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64509-9

NO. 64509-9-I

IN THE COURT OF APPEALS OF STATE OF WASHINGTON
DIVISION I

STATE OF WASHINGTON

Respondent,

v.

ADAM BRICK

Appellant.

ON APPEAL FROM THE SUPERIOR COURT OF THE STATE
WASHINGTON, KING COUNTY

The Honorable Theresa Doyle

APPELLANT'S OPENING BRIEF

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A. ASSIGNMENTS OF ERROR

1. The Prosecutor Committed Misconduct when She Permitted Her Primary Witness to Appear for Testimony holding a Stuffed Animal when She had Failed to give Notice to the Defense of Her Intentions.

2. The Trial Judge Violated Brick's Constitutional Right to a Fair Trial when She Permitted the Witness to hold a Stuffed Animal During Her Testimony.

3. The Jury Instructions in This Case Failed to Protect Brick's Right to an Unanimous Jury Verdict on Each Count.

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

Issues Pertaining to the Assignments of Error

1. Did the prosecutor commit misconduct when she failed to give notice to the defense that her primary witness intended to hold a stuffed animal during her testimony and failed to ask for a pretrial hearing on this issue?

2. Was Brick's right to a fair trial violated when the trial judge permitted the witness to hold the stuffed animal?

3. Did the jury instructions fail to protect Brick's right to a unanimous jury verdict on each count?
4. Did the trial judge violate the state and federal constitutional protections to a public trial?

B. STATEMENT OF THE CASE

1. PROCEDURAL FACTS

Adam T. Brick was charged by amended information with three counts of first degree rape of a child. In each count the victim was his daughter, M.W. Each count the amended information stated:

That the defendant ADAM TERRANCE BRICK in King County Washington during a period of time intervening between June 13, 2002 through April 26, 2007, ... had sexual intercourse with M.W...

CP 7-8.

Brick proceeded to a jury trial and the jury convicted him as charged. CP 44-46. He was sentenced to 216 months in prison. CP 71. This timely appeal followed. CP 53.

2. VOIR DIRE

Voir dire took place on October 5 and 6, 2009. The State asked that the trial judge use a confidential questionnaire. C.P. 77-113.

On October 19, 2009, the trial judge signed an “Order to Seal.” CP 114-115. The order states that the court is sealing the juror questionnaires because “the privacy interests of the prospective jurors in their answers regarding sexual history and victim status outweighs the public’s right of access.” Neither trial attorney signed the order and there was no discussion about it on the record.

3. TRIAL TESTIMONY

Susan Hewitt testified that she is M.W.’s grandmother. 10/6/09 RP 2 . She said that M.W. was 11 years old. *Id.* at 3. At the time of trial, M.W. was in middle school. 10/7/10 RP 24. She was very active in M.W.’s life. She said that when M.W. was born, Brick and her daughter Laura were not married and Brick was not very involved in M.W.’s life. *Id.* at 7. Shortly before M.W.’s sixth birthday, however, Brick and Laura began talking again and, eventually, Brick moved into the apartment with M.W. and Laura.

Brick lived with Laura and M.W. for 2 years. In 2007, M.W. reported to her grandmother that Brick was inappropriately disciplining her. Brick moved out and M.W. and her grandmother began going to counseling with a man named Seth Ellner. 10/7/09 RP 10. About two months into the counseling session, Ellner asked M.W. if her father had

ever touched her “privates.” M.W. said that he “put his fingers down there” and “it would hurt me really bad.” *Id.*

Later, on the way home, M.W. told her grandmother that her father had put his “wiener inside of me all the way. And it would hurt really bad.” 10/7/09 RP at 14. According to Hewett, M.W. later repeated that her father had put his penis inside her and blood got on the sheets. *Id.* at 18.

On cross-examination, Hewett stated that Brick was over six feet tall and weighed between 250 and 300 pounds. *Id.* at 37. Hewett admitted that M.W. also told her that her father picked her up by the neck and held her up to the ceiling. But M.W. never complained of any neck pain and her grandmother did not observe any injuries. *Id.* at 38-39. M.W. said that her father would sometimes sleep on her “with all his weight.” *Id.* at 39. He would stand on her. *Id.* But she never appeared to have injuries as a result. She also told her grandmother that she was forced to sleep naked on the apartment balcony directly over and visible to 4 lanes of traffic on Lake City Way N.E. *Id.* at 42. Hewett also stated that M.W. told her that Brick had a multicolored penis. *Id.* at 50.

