage, 555 F.3d 112, 119-120, (2d Cir. 2009) (“It does not necessarily follow, however, that every deprivation in a category considered to be ‘structural’ constitutes a violation of the Constitution or requires reversal of the conviction, no matter how brief the deprivation or how trivial the proceedings that occurred during the period of deprivation.”) If the result of the hearing would be the same despite the closure, a new trial is not warranted. *See*, Waller, 467 U.S. at 50 (“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”). This Court also allowed for the possibility of some remedy other than a new trial if the hearing were sufficiently separable from the trial. *See, Wise*, 176 Wn.2d at 19.

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. The in chambers questioning of the juror without Bone-Club findings did not affect the entire framework of the trial. The juror was excused for cause and would have been excused, either on peremptory or for cause, even if she had not been questioned in chambers. The seven minute in chambers questioning did not render the trial fundamentally unfair, and in this case there is the ability to quantify the prejudice and there was none.

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 be the type of windfall that the courts in Momah and Waller indicated is not in the public interest. Momah, 167 Wn.2d at 150.

D. CONCLUSION

For the reasons set forth above, State of Washington, respectfully requests that this Court 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 27th day of June, 2013.



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Appellate Deputy Prosecutor
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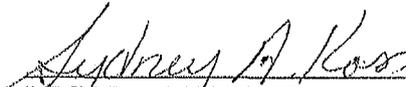
CERTIFICATE

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 all counsel, addressed as follows:

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LEGAL ASSISTANT


DATE

OFFICE RECEPTIONIST, CLERK

To: Sydney Hopkins-Koss; paoappellateunitmail@kingcounty.gov; zinner@nwattorney.net; John Sloane; marla@washapp.org
Cc: Hilary Thomas
Subject: RE: State v. Shearer No. 86216-8 Pet's Suppl Brf

Rec'd 6-28-13

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State v. Shearer, Pet for Rev: Supreme Court No. 88556-7.
Attached please find the Petitioner, State of Washington's, Supplemental Brief in the above referenced matter.

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