Hewett admitted probing M.W. for more information about her father. *Id.* at 46. She said that the issue was a sensitive one for her because she had been molested by a Catholic priest as a child. *Id.* at 62.

Prior to trial, a physician examined M.W. 10/14/09 RP at 24. A doctor testified that the colposcope exam was “consistent” with M.W.’s report that “about penetration with the wiener.” *Id.* at 46. Joanne Mettler, a nurse practitioner, read from a report by Dr. Naomi Sugar. Dr. Sugar said that M.W. reported one instance where her father put his “‘private area’ in hers and after a while mine started bleeding.” *Id.* at 32. She also told the doctor that it happened almost every day after school. *Id.* at 33.

Ashley Wilske, an employee of the prosecutor’s office, also interviewed M.W. State’s Exhibit 49. M.W. stated that the abuse occurred 4 or 5 times but was not explicit about the times. *Id.*

M.W. testified that she was 11 years old and attended middle school. 10/8/09 RP 23. When she entered the courtroom to testify she was holding “a teddy bear and throughout her entire testimony and cross-examination she had the teddy bear. Or I think he was a reindeer, actually, that was cradled on her lap the entire time.” 10/13/09 RP at 14. Defense counsel objected. *Id.* The trial judge overruled the objection and found that holding the “stuffed animal” did not prejudice the defendant. *Id.*

She said that when she was in grade school, her father lived with her and her mother. 10/8/09 RP at 26. She said that during that time her father disciplined her by putting her in a cold shower and by picking her up and throwing her on her bed. *Id.* at 27-28. According to M.W., her

father told her not to tell her mother about these instances of discipline. The first person she told about this was her grandmother. *Id.* at 32. She also stated that her father would “step on my stomach with all his weight.” *Id.* at 34.

During this time period, M.W. and her father shared a bedroom and slept in the same bed. *Id.* at 35-36. She said that sometimes her father lay down on her with all his weight in the bed. During this time she was wearing her pajamas and he had on his boxer shorts and a shirt. *Id.* at 37. When he lay on top of her, he was wiggling the top part of his body. *Id.* at 38. Then she said: “one part I remember I was bleeding at one part. I was going to the bathroom and I like wiped it on a towel. But I don’t know why I was bleeding.” *Id.* She clarified that the blood was coming from the front part of her “butt.” *Id.* at 40-41. She also stated that “it hurt really bad.” *Id.*

For every other instance when her father laid on her, M.W. described him as wearing his boxer shorts. *Id.* at 43-46. She stated that she never touched her father’s “privates” but that his “front private” touched her “front private.” She said it was “just on top. It wasn’t anywhere else.” *Id.* at 46.

When the prosecutor attempted to get M.W. to distinguish as to individual events, M.W. said: “Well he did it more times, but, it would it

be the same time. Like that same time he did that. I mean, like, he would do the same thing every time.” *Id.* at 32. Then when the prosecutor asked, “How many times would he do it?” M.W. answered, “I would say every night.” *Id.*

M.W.’s mother, Laura Wyman, testified that she relied on her mother to help her care for M.W. *Id.* at 95. When Brick moved into the apartment, she and he were not romantically involved. *Id.* at 96. The apartment had two bedrooms. Initially M.W. slept with her mother. But her mother snored so badly she eventually began sleeping in the other room with Brick in the same bed. *Id.* at 97-98.

For most of the time Brick lived with them, he was unemployed. *Id.* at 102. Laura, however, worked full time. She did not notice any unusual injuries to her daughter during the time Brick lived with them. *Id.* at 120. Laura stated that before one court hearing, M.W. told her that the abuse did not happen. *Id.* at 158. Then M.W. changed her mind and said that it did happen. *Id.* at 159.

Seth Ellner, testified that he was a child and family therapist. 10/15/09 RP 17. He stated that he worked with M.W. from April 20, 2007 to February 9, 2009. *Id.* at 23. M.W. was referred to his office because she had reported physical abuse by her father in the form of severe discipline. *Id.* at 27. According to Ellner, M.W. told him variously that

her father put his finger in her vagina, had her rub his penis, put her mouth on his penis and put his penis on her “butt.” *Id.* at 42.

The investigating officer later seized 4 garbage bags of clothing and linens from Brick’s house. In one bag he found a towel that he sent to the state crime lab for testing. 10/14/09 RP at 143. The lab later discover DNA from both Brick and M.W. on the towel. 10/8/09 RP 91.

Brick gave a recorded statement to the investigators denying all of the allegations of rape. Exhibit 80.

At the close of trial, defense counsel moved to dismiss all three counts on the grounds that there was not enough evidence for the jury to unanimously agree on three individual instances of criminal conduct. 10/19/09 at 2-4. The trial judge denied the motion. *Id.* at 12-13.

4. *JURY INSTRUCTIONS*

As to each count, the trial court instructed the jury that it could convict Brick of three counts only if there were three “separate and distinct” acts of rape. CP 38, 39, 40. The Court also instructed the jury that:

The State alleges that the defendant committed acts of Rape of a Child on multiple occasions. To convict the defendant on any count of Rape of a Child, one particular act of Rape of a Child must be proved beyond a reasonable doubt, and you must unanimously agree as to which act has been

proved. You need not unanimously agree that the defendant committed all the acts of Rape of a Child.

CP 37.

5. *JURY INQUIRIES*

During deliberations, the jury sent out a note asking: “Can we have copies of all interview transcripts?” CP 13. The judge stated that she called both the prosecutor and defense counsel and told them she was going to tell the jury: “You have all the exhibits that were admitted.” CP 14. The judge said that she called counsel and counsel for the state had no objection. CP 52.

Later that same day the jury asked to hear the recording of Detective Grossman’s interview of Brick. The Court reported that:

Julie Kays came to the courtroom briefly to assist the bailiff with the equipment. I told John Crowley over the phone the question. Mr. Crowley said that the audio recording was definitely admitted and that they could hear it. He said that he was in a meeting @ U.S. District Court and could not come to the court. He said that in the past Judge Inveen played the tape absent counsel, and he would have no objection if we did the same.

CP 52.

The next day the jury asked to view the DVD of M.W.’s interview. CP 13-16, 47-48. There is nothing in the record describing whether or not

counsel were contacted regarding replaying of this video. But the video was replayed in open court for the jury. *Id.*

C. ARGUMENT

1. THE PROSECUTOR COMMITTED MISCONDUCT WHEN SHE PERMITTED HER PRIMARY WITNESS TO APPEAR FOR TESTIMONY HOLDING A STUFFED ANIMAL WHEN SHE HAD FAILED TO GIVE NOTICE TO THE DEFENSE OF HER INTENTIONS AND WHEN SHE FAILED TO ASK FOR A PRETRIAL HEARING ON THE ISSUE

“Prosecutors have a duty to seek verdicts free from appeals to passion or prejudice.” *State v. Perez-Mejia*, 134 Wn. App. 907, 915, 143 P.3d 838 (2006) (citing *State v. Belgarde*, 110 Wn.2d 504, 507, 755 P.2d 174 (1988)). In the interest of justice and as a quasi-judicial officer, the prosecutor must act impartially. *State v. Charlton*, 90 Wn.2d 657, 664, 585 P.2d 142 (1978). “Prosecutorial misconduct may deprive the defendant of a fair trial. And only a fair trial is a constitutional trial.” *Charlton*, 90 Wn.2d at 664-65.

It appears the use of the stuffed animal had not been disclosed to defense counsel. And, the prosecutor did not take the stuffed animal away from the witness before she testified. This was misconduct designed to make the victim appear younger and more vulnerable than she perhaps was. Clearly, the prop was designed to invoke sympathy for the alleged

victim. The negative aspects of permitting these tactics could be reduced or eliminated by taking relatively easy legal steps. For example, stringent voir dire or limiting jury instructions could be used to address undue influence issues.

But when the prosecutor does not give notice of the tactic, defense counsel does not have the opportunity to properly voir dire the potential jurors, brief the relevant issues or formulate the proper jury instructions. And here, the surprise tactic worked. By the time the defense objected, the jury had already seen the stuffed animal. And the trial judge did not have the benefit of comprehensive briefing on the issue. Thus, she simply determined that there was “no prejudice” to the defendant without being provided with all the relevant facts including whether the witness brought the animal herself, whether she really needed the toy on the stand and, even if the witness felt uncomfortable, the balance favored the defendant’s right to a fair trial over the witness’s discomfort.

*2. THE TRIAL JUDGE VIOLATED BRICK’S
CONSTITUTIONAL RIGHT TO A FAIR TRIAL WHEN SHE
PERMITTED THE WITNESS TO HOLD A STUFFED
ANIMAL DURING HER TESTIMONY*

Brick’s due process right to a fair trial was violated because M.W. was permitted to hold a stuffed animal during her testimony and this garnered improper sympathy from the jury. U.S. Const. amend. XIV.

In Washington the only legislatively approved method of ameliorating a child's stress about testifying is found in RCW 9.44.150. That statute permits the State to file a motion to permit a child under the age of ten to testify in a room outside the presence of the defendant and the jury while one-way closed-circuit television equipment simultaneously projects the child's testimony into the courtroom. Before the procedure can be used, the trial court must hold a hearing outside the presence of the jury and the State must demonstrate by substantial evidence that requiring the child witness to testify in the presence of the defendant will cause the child to suffer serious emotional or mental distress that will prevent the child from reasonably communicating at the trial. RCW 9.44.150(1)(c).

In this case, when defense counsel objected, the trial judge should have held a similar hearing to ensure that the witness would not testify without the presence of the stuffed animal. Without such a hearing the State has failed to demonstrate why M.W., an 11 year-old middle schooler was incapable of testifying without this crutch.

The results of the cases from this Court depend upon such a finding. For example in *State v. Harper*, 35 Wn. App. 855, 862, 670 P.2d 296 (1983), *review denied*, 100 Wn.2d 1035 (1984), this Court clearly disapproved of a child over 11 years old holding a teddy bear on the witness stand. But in *State v. Hakimi*, 124 Wn. App. 15, 98 P.3d 809

(2004), *review denied*, 154 Wn.2d 1004, 113 P.3d 482 (2005), a 9-year-old was permitted to testify while holding her doll. This Court found no error because the record established that the child was “highly reluctant” to testify. In addition, there was expert testimony that “girls in particular in the 9-year-old age range may find security and comfort by holding a toy” while testifying. *Id.* at 23.

Other courts have recognized that “In cases, such as this, where it is necessary to receive testimony from young children, the court must strike a balance between the defendant’s right to a fair trial and the witness’s need for an environment in which he or she will not be intimidated into silence or to tears.” *State v. Cliff*, 116 Idaho 921, 924, 782 P.2d 44, 47 (1989). In *State v. Palabay*, 9 Haw. App. 414, 844 P.2d 1 (1992), *cert. denied*, 74 Haw. 652, 849 P.2d 81 (1993), a 12 year-old, seventh grader carried a teddy bear while testifying. The State failed to give any notice of the teddy bear before trial. The Court held there was no evidence on the record to indicate the compelling necessity for the witness to hold a teddy bear while testifying. The Hawaii Court of Appeals held that absent the finding of necessity, it was error to permit her to do so.

Had the trial judge held such a pretrial hearing in this case, she would have been compelled to recognize the extreme prejudice this practice caused to Brick’s right to a fair trial or employ the proper

safeguards. Her failure to do so, while understandable given the State's failure to give pretrial notice of this tactic, is still error and Brick's convictions must be reversed.

3. *THE JURY INSTRUCTIONS IN THIS CASE FAILED TO PROTECT BRICK'S RIGHT TO AN UNANIMOUS JURY VERDICT ON EACH COUNT*

A unanimity instruction that does not adequately inform the jury of the applicable law violates a defendant's right to a unanimous jury verdict. *State v. Watkins*, 136 Wn. App. 240, 244, 148 P.3d 1112 (2006), *review denied*, 161 Wn.2d 1028, 172 P.3d 360 (2007), *cert. denied*, 552 U.S. 1282, 128 S.Ct. 1707, 170 L.Ed.2d 518 (2008). Accordingly, he may raise the error for the first time on appeal. *State v. Levy*, 156 Wn.2d 709, 719, 132 P.3d 1076 (2006).

A defendant's right to a unanimous jury verdict is the guarantee that a defendant may be convicted only when a unanimous jury concludes that the criminal act charged in the information has been committed. *State v. Petrich*, 101 Wn.2d 566, 569, 683 P.2d 173 (1984). Pursuant to this right, a jury must be unanimous as to which act or incident constitutes a particular charged count of criminal conduct. *State v. Noltie*, 116 Wn.2d 831, 842-43, 809 P.2d 190 (1991); *Petrich*, 101 Wn.2d at 572. Thus, in cases where several acts could form the basis of one charged count, in

order to convict the defendant on that count, the State must either elect the specific act on which it relies for conviction or the court must instruct the jury that it must unanimously agree that a specific criminal act has been proved beyond a reasonable doubt. *Noltie*, 116 Wn.2d at 843; *Petrich*, 101 Wn.2d at 572.

Here, instruction 10 was intended to provide the protection required by these principles. But because this case involved both multiple counts and multiple incidents to support each count, instruction 10 actually misinformed the jury of its duty. The first two lines of the instruction state that, to convict the defendant, the jurors must unanimously agree that a specific criminal act had been proved beyond a reasonable doubt. But the third line states: “You need not unanimously agree that the defendant committed all the acts of rape of a child.” CP 37. The next three instructions set forth 3 counts. CP 38, 39, 40. Those instructions tell the jury that they must determine if three acts of rape of a child occurred between June 13, 2002 and April 26, 2007. The instructions state that these acts must be separate and distinct from each other. But none of these three instructions state that the jury must be unanimous as to each separate and distinct act for each count. In fact, the final line of Instruction 10 tells them otherwise. It expressly states that the jury does

not have to “unanimously agree that the defendant committed all of the acts of Rape of a Child.”

For that reason, all three counts must be reversed.

4. *FEDERAL AND STATE CONSTITUTIONAL RIGHTS TO AN OPEN AND PUBLIC TRIAL WERE VIOLATED WHEN THE TRIAL COURT SEALED JUROR QUESTIONNAIRES WITHOUT FIRST CONDUCTING A BONE-CLUB HEARING*

a) Introduction

The right to a public trial is protected by both the federal and the Washington state constitutions. *See* U.S. Const. amend. VI (“In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial.”); Wash. Const., Art. 1, § 22 (“In criminal prosecutions the accused shall have the right ... to have a speedy public trial.”); Wash. Const., Art. 1, § 10 (“Justice in all cases shall be administered openly.”). This right includes the right to open jury selection. *State v. Strode*, 167 Wn.2d 222, 226-27, 217 P.3d 310 (2009), citing *In Re PRP of Orange*, 152 Wn.2d 795, 804, 100 P.3d 291 (2004), and *Press-Enterprise Co. v. Superior Court*, 464 U.S. 501, 505, 104 S.Ct. 819, 78 L.Ed.2d 629 (1984).

Washington Courts have scrupulously protected the accused’s and the public’s right to open public criminal proceedings. And “[w]hile the right to a public trial is not absolute, it is strictly guarded to assure that proceedings occur outside the public courtroom in only the most unusual

circumstances.” *Strode*, 167 Wn.2d at 226, citing *State v. Easterling*, 157 Wn.2d 167, 174-75, 137 P.3d 825 (2006) (emphasis supplied). *See also State v. Brightman*, 155 Wn.2d 506, 514, 122 P.3d 150 (2005) (closing courtroom during voir dire without first conducting full hearing violated defendant’s public trial rights); *Orange*, 152 Wn.2d at 812 (reversing a conviction where the court was closed during voir dire); *State v. Bone-Club*, 128 Wn.2d 254, 256, 906 P.2d 325 (1995) (reversible error to close the courtroom during a suppression motion); *Seattle Times Co. v. Ishikawa*, 97 Wn.2d 30, 36, 640 P.2d 716 (1982) (setting forth guidelines that must be followed prior to closing a courtroom or sealing documents). “[P]rotection of this basic constitutional right clearly calls for a trial court to resist a closure motion except under the most unusual circumstances.” *Orange*, 152 Wn.2d at 805, citing *Bone-Club*, 128 Wn.2d at 259 (emphasis in original).

b) A Hearing Must Precede Any Contemplated Closure or Sealing

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

1. The proponent of closure or sealing must make some showing [of a compelling interest], and where that need is

based on a right other than an accused's right to a fair trial, the proponent must show a “serious and imminent threat” to that right.

2. Anyone present when the closure motion is made must be given an opportunity to object to the closure.

3. The proposed method for curtailing open access must be the least restrictive means available for protecting the threatened interests.

4. The court must weigh the competing interests of the proponent of closure and the public.

5. The order must be no broader in its application or duration than necessary to serve its purpose.

Strode, 167 Wn.2d at 227-28, citing *Bone-Club*, 128 Wn.2d at 258-59

(quotations in original). As the test itself demonstrates, analysis of the five factors must occur before the closure or sealing. For example, it is impossible to weigh the reasons given by a member of the press or public opposed to closure if the trial court fails to expressly invite comment on the matter. *See Strode*, 167 Wn.2d at 228-29.

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

After conducting a full hearing, the trial court must then make findings. The constitutional presumption of openness may be overcome only by an overriding interest based on findings that closure is essential to preserve higher values and is narrowly tailored to serve that interest. The interest is to be articulated along with findings specific enough that a reviewing court can determine whether the closure order was properly entered. *Orange*, 152 Wn.2d at 806, quoting *Waller v. Georgia*, 467 U.S. 39, 45, 104 S.Ct. 2210, 81 L.Ed.2d 31 (1984) (emphasis supplied). These requirements are necessary to protect both the accused's right to a public trial and the public's right to open proceedings. *Easterling*, 157 Wn.2d at 175.

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

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

system.” This Court has recognized that this requirement applies with equal force to the handling of juror questionnaires. *State v. Coleman*, 151 Wn. App. 614, 621-23, 214 P.3d 158 (2009) (notwithstanding GR 310, trial court must hold *Bone-Club* hearing before ordering the sealing of juror questionnaires).

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

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

Strode, 167 Wn.2d at 223:

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

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

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

Despite the clear language in *Strode*, some confusion regarding remedy may be engendered by the Washington Supreme Court’s decision in *Momah*. *Strode* and *Momah* were argued on the same day, decided on the same day, and involved similar facts – closure of the courtroom during individual voir dire. However, the Court reached opposite conclusions, affirming in *Momah* and reversing in *Strode*. Although the Supreme Court could have made the distinction much clearer, the legal line that separates *Momah* from *Strode* is simple. In *Momah*, the trial court conducted a *Bone-Club* hearing or its equivalent. In *Strode*, no *Bone-Club* hearing took place. The *Strode* concurrence noted that “(t)he specific concerns underlying the *Bone-Club* factors were sufficiently addressed by the *Momah* trial court.” *Strode*, 167 Wn.2d at 234 (Fairhurst, J. concurring).

While the *Bone-Club* factors could have been more explicitly detailed in the record, the concurrence¹ concluded:

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

Unlike the situation presented in *Momah*, here the record does not show that the court considered the right to a public trial in light of competing interests. The record does not show a knowing waiver of the right to a public trial. Although the dissent addresses the right of jurors to privacy, the record does not show that this interest was considered together with the right to a public trial. I agree with the dissent that “public exposure of jurors’ personal experiences can be both embarrassing and perhaps painful for jurors.” I agree that jurors’ privacy is a compelling interest that trial courts must protect. I agree that had the trial judge failed to close a portion of voir dire to the public, he would have “undermined the court’s procedural assurances that juror information will remain private [and] would have jeopardized jurors’ candidness and potentially the defendant's right to an impartial jury.”

Strode, 167 Wn.2d at 233, 235-36 (Fairhurst, J. concurring) (citations to dissent omitted) (italics in original) (emphasis supplied).

¹ Both *Strode* and *Momah* were 6-3 decisions, with Justices Fairhurst, Madsen and Owens changing sides from one case to the next. Justice Fairhurst’s concurrence in *Strode* (which was joined by Justice Madsen) is of particular note because it explains the reasoning of two of the three Justices who changed their votes between *Strode* and *Momah*.

But the potential for jeopardizing a defendant's right to an impartial jury does not necessitate closure; it necessitates a weighing of the competing interests by the trial court. Because, unlike in *Momah*, the record does not show that this occurred, this case fits into the category of cases where expressly engaging in the *Bone-Club* analysis on the record is required. The trial court here erred in failing to engage in the *Bone-Club* analysis.

D. CONCLUSION

This Court should reverse Mr. Brick's convictions.

Respectfully submitted this 30th day of August, 2010.


Suzanne Lee Elliott
WSBA 12634

Certificate of Service by Mail

I declare under penalty of perjury that on September 3, 2010, I placed a copy of this document in the U.S. Mail, postage prepaid, to:

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